

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

03 AUGUST 2020

DAY 243



Gauteng Transcribers
Recording & Transcriptions

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 03 AUGUST 2020

CHAIRPERSON: Lighting seems not to be as good as it should be.

ADV SONI SC: Yes.

CHAIRPERSON: Okay let us continue. I think they will attend to it.

ADV SONI SC: Chairperson you would recall that on Friday there was an application for a variation of the directive that was issued on the 24 July. Over the weekend we were told –
10 received a notification that Mr Nxasana is now going to be acting for Judge Makhubele and her previous attorneys had withdrawn from the matter. Early this morning we received a new Notice of Motion asking for further relief but Chairperson for all practical purposes what we have is the application that was adjourned on Friday and the extent to which it is being amplified today.

CHAIRPERSON: Okay. So let us – you propose to – to let me hear what Mr Nxasana has to say?

ADV SONI SC: As you please Chairperson.

20 **CHAIRPERSON:** Okay they just need to sanitise there first.

ADV NXASANA: Thank you Chairperson. Chairperson the situation is as follows. Indeed, we received instructions on Saturday to...

CHAIRPERSON: Yes you just want to place yourself on record first properly.

ADV NXASANA: Yes thank you.

CHAIRPERSON: Yes.

ADV NXASANA: Thank you Chairperson.

ADV NXASANA: Yes.

CHAIRPERSON: And you can move your mask a little bit if

...

ADV NXASANA: Yes thank you.

CHAIRPERSON: If you do not have a problem with that so that I can hear you properly.

10 **ADV NXASANA:** Thank you Chairperson I am – my name is Nxasana initials MSO of MSO Nxasana and Associates.

CHAIRPERSON: Yes.

ADV NXASANA: Attorneys based in Durban. Chairperson I am here representing Judge Makhubele. I received instructions on Saturday that was the 31 – is it the 1st? Yes on the 1st – Saturday the 1st August to assist her with this matter and my instructions were very specific that I have to brief senior counsel in the matter. I have – I was also given the name of the senior counsel that client intends briefing
20 and I have contacted the senior counsel who then advised me that he is – he will only be available after mid-September because of the prior engagements that he is busy with. And the senior counsel also advised me – he indicated that he will be appearing before the Chairperson here in this commission in a matter involving the – I think it is the DG of

the State Security Agency but a date has not yet been allocated for that matter. And ...

CHAIRPERSON: I am sorry.

ADV NXASANA: As a result of ...

CHAIRPERSON: Yes.

ADV NXASANA: As a result of my instructions Chairperson I immediately sent a Notice of Appointment as attorneys of record I think it was on Saturday – on Sunday if I am not mistaken. I am seeing client for the first time because we
10 have been communicating over the phone since I am based in Durban and she is based here.

At the time of receiving instructions I was also simultaneously advised that – that was before instructions were confirmed that there was an application that was set down on Friday and the client could not make it because of the short notice and also because of the developments arising from the withdrawal of the – of her attorneys of record on that day.

Then the situation is I pointed out in the letter that I
20 will be appearing today and seeking an adjournment so that we can fully and properly consult with client together with counsel.

That is the reason I am here today. Thank you
Chairperson.

CHAIRPERSON: So you – you are applying for a

postponement and the reason for the postponement or the application is that you have been instructed as the attorney and your instructions are to obtain senior counsel's services – senior counsel – the particular senior counsel that is sought to be involved in the matter is not available until mid-September.

ADV NXASANA: That is correct Chairperson.

CHAIRPERSON: Basically, the lawyers are not ready?

ADV NXASANA: That is correct Chairperson.

10 **CHAIRPERSON**: That is the problem.

ADV NXASANA: Yes.

CHAIRPERSON: But your client had lawyers for a long time.

ADV NXASANA: Yes.

CHAIRPERSON: And according to their letter as I understand it – their correspondence their mandate was terminated on I think they said on Thursday but I think the communication to the commission was on Friday morning when the application that your client had effectively lodged she had not put it as an application it was an affidavit but I
20 decided to treat it as an application because she was making a certain request in the affidavit with regard to the amendment of the directives.

That application was set down for hearing at two o'clock in the course of the morning. I think the legal team obtained at least I think the secretary of the commission –

acting secretary of the commission the correspondence or Notice of Withdrawal and therefore nobody appeared at two o'clock on her behalf.

I decided to postpone the matter to today on the basis that it was important that unless there is a good reason that is advanced for an adjournment the hearing of her evidence should continue today and that application would be deal with this morning. But from what you are saying I do not know whether you are in a position to deal
10 with anything other than the application for a postponement. In other words, I do not know whether you are even in a position to deal with that application itself insofar as it may have aspects that do not or may not relate to a postponement. It may be that all of them relate to a postponement but I just want to make sure that I understand quite well what it is that you are dealing with.

ADV NXASANA: Chair before I respond.

CHAIRPERSON: Hm.

ADV NXASANA: I see client is waving there.

20 **CHAIRPERSON:** Yes okay. You want to...

ADV NXASANA: If I may approach her?

CHAIRPERSON: Ja okay alright.

ADV NXASANA: Thank you Chair. Chair perhaps without prejudice to client's rights she advises me that in fact I omitted to address that because having then noted that the

matter was set down on Friday I did canvass that issue with her with a view to finding out if she then did make an appearance before the commission after the erstwhile attorneys had withdrawn. But then she indicated to me that a lady from the commission who called her and advised her that she was directed to appear in person after the attorneys had withdrawn and that lady told her that the matter was set down at two. It was at approximately about half past one when she received the call and it was impossible for her to
10 make an appearance considering that she had to drive and come here.

CHAIRPERSON: No, no I – I do understand up to a certain point maybe her inability to be here on Friday.

ADV NXASANA: Yes.

CHAIRPERSON: She may – she may have been in court, she may have had some commitments and the termination of mandate of the attorneys may have happened at the last minute. So – so it is just a pity that nobody appeared but I did not dismiss the application I postponed it to today. So
20 my question is whether you are moving that application or you just moving an application for a postponement because of the reasons that you have advanced separate from whatever reasons may have been in that application. Or is it – is it both. I just want to know what I am dealing with.

ADV NXASANA: Oh thanks Your Worship – sorry Chair.

Chair my – my standpoint today is to move an application for a postponement. Firstly, to deal with the application itself as well as to deal with the – the – her testimony.

CHAIRPERSON: Hm.

ADV NXASANA: Simply because from my reading of the material that has been provided to me and also from the instructions that I managed to take telephonically from client Chair we are dealing with – I am not saying that she must be treated differently to other witnesses but the fact of the matter is she is a sitting judge. And a sitting – as a sitting judge we know that the matter which she is invited to testify about where she has been implicated by some witnesses that matters is serving before the Judicial Conduct Committee of the JSC. And the – a recommendation has already been taken that a tribunal should be established to investigate those allegations. The point I am making Chair is that the reason why she seeks the assistance of senior counsel it is because of the repercussions that the matter might end up having on herself. The matter has the potential of – of getting her impeached if one were to say so.

CHAIRPERSON: Yes.

ADV NXASANA: And she knew this.

CHAIRPERSON: Yes but that is not something she would have realised only recently. That is something that she knew a long time ago.

ADV NXASANA: Chair I – I agree that she knew about that perhaps but if – I think when she gets the opportunity to explain herself properly, she will take the Chairperson into her confidence and explain what exactly happened. But as of now Chair I was given an – an assurance that the matter will definitely see to finality and that is why I am here – I came all the way yesterday from Durban to make sure that the matter – if a postponement is granted by mid-September here counsel will be available and we will have...

10 **CHAIRPERSON:** You see your client has had a long time to make all the preparations. She did not know as far as I can gather from the various affidavits and documents that are in the file of the commission. She did not just get to know that there were all kinds of allegations against her with regard to the role she played when she was Chairperson of the Board of PRASA only this year. She knew that there were allegations against her in regard to her role in PRASA already in 2018. She left the board I think about mid-March 2018. There were court applications that were brought by
20 PRASA relating to against Siyaya where allegations were made against – against her by I think some of the witnesses that have given evidence. She – she has known about those allegations for quite some time. If I understand correctly from correspondence, she herself at some stage indicated that she wanted to clear her name with regard to these

allegations. And she has had affidavits – the affidavits of Mr – of Ms Martha Ngoye, Mr Dingiswayo and Mr Agmat from February this year. That is six months. Somebody who was very concerned about these allegations would not even have waited for a date to – of hearing would do all the work necessary to be ready. And she has had the affidavits of Mr Botes and Mr Magashoa for the past at least two months, I think. She had attorneys from I think from soon after she was served with Rule 3.3 Notices in February or March and
10 the attorneys began to correspond with the legal team of the commission. As I understand the position the legal team of the commission communicated to her that they would like her version on the allegations already at that time – maybe April – months ago. She did not furnish the commission with her version all these months. The only affidavit that she – or the first affidavit that she furnished related to Mr Botes – Mr Botes' statement and I think in it she does deal with certain aspects of what happened at PRASA when she was Chairperson of the Board her relationship with Ms Ngoye and
20 Mr Dingiswayo. I am not saying that she deals fully with those allegations but she does deal with them. She – those attorneys withdrew at some stage a few months ago and she indicated that she was prepared to meet with the legal team of the commission and she was ready to furnish her affidavit or affidavits. And I think that was either some time in I think

that some time in – towards the end June if I am not mistaken. She had a meeting with the legal team on the 9 July. There may be some issues about how she felt treated in that meeting but what has been said and I think what is common cause is that she came to that meeting only prepared to deal with one affidavit namely that of Mr Botes and not all the others. We put a day aside on Friday – Friday the 24th for the hearing of her evidence. We lost that day. We had to shift other witnesses in order to hear her
10 evidence today. If I grant her application it means we lose another day. We do not have a lot of time as a commission. We are operating under a court order that says we must finish our work within a certain time. There are many other people who must still testify. There is – there are really serious problems. Now it is very difficult for me to see that on what you have submitted there is a good reason for postponement in the light of all of these things that I am saying. I am putting to you what is in my mind for you to address if there is anything you wish to say other than what
20 you have been able to say.

ADV NXASANA: Chair thank you for giving me that background. Chair as I have indicated that I have taken tentative instructions I will try my best to respond to some of the issues that the Chairperson has raised. Chair one of the things that have been...

CHAIRPERSON: Oh I am sorry let me also mention something else. If I recall correctly her counsel on Friday the 24th indicated that there was an undertaking on her part to file affidavits or an affidavit by the end of this past week and of course the application that was lodged on – on Thursday last week asked for time to file the affidavits today and I was hoping that this morning one would be told the affidavits are ready – are available but even if they are not available I think certainly from my side and I think the same
10 position with the legal team it does not mean that we cannot proceed and I cannot proceed and hear evidence and she can be questioned on the various matters. The matters on which she would be questioned are largely factual. I am not – I cannot remember that there is any legal complex issue that arises. They are largely factual matters.

ADV NXASANA: Chair thank you. I hear you. But Chair my instructions are that there were – there was a period of lockdown that also must be taken into consideration. Also, client is a judge she is allocated work and she has to attend
20 to all these litigations.

CHAIRPERSON: Well you see the – the question of being a judge is – its importance as I see it relates to when she is going to be required to appear before the commission because she could be – it could be a date that on which she is supposed to be in court and there are other people who

would have been ready to appear before her and there would be lawyers, they would be cost for people and it is – so it is that public interest part that I think is important.

ADV NXASANA: Yes.

CHAIRPERSON: Once – once you are not talking about that you are talking about preparing affidavits. I do not see why her situation – her work commitments are any different from anyone else who is not a judge who has – who also has work commitments. Everybody makes time to – to do what they
10 need to do. There are lots of people who are not judges who are very busy with whatever they do but when they – they are required to prepare affidavits they prepare affidavits.

ADV NXASANA: Chair perhaps for the sake of clarity and progress can I – can I ask – can I request that client explains herself.

CHAIRPERSON: Yes, no that is fine.

ADV NXASANA: Yes.

CHAIRPERSON: We can do that. Well I think if she is going to explain herself it seems to me, she would have to do that
20 under oath because you are her lawyer. I do not see that she can ...

ADV NXASANA: Yes no that is fine.

CHAIRPERSON: Represent herself while you are here.

ADV NXASANA: No it is fine.

CHAIRPERSON: So – so if – but if she does that I – under

oath that is different.

ADV NXASANA: Yes.

CHAIRPERSON: Is that fine?

ADV NXASANA: It is fine Chair.

CHAIRPERSON: Okay alright. Thank you. Will you please administer the oath or affirmation?

REGISTRAR: Please state your full names for the record?

JUDGE MAKHUBELE: Tintswalo Annah Makhubele.

10 **REGISTRAR:** Do you have any objection to taking the prescribed oath?

JUDGE MAKHUBELE: None at all.

REGISTRAR: Do you consider the oath to be binding on your conscience?

JUDGE MAKHUBELE: Yes.

REGISTRAR: Do you swear that the evidence you will give will be the truth; the whole truth and nothing else but the truth; if so please raise your right hand and say, so help me God.

JUDGE MAKHUBELE: So help me God.

20 **REGISTRAR:** Thank you.

CHAIRPERSON: Thank you. You may be seated.

TINTSWALO ANNAH MAKHUBELE [d.s.s.]

CHAIRPERSON: If you are going to be comfortable removing the mask to enable you to be heard, that is fine. If you are not comfortable with that, we just need to make sure

we can hear you. Whatever you are comfortable with.

JUDGE MAKHUBELE: Well, Chairperson the mask is made with a long beak. So I should be able to speak. So if you can hear me properly, I rather keep it on.

CHAIRPERSON: Yes. No, no, no. That is fine. As long as I hear you, that is fine. I think somebody must check with the transcribers if they can hear.

STENOGRAPHER: [Indistinct]

CHAIRPERSON: Okay. I think just say something
10 ...[intervenes]

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: ...then they will tell me. They will indicate if they can hear you properly.

JUDGE MAKHUBELE: Can you hear me everybody?

STENOGRAPHER: [Indistinct]

CHAIRPERSON: H'm?

STENOGRAPHER: [Indistinct]

CHAIRPERSON: It is muffling, the sound.

JUDGE MAKHUBELE: Thank you, Chairperson.

20 **CHAIRPERSON:** Okay thank you. Thank you. Okay Mr Nxasana. Well, Judge Makhubele, your counsel says it is better that you explain yourself, to address some of these issues that I have raised. You have heard what I have raised, is it not?

JUDGE MAKHUBELE: Chairperson, I have actually been

handing notes to my attorney. You probably realise that
...[intervenes]

CHAIRPERSON: I saw that, yes.

JUDGE MAKHUBELE: I was getting restless and I was, at
some point, I raised my hand and I... at some point I wanted
to stand up.

CHAIRPERSON: Oh, I did not see you raise your hand.
Yes.

JUDGE MAKHUBELE: Because I realised something is
10 about to repeat itself here.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: My attorneys... my senior counsel
are very competent, as in Mr Shakoane, senior counsel of
many years, appeared on my behalf on 24 July.

Under similar circumstances as Mr Nxasana here, not
even having had one minute eye... physical or eye-contact
communication with me.

And although I was at home... I was not watching the
proceedings. My family was. And I read a lot of reports
20 about it. And because me and him, we never had a
consultation. There were a lot of factual inaccuracies.

And I see it happening when Chairperson tries to get
information that I only can give to this Commission. Mr
Shakoane and my attorneys, previous attorneys, a competent
black law firm were seriously embarrassed on 24 July.

Despite their protest machines, that they have not had a consultation with me but they had to represent me under those circumstances.

And you can imagine what that does to one's self-confidence and one's law firm because the media, the public had a go at them, taking into account their inability to represent me properly because they did not have a consultation with me.

So when I say a repeat, I see Mr Nxasana is trying to
10 phone ...[intervenes]

CHAIRPERSON: Why did you not have a consultation with them?

JUDGE MAKHUBELE: I will explain. I have already explained Chairperson. So I... Mr Nxasana and I, when we talked, I said I have already lodged an application and if I must deal with that application, I will deal with it myself today Chairperson.

CHAIRPERSON: H'm.

JUDGE MAKHUBELE: Actually, I do not want to give it
20 without answering the questions that you have raised in my absence on 24 July.

CHAIRPERSON: H'm.

JUDGE MAKHUBELE: Whatever context, whether it will be for you to consider the application but simply made me to explain, so that when someone represents me and put it as

an application, the Chairperson should understand.

CHAIRPERSON: H'm.

JUDGE MAKHUBELE: I have no... I am not... the allegations against me relating to one issue of PRASA, I have no problem with that. Chair has already indicated in my affidavit when I have dealt with the evidence of Advocate Botes, I have already touched on what actually happened.

CHAIRPERSON: Yes, yes.

JUDGE MAKHUBELE: So I... that is my version.

10 **CHAIRPERSON:** Yes, okay.

JUDGE MAKHUBELE: And I have already said that is my version.

CHAIRPERSON: Okay.

JUDGE MAKHUBELE: So for all intense and purposes. My version is already ...[intervenes]

CHAIRPERSON: Is already... okay.

JUDGE MAKHUBELE: It is already before the Commission.

CHAIRPERSON: Okay.

20 **JUDGE MAKHUBELE:** It may be because Chair I have not had sight of the transcript of the evidence of Ms Ngoye and Mr Dingiswayo. I will need to supplement.

CHAIRPERSON: Okay.

JUDGE MAKHUBELE: And obviously with the assistance of my legal team. So I am not scared of those allegations.

CHAIRPERSON: Yes, okay.

JUDGE MAKHUBELE: But what I am scared of Chairperson is the perception that has been created that I am this arrogant person, disrespectful, refusing to work with the Commission. Chairperson, if you have read my affidavit in the matter of Advocate Botes, or rather, my complaint against Advocate Botes. I even ...[intervenes]

CHAIRPERSON: Yes, I have read it. Ja.

JUDGE MAKHUBELE: I have indicated that even before this Commission sat, one of the witnesses against me, that is
10 Unite Behind, which is going to be represented by Mr Achmat. They had already started a campaign. They have given me a name ‘state capture judge’. So when they say, “state capture judge”, they are not referring to you Chairperson. They are referring to me.

CHAIRPERSON: H’m.

JUDGE MAKHUBELE: They generated a lot of articles through one of their online publications, first book, Peter and... Even before you had your first sitting calling me “state capture judge”.

20 So I... I am... these words scares me Chairperson. The perception that it is going out there about who I am Chairperson.

So in the affidavit that I have filed, I will answer all your questions with regard to the issues that you have raised with my erstwhile senior counsel which he was not able to

articulate.

And Chairperson, I will demonstrate before you that, one day when I was listening or watching the proceedings, Chairperson you were telling somebody whatever correspondence goes out, it goes with your... you may not be signing it but you are aware of everything.

CHAIRPERSON: I am sorry. Just repeat that last sentence.

JUDGE MAKHUBELE: That you are aware of every correspondence that stand out to the witnesses or outsiders.

10 **CHAIRPERSON:** No, you must have misheard. I am not aware of all correspondence that goes out of the Commission. If I was to be aware of all of it, I would not have time to do anything.

JUDGE MAKHUBELE: Well ...[intervenes]

CHAIRPERSON: There is, however, correspondence that I see, for example, when the former president appeared before this Commission, I did announce that the specific correspondence that had been addressed to him in which he, through his lawyers, responded in a certain way, I did say
20 that I was responsible for that correspondence and therefore, if they had anybody to criticise they should criticise me.

JUDGE MAKHUBELE: Well, I am ...[intervenes]

CHAIRPERSON: But otherwise, there is a lot of correspondence that goes out without me seeing it but I do

see some correspondence when there is a reason for me to see it.

JUDGE MAKHUBELE: Well, there is one email I will refer to. It is maybe some 29 June from the acting Secretary of the Commission ...[intervenes]

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: ...to me.

CHAIRPERSON: Yes, yes.

JUDGE MAKHUBELE: And when I complained about short
10 notice of hearings and... the evidence that I will present to
you Chairperson will show you the kind of notices I have
been given. The time periods.

Then she respond... in that case, I was given... in the case of Advocate Botes, the notice came to me of the hearing on twenty... 28 or 29 June, he was due to testify on the 1st of July.

You tell me Chairperson if that is sufficient notice? And with... and same with Mr Mogashoa. I do not know if he ended up testifying.

20 **CHAIRPERSON:** He has not testified yet.

JUDGE MAKHUBELE: But the notice, I received a day before his testimony. So when I complained about the short notice, the acting secretary replied to my email and then they were talking amongst themselves as a team.

But I was copied in that email, where she was saying

there has been an instruction that the correspondence from me should be directed to you Chairperson to deal with.

So that is only... maybe three weeks. Three weeks ago. But throughout I have been communicating with the Commission with almost everybody and anybody.

And at some point, I will show you, one would not know what the other one has already written to me about. And so I intend to show you Chairperson that I heard on 24 July, you acknowledged that I am not an ordinary...

10 I am Judge Makhubele. I am just a simple girl but I occupy the position of a judge. I am not an ordinary person. And then I... because your rules do not...

I think the argument will be, your rules... you did not anticipate to be dealing with judges or people who will be occupying high offices would appear before you but they do not make provision.

But I then pointed out to the Commission. I will show you the correspondence Chairperson that...

CHAIRPERSON: H'm?

20 **JUDGE MAKHUBELE:** The closest to that, I think should be applied, is the Superior Courts Act because ...[intervenes]

CHAIRPERSON: But hang on Judge Makhubele. We need to... there is an application for a postponement that Mr Nxasana has moved. We need to analyse that. Now I understood that Mr Nxasana wished you to clarify certain

matters with regard to that application.

JUDGE MAKHUBELE: Well, Chairperson what I realised is that ...[intervenes]

CHAIRPERSON: I am sorry. I am sorry. I am interrupting you but I am sorry. I understand from what you... from part of what you have said that you are saying as far as dealing with allegations against you relating to your role at PRASA, you do not have a problem with that. Did I understand you correctly?

10 **JUDGE MAKHUBELE:** I said... because when I... I never when Miss Interpreter... your interaction with Mr Nxasana, I thought you are saying I have not... I have had this complaint for long. I have not given a version. And all I am saying is, I have given a version. It may not been a ...[intervenes]

CHAIRPERSON: Yes, yes.

JUDGE MAKHUBELE: It may not be in a form that ...[intervenes]

20 **CHAIRPERSON:** It might not be as full as you would have liked.

JUDGE MAKHUBELE: Yes, yes.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: So I have given a version.

CHAIRPERSON: Okay, so you have given a version?

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: Am I to understand that as far as you are concerned that there might not be much to add to that version?

JUDGE MAKHUBELE: I said... it is in my application. Remember, I ...[intervenes]

CHAIRPERSON: Ja, whatever you have said.

JUDGE MAKHUBELE: ...I have not... I have... I did not attend the hearings of Ms Ngoye and Mr Dingiswayo.

CHAIRPERSON: Yes, yes.

10 **JUDGE MAKHUBELE:** My former attorneys requested transcripts. They have not been given those transcripts. So I may want to add when I receive those transcripts.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: In the application that I am going to move, if Chair says I must move it, I have made that request that... with regard to Ms Ngoye and Mr Dingiswayo because they are the only direct witnesses that... for what happened at PRASA.

CHAIRPERSON: Yes.

20 **JUDGE MAKHUBELE:** I would want to have sight of their evidence and then I add my version which, obviously, I have to confirm. It was in a state... it is not in a sworn statement. It is in a statement that I submitted at the Pretoria Bar.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: So I will have to then confirm that

statement and then add what I need to add. And also, in the application I have also indicated there, there are certain investigations that were conducted by... certainly, let me not speak about Advocate Botes' devices because I have already requested that information which I have not yet been provided with.

But on my part, on the day when I have consulted with the legal team, a forensic investigator came for the consultation and he took my details, my ID number, my cell
10 number.

And he was going to request cell phone records for a specific period. Remember with... between me and mister... and Advocate Botes, the issue is who called who. That is very important. It may sound trivial but it is very important.

So we provided the investigator with that information. That was on the 9th of July. Today is the 3rd of August. I was informed it takes four days.

So in the application that I have made, I have made that request that I need that information. So those are things
20 that I may want to supplement ...[intervenes]

CHAIRPERSON: To... yes.

JUDGE MAKHUBELE: ...to the... but with regard to the circumstances that brings me before you Chairperson ...[intervenes]

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: I have already given a version.

CHAIRPERSON: You... yes.

JUDGE MAKHUBELE: I have.

CHAIRPERSON: Okay. No, that is ...[intervenes]

JUDGE MAKHUBELE: So what I was saying is that when Chairperson asked Mr Nxasana about my commitments, my failures... Can I answer?

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: Because he does not know.

10 **CHAIRPERSON:** H'm. H'm.

JUDGE MAKHUBELE: I saw him for the first time ...[intervenes]

CHAIRPERSON: Yes and he said so too. [laughs]

JUDGE MAKHUBELE: He flew from... we spoke... we have been speaking since maybe Friday or Thursday evening.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: But then yesterday, then we agreed that he must appear. Then he flew over. I do not... we met here at the reception ...[intervenes]

20 **CHAIRPERSON:** Ja.

JUDGE MAKHUBELE: ...as inside in Chairperson. And Chairperson, may I just remind Chairperson that it is not just about legal representation. It is about efficient representation because when my legal team does not have a chance to even talk to me for a day or 30-minutes to put

something to assist me.

CHAIRPERSON: H'm. But that is because you instructed them late.

JUDGE MAKHUBELE: Yes, but also Chairperson, the other thing I want to correct is, the previous attorneys... if I can take you through how they... their ...[indistinct] in my matter.

In February they have dealt with my matter, just correspondence because they were already dealing with the JCC matter on my behalf.

10 So they replied to one correspondence. And that is on the 24th of February when I first received the Rule 3.3 Notice.

The first Rule 3.3. Notices came, I think, on the 21st, 22nd February of this year. So these attorneys, because they were already assisting with the JCC matter, they then replied to those notices.

And they indicated, right from the beginning, that the counsel that is assisting me at the JCC is conflicted because he is on retainer with the PRASA.

20 So he, obviously, from an ethical point of view, he cannot be appearing before me... to assist me in that matter because the same complainants are his briefing clients.

So that was the end of February Chairperson. And then I explained that then... we then had a lot of exchange with the secretariat.

I then appeared before the JCC just before National Lockdown. And then there was National Lockdown on the 30th of March. As Mr Nxasana says, that period must be taken into account.

It had only been about three weeks since I was served with the Rule 3.3 Notices. Then there was National Lockdown from 30 March where no one could anything and then when you resumed Chairperson ...[intervenes]

CHAIRPERSON: Well, a lot of work could be done during...
10 even Level 5 and Level 4 Lockdown, using technology without meeting people. We, ourselves, in the Commission, you know, did quite a lot of work. People could be consulted virtually and emails could be exchanged. All of that. So a lot of work could be done without ...[intervenes]

JUDGE MAKHUBELE: Well ...[intervenes]

CHAIRPERSON: ...physically meeting with people.

JUDGE MAKHUBELE: I agree fully Chair because we have been sitting. I did research duty just after National Lockdown and then that is when we were starting with this
20 MS teams because we already in the digital platform.

But what I am talking about is for me to consult... to appoint and consult an attorney under Level 5. That was impossible Chairperson.

And I did indicate to the Commission because they wrote to me sometime in April and then I said as soon as... you will

see from the papers, one of the questions I asked them for reassurance was: “Please, if you get a designation as an essential service, let me know because I may use that to travel to consult with my attorneys”.

I did ask them that Chairperson. I will show you the correspondence at the right time. And then we... then there were other issues.

Then when you resumed, you announced you have resumed. And then... I then... that is when end of May, I
10 received those notices about Advocate Botes and Mr Mogashoa.

And I then wrote the Commission and said... it may not have been immediately. I explained why not immediately because it came in a week when I was doing urgent applications. Two weeks.

Then when I finished, I then wrote to the Commission to say I have read the affidavit of Advocates Botes and Mr Mogashoa and I think I want to get on with this matter.

I... can you please let the legal team get in touch with
20 me? And because initially I had raised a lot of objections. Can I... I... what Mr Botes says here now requires me to act immediately.

Then I... that is when I wrote the letter of 23 June Chairperson. And then I then dealt with the issue of how I was approached by the legal team.

And then the agreements we reached but in between two three days before mister... Advocate Botes testified, I was then told he was testifying and which was then impossible.

Even before the legal team, as I have commented Chairperson, he came to testified. But then I said I requested leave from JP Mlambo that I need to file this affidavit.

And he gave me days off Chairperson and I filed this. So it is not true. Because I see these things are being
10 reported that I never did anything. I filed an affidavit just a day before Advocate Botes testified.

And then the arrangement was I will consult with the legal team who prepared the affidavit for the other witnesses because that one of Mr Botes was specific to him.

And in my letter Chairperson, I made request... a request that: "Can I please testify during reses?" Because we were approaching reses.

The letter is very clear. I said: "Can I testify on the evidence of Advocate Botes because during June reses...?"

20 And then... well, the Commission will explain why then even before I consulted with the legal team, then they said... they then set the date for the 24th.

CHAIRPERSON: Ja ...[intervenes]

JUDGE MAKHUBELE: So Chairperson, I am trying to explain that there is a lot of things that ...[intervenes]

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: ...has been said about me
...[intervenes]

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: ...that I feel I am not leaving well. If
I you say I must leave, I will.

CHAIRPERSON: [laughs]

JUDGE MAKHUBELE: But I [laughs]... I would not want to
leave this Commission without dealing...

10 **CHAIRPERSON:** Ja.

JUDGE MAKHUBELE: But Chairperson, I filed an affidavit.
It is 47-pages long.

CHAIRPERSON: Yes, I know. I had to read all 47-pages.

JUDGE MAKHUBELE: And I... it is a sequence and I was
answering each and every question that I have been told I
must respond to. The purpose of attaching the
correspondence was to show the sequence and the issues
that were being discussed. And then again ...[intervenes]

CHAIRPERSON: That, of course, is ...[intervenes]

20 **JUDGE MAKHUBELE:** ...I was asked to explain why I pulled
out of the consultation with the legal team and I took time to
respond to... to answer you Chairperson. It is for you
Chairperson to decide whether my explanation makes sense
or not.

CHAIRPERSON: H'm. H'm.

JUDGE MAKHUBELE: And I was... or there are other things I was asked to address and I did but Chairperson the legal team answered my affidavit on Friday. I received it Friday morning.

CHAIRPERSON: I think it was... it was... well, I think they responded... I do not know when they responded but ...[intervenes]

JUDGE MAKHUBELE: Ja, but ...[intervenes]

CHAIRPERSON: ...your affidavit came on Thursday, I think.

10 **JUDGE MAKHUBELE:** I will also tell you the pressure that I had to finalise that affidavit because my attorneys let me down. Remember, I was doing opposed roll last week. So we were... we would be consulting by telephone. Draft... sending a draft for them to settle and then them bringing it back to me and then me waiting.

But it was clear that we were not going to be able to file the statements, the sworn statements. So what we were trying to do was to tell Chairperson that time... those timeframes are impossible to comply with, having regard to
20 the fact that I was sitting in an opposed roll and I only had three days.

And the opposed roll runs for a week Chairperson. So by six o'clock on the due date, my attorneys then told me that: "Look, Judge we think..." I do not know if this... what I am saying falls within a privileged attorney/client but for your

purpose Chair, because I must respond to this question.

By 18:00... remember, during the day I am in court. By 18:00 I am expecting a settled affidavit from my attorneys. They then tell me that “Look, it is impossible. We cannot do this”.

What were my... my options were to sit back or do something. I decided to do something Chair. I was working from chambers. I then called my family: “Come here. We must finalise this affidavit”. My family assisted me. We put
10 together the affidavits. We left my chambers at around 12 a.m. because I did not want to defy you order, Chair. We went to the police station, the police were reluctant but they finally agreed to certify ...[intervenes]

CHAIRPERSON: The affidavit.

JUDGE MAKHUBELE: The affidavit and the annexures, all totalling 140 pages. 12 a.m. And then I called my one child has a bigger scanning machine to come to the house and we stand – we slept at 4 a.m. That affidavit was sent to the Commission around twenty to four, Chairperson,
20 because I did not want to defy your order, I said rather when the Chairperson wakes up, the affidavit ...[intervenes]

CHAIRPERSON: The affidavit should be there.

JUDGE MAKHUBELE: The affidavit should be there and then I will deal with the other issues. You will see there

was no notice of motion because ...[intervenes]

CHAIRPERSON: Yes. No, there was no notice of motion.

JUDGE MAKHUBELE: But all the issues that I am requesting have been addressed in the affidavit.

CHAIRPERSON: Ja, ja, yes.

JUDGE MAKHUBELE: And thereafter we did not even – you know, when it is your own matter you even forget how things are supposed to be done. I even forgot to paginate.

CHAIRPERSON: Ja.

10 **JUDGE MAKHUBELE:** So I just – we just scanned and sent through and then we – but when yesterday I realised oh, this thing is not paginated, then I sat down and paginated.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: And then I said but there is no notice of motion.

CHAIRPERSON: No, that is fine ...[intervenes]

JUDGE MAKHUBELE: Then I then sent through the notice of motion.

20 **CHAIRPERSON:** Yes.

JUDGE MAKHUBELE: But everything that I am requesting is in that affidavit.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: But then, Chairperson, I was talking about the legal team's response to the issues. I did

not just wake up and say I want to find this affidavit, I wanted to respond to the issues that made you, Chairperson, to issue a subpoena, a regulation 10.6 against me. That is tantamount to a warrant of arrest or a summons and the regulation is clear, it says may – it gives you a discretion and obviously same thing if it was an application to rescind a judgment obtained in my absence. I will have to put factors that if you had been aware of me sitting there on the 24 July you would not have issued a
10 regulation 10.6 notice against me. That is the purpose of that affidavit, Chairperson.

And then the legal team responds in five pages – well, it is not the volume but it is the substance, but they do not deal with my – the merits of what I have said. They simply say we deny we gave time ...[intervenes]

CHAIRPERSON: Yes, okay. No, that is fine, I ...[intervenes]

JUDGE MAKHUBELE: Then they need time to find a substantive answer to my affidavit.

20 **CHAIRPERSON:** Ja, well, they will speak for themselves. I think we need to have some finality. I certainly read your 47 page affidavit on – I think I read it on Thursday, so I am aware of what you say in it. I was aware when the matter was supposed to be heard at 2 p.m. on Friday. I have read your earlier affidavit that you filed in response to Mr

Botha's affidavit so I am aware of all of those things.

I think I need to say this. Nothing that has been said so far changes my inclination not to grant a postpone but if there is anything that you have not said which you would like to say in support of the application, I am giving you another ten minutes to address me then you have had your time. Now whether you use that ten minutes or he uses it or you take five minutes, he takes five minutes, I leave that to you but I want us to have finality on the
10 question of a postponement.

Well, Chairperson, I would request the matter to stand down so I can discuss with my attorney on the issue of postponement.

CHAIRPERSON: Okay.

JUDGE MAKHUBELE: Because, as I say, we did not discuss.

CHAIRPERSON: Yes, no...

JUDGE MAKHUBELE: But then from my part, what I can tell you is that - as I have said, preparing, consulting with
20 lawyers, preparing for efficient representation requires me to be not in court. Imagine today, it is my reading day for tomorrow's matters, I am sitting here. I am an emotional being. When I leave here I am expected to go and read files for tomorrow's matters. I mean, if I had not been given the week off. So it is – I realise it is – I realise it is

impossible and I think I need to prepare. Even if I were to do the drafting myself I need to prepare, I need to put together documents and I may have noted at some point I asked JP Mlambo that, please, just give me special leave, which I still intend to do because I am not coping, Chairperson. I am not doing myself a good service and as my attorney has already said, this matter has serious implications for me.

CHAIRPERSON: Ja.

- 10 **JUDGE MAKHUBELE:** And it is not something that I can take light and say let me not just go and appear without consultation with attorneys but I request that we adjourn so I can brief my attorney. I did something unconventional just now because, you know, when you have counselled an attorney, he is the one who must make submissions.

CHAIRPERSON: Yes, ja.

JUDGE MAKHUBELE: But Chairperson must understand, we are only meeting now.

CHAIRPERSON: Yes.

- 20 **JUDGE MAKHUBELE:** And I did not – the line of your – or rather, your conversation with him I realised that we are going back to that issue that here is a difficult State Capture Judge, she is controversial, she does not want to respond.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: Then that is when I decided I need to address you.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: But can you allow us an opportunity and I think 10 minutes, Chairperson, is too short a time.

CHAIRPERSON: Well, I was giving you ten minutes to say whatever else you might wish to say in support of your application if there is anything you have not said and I think it might be better that I hear what Mr Soni has to say before we allow the adjournment because then you would be knowing what he has had to say. So I will give you the time but I want us to maybe adjourn if possible when there will be nothing further that you have not said in support of the application that you want to say.

JUDGE MAKHUBELE: Well, I have, but under my ...[intervenes]

CHAIRPERSON: Oh you say – or are you saying that some of the things you want to say you would like to consult him first?

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: Oh, okay, alright.

JUDGE MAKHUBELE: Yes, Chairperson, that is why I am saying our submissions.

CHAIRPERSON: Yes, yes.

JUDGE MAKHUBELE: Can we consult so that when Mr Soni makes submissions, we have already placed everything that we need to place before you, Chairperson.

CHAIRPERSON: Ja. You say ten minutes would not be enough?

JUDGE MAKHUBELE: I do not – well, let my attorney speak now ...[intervenes]

CHAIRPERSON: Attorney or counsel, what do you say? I do not want us to spend too much time that we do not
10 have.

ADV NXASANA: Yes, Chair.

CHAIRPERSON: On things that might be dealt with without an adjournment but if there is a need for adjournment – is there any – are you able to say anything about how much time you need?

ADV NXASANA: Chair, can I propose that we be given at least 30 minutes?

CHAIRPERSON: I think what I am going to do, I think I would rather – what I will do is, let me hear what Mr Soni
20 has to say including on the amount of time and that does not mean that your part is finished, I will still allow you – I will still like the question of that adjournment but I just want us to make use of the time as much as we can. Okay, so let me hear Mr Soni.

ADV SONI SC: Thank you, Chair.

CHAIRPERSON: Both on the application so far as well as on the request for 30 minutes.

ADV SONI SC: Thank you, Chairperson.

CHAIRPERSON: Yes, Mr Soni?

ADV SONI SC: Chairperson, I am going to take into account the interactions that you have heard with my learned friend.

CHAIRPERSON: Yes.

ADV SONI SC: And what Judge Makhubele has said.

10 Chairperson, the purpose of today is to decide on the application, this one, and Judge Makhubele says that the affidavit that was served on us in the early hours of Thursday is the affidavit in support of the application. May I just make this point, Chairperson, that the first application for a postponement was made on the 24 July without any papers and that is a matter, Chairperson, that you raised with my learned friend who then appeared for Judge Makhubele, but is there no substantive application? And reasons were given for that, good or bad, but it was
20 given.

And then we have now a further application with now a substantive application. We submit, Chairperson, that the application before you must be determined by what is contained in the affidavit in support of that application.

Now I have heard Judge Makhubele say well, we

may wish to respond to different things in the affidavit where she refers to the legal team. Chairperson, we do not want to because that is not the issue before you today.

The question really is – and this is the issue, Chairperson, from the 24 July when application for postponement was made and the directive was given, Judge Makhubele knew that she had to file her papers, her affidavit by the 29 July and she would have to appear today. What was then required was could that directive not
10 be complied with? Nothing in the affidavit addresses anything that happened after the 24th. So, Chairperson ...[intervenes]

CHAIRPERSON: Actually, if one goes on the basis that, as Judge Makhubele indicates, she has given her version in the affidavit. It might not be as full as she might have referred, it seems that then there was less work to be done in preparing the affidavit, an affidavit would just supplement that version.

ADV SONI SC: Yes.

20 **CHAIRPERSON:** And I get the impression that what she says is you have got the gist of my version already.

ADV SONI SC: There is one further matter that I must you, Chairperson. Judge Makhubele says that part of the reason she is seeking the adjournment is that she has asked for the transcripts of the evidence of Ms Ngoyi and

Mr Dingiswayo. Well, Chairperson, on the 23 July her attorneys asked for it at about 11 o'clock on the 23rd and at about four o'clock or three o'clock on the very same day they were given the link to the ...[intervenes]

CHAIRPERSON: To the website.

ADV SONI SC: To the transcript, yes.

CHAIRPERSON: So they could have got it from the 23rd.

ADV SONI SC: Yes. And, Chairperson, at that time, that is the attorney that was representing Judge Makhubele.

10 **CHAIRPERSON:** But, as I understand it, the oral evidence that was given by Ms Ngoyi and Mr Dingiswayo in relation to Judge Makhubele's role at PRASA was substantially the same as what is in the affidavit.

ADV SONI SC: Yes, yes.

CHAIRPERSON: Is that correct? Is my recollection correct?

ADV SONI SC: Absolutely. And, Chairperson, you will recall that in the case of Mr Dingiswayo all he did was confirm the correctness because it was late in the day and
20 instead of having his evidence follow on the next day I proposed that he merely confirms it.

CHAIRPERSON: Yes.

ADV SONI SC: So – and, Chairperson, you are absolutely right in regard to Ms Ngoyi, all she did was effectively set out what was set out in the affidavit that she made.

CHAIRPERSON: Ja. Okay, alright.

ADV SONI SC: Chairperson, we submit that the day must be used for the purpose that it has been set aside for, namely for Judge Makhubele to give her evidence.

CHAIRPERSON: Ja. I am going to take a tea break, it is now about seventeen minutes past eleven. I am going to return at quarter to twelve. Whatever you need to do – so that is tea break and whatever discussions you need to have with your attorney, use that time. When I come back,
10 I will give you the ten minutes to say whatever you might still need to say in support of the application for a postponement. I can indicate, as I have already indicated, that my inclination is to dismiss the application. If nothing is said that persuades me when I come back, the application will be dismissed and I will need us to start.

Now the question of whether there was good cause for you not to file affidavits on Wednesday, that need not be decided now. I can decide it even later. Or what is more, what is important is whether today we are able to
20 proceed to hear your evidence. So that is the inclination, I am giving you the benefit of knowing what is in my mind.

When we come back, I will give you ten minutes to see whether there is anything else you want to say and then if I feel that I can decide immediately, I will decide immediately if, from what you say, I need more time. Then

we will take it from there. Yes, Judge Makhubele?

JUDGE MAKHUBELE: Chair, there is an application. Are you saying you are not going to hear me because in that application I have made requests that require Chairperson to make orders. Are you saying my application is not going to be heard?

CHAIRPERSON: Well, remember, I said, you know, I need – earlier on I said I need to know exactly what we are dealing with today and there is an application for a
10 postponement. I have given you time to address me on the application for a postponement and I am saying that I am going to give you ten minutes after the adjournment, because we have been dealing with it for a long time already, to address me. If there is anything else that you want to address other than the application for a postponement, you will need to tell me but you will remember that when we started I asked Mr Nxasana exactly what it is that we are dealing with because I wanted to be sure.

20 So what I am saying is, I have heard what you have said up to now. I have heard what Mr Nxasana has said up to now. Based on what has been said to me, I am inclined to dismiss the application but I have not made a decision to dismiss it, I will give you more time to address me. But I am saying that I gave you ten minutes after the

adjournment to address me and if there is anything else I have missed that you want to bring to my attention that will be the time to bring it to my attention and then we will take it from there.

JUDGE MAKHUBELE: The reason I am asking, Chair, if you can forgive me, is because if you start by dismissing my application for postponement then in the – in my affidavit I have already said the notice of motion that I sent it is actually what I am requesting in my affidavit. And in

10 ...[intervenes]

CHAIRPERSON: Yes, but why should you not deal with that after the adjournment, exactly what you want to raise, why should you not include it after the adjournment? Ja, we will adjourn now, we will resume at quarter to and then I will give you that opportunity before I make a final decision.

JUDGE MAKHUBELE: Thank you.

CHAIRPERSON: Okay, we adjourn.

INQUIRY ADJOURNS

20 **INQUIRY RESUMES**

CHAIRPERSON: Yes, Mr Nxasana you were going to address whatever else you might not have addressed to me earlier in support of the application.

Just switch on your mic, ja.

ADV NXASANA: Thank you Chair. Chair I first indicated

that when I stood up ...[intervenes]

CHAIRPERSON: Do you want to move your mask a little, so I can hear you properly, thanks.

ADV NXASANA: Chair when I told the Chairperson that that the instructions are to move an application for a postponement based on the reasons, especially that we have not consulted. Chair, I was under the impression that today the matter was, obviously set-down for the application that my client has brought and I was moving
10 that application for a postponement to enable her to enable her to get legal assistance even if to argue that application, I don't know if the Chair understands me?

CHAIRPERSON: So you are moving an application, not only for the postponement of the hearing of her evidence but also for the postponement of her application for a postponement?

ADV NXASANA: That is correct Chair.

CHAIRPERSON: Is it correct?

ADV NXASANA: That is what I was saying, although I
20 hear the client is saying that she – because I haven't – that is the reason why I was moving that application, precisely because I felt...[intervenes].

CHAIRPERSON: So there was an application for a postponement, you come, not to move that application for a postponement but to move another application for a

postponement of the postponement? [Laughter] What is that Mr Nxasana?

ADV NXASANA: Chair the bottom line is it's clear that Judge Makhubele requires legal assistance. Yes, she has explained to the Chairperson how she ended up drafting the affidavit herself, when she had instructed attorneys and she said in her own words that the attorneys – after the attorneys had let her down and because...[intervenes].

CHAIRPERSON: Let's clear out again what we are
10 dealing with. Is it the application for a postponement that was postponement today, including an application for the amendment of the Directive of 24 July or are you moving an application for a postponement of that postponement application?

ADV NXASANA: Chair, my view was to move an application for a postponement.

CHAIRPERSON: Of what, postponement of what?

ADV NXASANA: Of her testimony first and also I
20 answered that I understood that the matter was set-down on the 30th at two for the application that client has brought, which application could not proceed for the reasons that I have advanced but Chair, I then said that I submitted that she requires legal assistance because of the implications that all those proceedings may have, taking into consideration that the matter is serving before

the JCC and a recommendation has already been made that the tribunal should be established, that was on that premise but then when the Chairperson pressed me with questions that is when I said, client is here to explain especially because there was an impression that client was delaying the matter to – she was delaying to come to the Commission and if, Chairperson, the Chairperson has already indicated if the Chairperson is inclined to refusing the postponement then based on the reason that the
10 Chairperson has furnished then the – then my application or my submission, Chair, is that if the Chairperson looks at the matters of motion that the client filed late last night, you'll see Chairperson that you are going back to the ...[intervenes].

CHAIRPERSON: Can I have a copy of that Notice of Motion, I did see it earlier on but I just want to have a look at it now, yes Mr Nxasana.

ADV NXASANA: Then, Chair, my submission is that, I hear the Chairperson saying that the matter – that Judge
20 Makhubele is expected to testify on, is purely of a factual nature but Chair, if you look at the affidavit that she filed in the application for the Regulation 10 sub-section 6, you see that she has made very serious allegations against the legal team, the very same legal team that is expected to lead her evidence.

CHAIRPERSON: Well, she brings her application in regard to the legal team at the last minute. She has known the members of the legal team of the Commission involved in this matter for months and of course she did have a consultation with them on the 9th of July, well, maybe she might not have known, she might have known one before June, I'm not sure, but certainly she had a consultation with them on the 9th of July so she knew them, at least at the latest on that date. Prior to that she had, as she said
10 earlier on herself, she had raised certain objections which included one of the members of the Commission's legal team involved in the PRASA matter but she later withdrew all the objections that she had articulated and was prepared to consult, which she did on the 9th of July. From the 9th of July she knew, at least, the two members of the Commission's legal team who are involved in the matter. On Friday the 24th, it was, if I recall correctly, it was not one of her grounds for a postponement that she had an objection to members of the legal team. When she filed
20 her affidavit on Thursday last week, yes she has expressed certain unhappiness with regard to members of the legal team which is in the affidavit but there has been quite a lot of time for her to raise such issues, at least from the 9th. We adjourned on the 24th, we adjourned today and she has raised, now, these concerns that she has raised. It seems

to me that she should have raised them much earlier number one. Number two, what about the fact that the members of the legal team will not really decide anything relating to her, they will put questions to her, I'm the one who will, ultimately, make a decision, what do you say about that?

ADV NXASANA: Yes it may be so but I think Chair, as a witness, if the witness is making such serious allegations against members of the legal team, Chair, I submit that
10 they must respond and from the answering affidavit you see that only one member has responded but not fully to the allegations and there is not even a confirmatory affidavit from the evidence leader...[intervenes].

CHAIRPERSON: Let's go to the actual allegations or do you want to address – to address them. As I understand it, I think she said they must indicate if they've done some work for PRASA or that kind of thing which suggests to me that it's not – it might not be, even a situation that she's in possession of any information herself in regard to one of
20 the members of the legal team, I think she did not want to put forward, in the affidavit what the issue was and I think, previously, she had done the same in regard to one member of the legal team but she had said that she was withdrawing that objection with regard to – when she withdrew objections, it included that objection against that

one member of the legal team. So – and she withdrew her objection and then bring it back.

ADV NXASANA: Chair that is also another problem, Chair, that I'm going to address the Chair on. The other difficulty, Chair, is that, I hear the Chair is asking questions but they are questions that I cannot answer simply because I haven't taken full instructions, I haven't had the opportunity to consult...[intervenes].

CHAIRPERSON: Ja but you are arguing on the basis of
10 an affidavit that she filed on Thursday.

ADV NXASANA: Yes.

CHAIRPERSON: Last week.

ADV NXASANA: But Chair I wasn't aware of the objection that she withdrew earlier on, that's my problem...[intervenes].

CHAIRPERSON: Ja but you did hear her later – earlier on because she also mentioned that she had withdrawn certain objections. I think the objections about PRASA might not have been part of any objection at that time. So,
20 I think the objections that may be new, may be objections about whether members of the legal team have done work for PRASA and the way she feels she was treated on the 9th of July in the consultation. I think those are the only ones that may be new, you must tell me if I'm missing something?

ADV NXASANA: Chair about new ones I'm not sure but what you have said is ...[intervenes].

CHAIRPERSON: Is what you know also, was the objections.

ADV NXASANA: Is what I've read about in the affidavit.

CHAIRPERSON: Ja.

ADV NXASANA: Yes and Chair, my understanding of her request in terms of the application that she has brought in terms of 11.1 is that she was asking the members of the
10 legal team to declare their interest, if they have any.

CHAIRPERSON: Which means she doesn't have information whether they have a conflict of interest or not otherwise she would not be asking. She would be saying, I'm aware that this and this is the position.

ADV NXASANA: Ja, but...[intervenes].

CHAIRPERSON: I mean, we are going to close to half a day now, I want finality. Give me your last submissions in the next five minutes, whatever you want to address, I've given you more than ten minutes, we have got to have
20 finality.

ADV NXASANA: Yes Chair, I think, Chair the justice will only be done in this matter, Chair, if Judge Makhubele were to be – if the application that she has brought herself was going to be heard before the Chairperson was going to make a ruling on the issue of the application for a

postponement. The reason why I say that, it's because it's there in the application that she's brought, the application in terms of Rule 11 sub-section 1, that is my submission and also Chair, in the event the Chairperson, as he has indicated that he is inclined to dismissing the application, in the event that the application is dismissed for a postponement to enable her to consult with her legal team, that will mean, basically, that she doesn't have legal representation because in terms of the rules of the
10 Commission, she's entitled to legal representation and one of the powers of the Chairperson is to grant the legal representative, appearing on behalf of the implicated witness, leave to re-examine the witness which I will not be in a position to do without having consulted and taken instructions but that's not only the point. The point is that the client requires and she needs services of Senior Counsel.

CHAIRPERSON: Yes.

ADV NXASANA: Yes.

20 **CHAIRPERSON:** Are those your submissions?

ADV NXASANA: Those are my submissions.

CHAIRPERSON: You see with regard to the question of whether she had good grounds not to file her affidavit or affidavits within the timeframe stipulated in the Directive of July 24, that I can decide later, I don't think I need to

decide that now. With regard to the application and with regard to the affidavits, she herself has said that she has actually, in her affidavit that she filed in response to Mr Botes, she has said that she has put in her version. It might not be as full as she might have wished but she has said that she has put in her version, it's not true that she has not put up her version and that's the gist of what she was saying. We are working under serious strains in terms of an Order of Court to make sure we work within a certain

10 time and she has had enough time to really obtain counsel who would be ready to proceed today, as I see it but also, although one accepts that, even a Judge does need legal representation in a case, in certain places one can't forget the fact that she is a Judge, she is legally trained and also in the end, also the fact that, really the matters that will be dealt with be very factual, we are – the Commission is scheduled for a number of witnesses for quite some time and there are many more people who are supposed to testify and we lost a day on the 24th, we shifted other

20 witnesses for today in order to sit. So, I'm going to dismiss the application but I will give reasons in due course. The application is dismissed.

ADV NXASANA: Thank you Chair, just for clarity, the application that is dismissed is the application for a postponement.

CHAIRPERSON: Well the application for a postponement is dismissed and I said the issue of whether she has complied – she had good cause to comply with the Directive in terms of filing an affidavit by Wednesday last week, that can be decided – I can decide that later on. Remember the Directive had two dates, one was the filing of the affidavits, on Wednesday and the other was for her to appear today and she has appeared.

ADV NXASANA: Yes Chair. Chair there is an application
10 before you, Chair...[intervenes].

CHAIRPERSON: Ja which one?

ADV NXASANA: The one that – in terms of Rule 11 sub-section 1.

CHAIRPERSON: It's an application for what?

ADV NXASANA: It sets out, there in the Notice of Motion, that 1) is the granting condonation for non-compliance with the time strains in term of service, 2) reconsideration in rescission of the Directives of 24 July 2020 alternatively substitution of the time periods indicated in the said
20 Directive. 3) Setting aside and/or withdrawing the regulation 10 sub-section 6 subpoena served on the applicant on 28 July 2020...[intervenes].

CHAIRPERSON: Well let's take them one by one let's leave out 1 for now, reconsideration and rescission of the Directives of 24 July 2020 or alternatively substitution of

the time periods indicated in the said Directives. The Directive was about two things, 1), her filing an affidavit or affidavits by Wednesday last week, 2) appearing today. She has appeared today so that falls away, there's – that falls away, she did not file an affidavit on the 29th and she is asking us to – for a reconsideration of that to the extent that she may be asking for more time to file affidavits, 1) She has said that she has filed an affidavit, she has put up a version it's not true that she has not put up a version, it
10 might not be as full as she wanted but even without that I would not do that – I would not direct that she does that on another date if that was to require a postponement of the matter because the matters can be dealt with, without any further affidavits but if she chooses, apart from, I addition to having given oral evidence that, for certain reasons she would like to file affidavits, that might be a separate issue then 3) is about setting aside or withdrawing 10(6) Directive that's what we have talked about and then granting the applicant sufficient time to consult with her
20 legal team, that's what I've indicated, I don't think that there is good cause that has been shown and then with regard to 5), the transcripts, Mr Soni says, the previous attorneys were told on the 23rd, they were given the link in order to be able to access the transcripts technologically.

ADV NXASANA: Chair, just on that point.

CHAIRPERSON: Ja.

ADV NXASANA: My instruction Chair, are that, that link was never provided to client and she has never seen the ...[intervenes].

CHAIRPERSON: Yes, well that might be – that might have to be dealt with but my recollection is that the evidence that was given is substantially the same as the evidence that was in the affidavits which she has had – so I wasn't going to postpone the proceedings in order for her to get
10 the transcripts first because, as I say, even if the link wasn't even – the oral evidence was substantially along the lines of the affidavits. 6) The results of the analysis of the investigations conducted by the forensic, I'm sure that can be arranged for her to get that, Mr Soni did not address that, directing the legal team to provide all the cell phone records both – but also this is all coming on the morning of the hearing, I mean very late. 8) Directing and compelling the Commission's legal team and investigators, assisting the Commission in the PRASA hearing to disclose
20 their professional interest in PRASA, ja. I think if she needs to file a complaint she must file a complaint. No we are proceeding.

ADV NXASANA: Thank you Chair.

CHAIRPERSON: Thank you.

ADV NXASANA: Just one more thing from my side Chair,

I understand that the client has made mention of the affidavit that she filed in the complaint against Advocate Botes.

CHAIRPERSON: Yes.

ADV NXASANA: And that she said she dealt therein with her evidence not substantially as she would have liked. Chair I have not seen that affidavit either, those are the constraints...[intervenes].

CHAIRPERSON: She should have given you that affidavit.

10 **ADV NXASANA:** Those are the constraints that...[intervenes].

CHAIRPERSON: We got it from her, as I understand it, I may be mistaken but we have had it for quite some time and I think she – I think that was end of June if I'm not mistaken. Well there are two options now that I've dismissed the application. One is whether I should give – well I don't know whether your position would be that you are going to withdraw in the light of the dismissal of the application or whether you are going to seek to have some
20 time to consult with her and that we – I give you some time before we resume to consult with her and then we resume at a certain time and then we deal with her evidence.

ADV NXASANA: May I approach Chair?

CHAIRPERSON: Yes, ja. Well Mr Nxasana I cannot sit here and...

ADV NXASANA: Chair thank you. I understand that Chair.

CHAIRPERSON: Yes.

ADV NXASANA: Chair perhaps just one issue Chair.

CHAIRPERSON: Ja.

ADV NXASANA: Client she is raising one issue.

CHAIRPERSON: Ja.

ADV NXASANA: If Chair can clarity that?

CHAIRPERSON: Ja. Yes Judge Makhubele.

MS MAKHUBELE: Chairperson I have noted you read the
10 prayers up to a certain prayer. Yes I understand with the
PRASA General Declaration of Interest I have an onus to
provide evidence which I will in time. But there is a prayer
specifically seeking the recusal of Advocate Vas Soni SC.
There is a prayer there Chairperson and if you dismiss my
application in general you – you...

CHAIRPERSON: Well...

MS MAKHUBELE: The affidavit – my affidavit deals with
Advocate Soni is the reason why I pulled out of the
consultation with the legal team and you cannot expect me
20 today to be led by him without you first hearing me – my
reasons why I say he should not be leading me in evidence.
You can call any person in the legal team to lead me but not
Advocate Soni.

CHAIRPERSON: Hm.

MS MAKHUBELE: Chairperson he – Advocate Soni in this

affidavit I have said on the 24 July he is standing there he told some untruth about me.

CHAIRPERSON: Hm.

MS MAKHUBELE: I have submitted evidence. Chairperson cannot simply dismiss me like that without even mentioning on the record what I have said and specifically dismiss that prayer that Judge Makhubele is talking coherences.

CHAIRPERSON: Well you remember...

MS MAKHUBELE: I need a ruling whether...

10 **CHAIRPERSON:** You remember – you remember I said I was going to adjourn to – and when we come back I will give you an opportunity to say whatever you might not have said.

MS MAKHUBELE: Thank you.

CHAIRPERSON: Let us go to – to that part of your affidavit.

MS MAKHUBELE: My part of the affidavit where I deal specifically with Advocate Soni because Chairperson remember you asked – you said I make myself available to consult with the legal team.

CHAIRPERSON: Yes.

20 **MS MAKHUBELE:** Which is true.

CHAIRPERSON: Yes.

MS MAKHUBELE: And then the objections that I had withdrawn maybe for the record at that time was and believe from my perspective made sense although there was never a ruling but I thought we could move along. But when I met

Advocate Soni I deal with it in the affidavit maybe from page 23 from paragraph 51. I detail how I met them.

CHAIRPERSON: Hm.

MS MAKHUBELE: And what broke down the relationship.

CHAIRPERSON: Hm.

MS MAKHUBELE: If that relationship did not break down, we would not be here today Chairperson. I was happy to provide an affidavit to the legal team but he is the reason I pulled out. And Chairperson has already made adverse
10 remarks about my pulling out of that consultation.

CHAIRPERSON: Hm.

MS MAKHUBELE: So it is important Chairperson that this issue be addressed and I request time to brief my attorney properly to present this application alternatively...

CHAIRPERSON: The recusal application?

MS MAKHUBELE: Yes. Alternatively, you allow me to move it which you effectively denying legal representation if I have present this application myself. This must be presented
Chairperson.

20 **CHAIRPERSON:** Well...

MS MAKHUBELE: If you say I must proceed today the question is who will be leading me? I can never sit here and have a conversation with you. I have no problem but I am not going to allow Advocate Soni.

CHAIRPERSON: The recusal application it is a recusal

application it is not an application for the postponement of the hearing of your evidence. Those are two different matters. And you remember that I kept on saying I want to know exactly which application – or which issue is being moved. You want an opportunity to talk to your attorney and brief him about the recusal application?

MS MAKHUBELE: Well I do not know Chairperson you have already ruled on some parts of the – my Notice of Motion.

CHAIRPERSON: I – the postponement I have dismissed the
10 postponement application.

MS MAKHUBELE: Yes but then Chairperson.

CHAIRPERSON: The recusal application.

MS MAKHUBELE: Chairperson there is a lot that was said about me on the 24 July.

CHAIRPERSON: Ja.

MS MAKHUBELE: You would recall.

CHAIRPERSON: Ja.

MS MAKHUBELE: And then the point that I am taking is the person making those remarks was not telling the truth. I
20 gave you evidence that when Advocate Soni stood there he said something that I – I did not return his calls. I am this, this and that and I deal with it and I also deal with his conduct when they have consulted with me that looking at how he dealt with me in that particular consultation I immediately pulled out Chairperson and I believe the

application that I have made must be entertained. You can dismiss it but after giving me an opportunity.

CHAIRPERSON: Ja.

MS MAKHUBELE: You cannot simply dismiss everything that I am making here Chairperson.

CHAIRPERSON: No, no. I remember I said I want to – from the beginning I said I want to know exactly what we are dealing with and so far, I was told the postponement application. No mention was made of a recusal application.

10 **CHAIRPERSON:** Now Mr Soni what do you say about the recusal application in terms of how we move forward? Let me hear that?

MS MAKHUBELE: Chairperson before you give him an opportunity.

CHAIRPERSON: Hm.

MS MAKHUBELE: I sit here.

CHAIRPERSON: Ja.

MS MAKHUBELE: I – before they come here, they prepare their work.

CHAIRPERSON: Hm.

20 **MS MAKHUBELE:** Before I go to court, I prepare my work.

CHAIRPERSON: Ja.

MS MAKHUBELE: But I managed – I did not sleep.

CHAIRPERSON: Ja.

MS MAKHUBELE: I wrote this affidavit after doing my oppose motion.

CHAIRPERSON: Yes.

MS MAKHUBELE: They have had this affidavit since – since when – Thursday morning. Today it is Monday.

CHAIRPERSON: Well ...

MS MAKHUBELE: I do not think it is

CHAIRPERSON: Well...

MS MAKHUBELE: Chair it is proper for ...

CHAIRPERSON: Judge Makhubele.

MS MAKHUBELE: For Advocate Soni to respond to my
10 affidavit.

CHAIRPERSON: No, no, no.

MS MAKHUBELE: He must file an affidavit about the move.

MS MAKHUBELE: No, no, no you have not – you have not heard what I say. I want to hear what Mr Soni has to say about the recusal application not the substantive part because you – your counsel has not – test it.

MS MAKHUBELE: But a judge has filed an affidavit under oath.

CHAIRPERSON: Yes.

20 **MS MAKHUBELE:** Why can he not file an affidavit under oath?

CHAIRPERSON: No but Judge Makhubele please wait.

MS MAKHUBELE: Thank you.

CHAIRPERSON: I need to hear him as well. Ms Nxasana take a seat and let me hear Mr Soni. Just put on your

microphone Mr Soni.

ADV SONI SC: Chairperson of course I stand here in a rather invidious position. Fortunately, though Chairperson there are two issues that are involved in everything that Judge Makhubele and Mr Nxasana has said.

First is; what is my role in this commission? I do not play any role in making any decisions. My role is to lead evidence and to challenge evidence. What comes of that evidence Chairperson is in your hands.

10 The second issue Chairperson is that it cannot be for a witness to say to the commission that it may not – the commission may not allow one of its members unless there are good reasons not to participate in particular proceedings. As I understand it.

CHAIRPERSON: Where is her affidavit that has got this of Thursday?

ADV SONI SC: If I recall application by Judge Makhubele for amendment of the regulations.

20 **CHAIRPERSON:** Just – just read the – just remind me of the relevant parts of that – in the affidavit?

ADV SONI SC: Chairperson at paragraph 52 this is where Judge Makhubele starts. She met Ms Mangata [?] and myself and then we had a forensic investigator and then she says:

“At the beginning of the meeting”

This is at paragraph 54.

“The commission’s team seemed to appreciate my position in the objections I raised. I say so because in respect of forensic analysis WhatsApp and messages they made a concession that there would be no need to do an imaging of my phone. Then we agreed that I should email to Ms **Mangata** [?] copies of all the annexure.”

That is at paragraph 65. Paragraph 56.

10 “The meeting progressed into or rather degenerated into a session of accusatorial exchanges with Advocate Soni who seemed to take a prosecutorial posture like despite an earlier acknowledgement by the commission that my matter was before the JSC and the JCC and that in essence the testimony required – required from me related to issues before those forums.

It became a very lengthy and tiresome engagement which distressed me and completely made me change my initial view when I offered to consult with the team. His behaviour actually confirmed my apprehension about the
20 objectivity of the legal team and investigators.

Advocate Soni attempted to act as a police officer, prosecutor and judicial officer. I do not believe that this is the role of the legal team when they take statements. Over and over again Advocate Soni made it clear that he was going to cross-examine me on things that he did not believe

that I was telling the truth. He actually sat with me as an agent of the witnesses that accused me of wrongdoings at PRASA particularly Ms Ngoye, Mr Dingiswayo and Mr Mkhathshwa.

Also, to mention that during our telephone conversations Advocate Soni had informed me that Mr Agmat would not be testifying.”

Then at paragraph 60.

“What broke my patience and tolerance of the consultation
10 was the attempt by Advocate Soni while Ms Mangata[?] remained silent suppress my evidence which I believe will contradict the allegations of the witnesses. I would refer to a few examples without revealing what my answer is at this stage.

1. The issue of the authority of the Chairperson of the board to intervene as I did.
- b. The delegation of authority from the board.
- c. My first interaction with Ms Ngoye and Mr Dingiswayo.
4. Contentions – contentious issues that the board raised
20 with the legal unit headed by Ms Ngoye.
5. My interactions with the employees of PRASA who testified at the insolvency inquiry.

All these matters and many more are recorded in my notebook which I showed Advocate Soni and Ms Mangate [?]. I told Advocate Soni and Ms Mangate[?] that I intended to

transcribe the notes because some of the issues constitute my defence and some saw wrongdoings on par.

Whenever I raised an issue that is favourable to me Advocate Soni would rudely tell me that I should concentrate on the allegations that I pushed a pushed a settlement plan. This is when I asked Advocate Soni about the expense of the commission's investigations in these PRASA hearings.

I then learned for the first time that the reason that I am before the commission is because Ms Ngoye and Mr
10 Dingiswayo had laid a complaint against me. Why does this shock me? I was of the view that the commission was investigating maladministration, irregularities and various breaches of government's policies at state entities and that the issues that I have been called to answer to is a result of that information.

I have information relating to irregularities committed by some of the complainants as Advocate Soni refers to them. I would simultaneously put my responding sworn statements provide these details.

20 Advocate Soni became very – extremely agitated about my responses then extended some stage he raised his voice and uttered the words 'with respect Judge focus on what you have done.'

In short we did not agree on the approach and what should be in my responding sworn statement he then became

extremely frustrated and pacing up and down telling me in an angry and intimidating way that we should forget about a written statement and that he was going to simply cross-examine me when I made an appearance at the commission. Consultation started a theme.

I thought it would have finished by two. I requested to be excused because we were not getting anywhere and Advocate Soni kept on badgering me with haphazard question on everything and frantically taking my answers.

10 At some point he challenged me to file a statement and implicate someone whose name appears in one of the memoranda that I have written at PRASA. I do not know what kind of an investigation this is but clearly there is something wrong.

The commission has been in possession of all the information relating to the issues that informed the issuance of the Rule 3 Notices against me, the affidavit of Ms Ngoye forms the basis of all allegations against me has been in existence since 2018.

20 According to me the role of the investigators is to conduct further enquires on issues arising from any affidavit. It does not require me to implicate anyone. The word implicate in the commission is used in criminal law sense.

I left the interview after about six hours of being interrogated and in my view being personally belittled and ill-

treated despite the very honourable office I occupy and despite the process – protests I made.

When I left the boardroom, I informed Advocate Soni that I was going to compile documents with a statement and was going to make one of those – and that one of those was the authority of the board. I earlier informed him that the board had made certain decisions with regard to the allegations that Ms Ngoye and Mr Dingiswayo are making and that I deem it relevant that such information should be –
10 should be brought before the commission.

Surprisingly he told me he was not going to pursue the issue of authority and that the – and then that – I think he was going to – I was making accusations against him. Yes my parting with Advocate Soni was on a sour and bitter note.”

That is the extent of the allegations.

CHAIRPERSON: Yes.

MS MAKHUBELE: Naturally.

CHAIRPERSON: Okay. What – what are your submissions
20 on the way forward on the recusal application?

ADV SONI SC: Chairperson again the question is, what is my role?

CHAIRPERSON: Hm.

ADV SONI SC: There are two issues that ordinarily present themselves when a witness comes before the commission.

One is the leading of evidence and the other is to look at evidence that has been presented by other witnesses.

CHAIRPERSON: Hm.

ADV SONI SC: Now I have no intention of leading Judge Makhubele because I do not have a statement. I simply cannot lead her. I have no objection to Mr Nxasana leading her on whatever he wants.

10 What I am required to do and that is my duty is to put to Judge Makhubele what the witnesses have said to the extent that they implicate her. For the purposes of this commission and to consider or to present to you or to challenge the correctness or otherwise of the evidence or to accept that it may well be that that is consistent with the probabilities. That is my only role. I do not have any other role Chairperson.

CHAIRPERSON: Hm.

ADV SONI SC: And so the question of a recusal of somebody who is asking questions.

20 **CHAIRPERSON:** Hm.

ADV SONI SC: Chairperson cannot arise in a situation like this. This is an inquisitorial commission Chairperson. Of course, Judge Makhubele has rights, he has the right to a legal representative who is here to protect her but on the other hand Chairperson it is part of my duty and Chairperson

we do have affidavits from people.

We have documents to suggest to you where the truth probably lies. That is all my role is and that is the role that I intend fulfilling and unless there is some basis to say that I am incapable of – of fulfilling that role Chairperson I must be allowed to continue.

CHAIRPERSON: I – okay thank you Mr Soni. Mr Nxasana. Just wait for the sanitisation of the stand before you go there Mr Nxasana somebody will come there and sanitise. Mr
10 Nxasana have you got any authorities that you can refer me to that deal with a recusal of an evidence leader in this type of situation or anybody that can be compared to an evidence leader?

ADV NXASANA: Not at hand Chair I do not have. I cannot think of any now.

CHAIRPERSON: Yes. Well the Judge might be aware. Judge Makhubele are you aware of any authorities that one can look at?

MS MAKHUBELE: Well Chairperson I listened to Advocate
20 Soni and I want the record to note that he has not denied any of the factual averments I have made.

CHAIRPERSON: Hm.

MS MAKHUBELE: So now the only issue will be to deal with the legal basis. If you can allow us an opportunity to go and...

CHAIRPERSON: And have a look.

MS MAKHUBELE: And have a look at this.

CHAIRPERSON: Ja.

MS MAKHUBELE: So – but – and I feel very distressed and embarrassed when my attorney a very experienced person keeps on coming there because he has not even read this affidavit. Now he must...

CHAIRPERSON: But you should have given it to him.

MS MAKHUBELE: Chairperson he – he – he said I – this
10 affidavit I filed this – on Friday – Thursday morning. Even your team has not responded to this affidavit. So...

CHAIRPERSON: No, no but the commission's legal team is not asking for an opportunity to respond to it. So you – you are within your right to say Mr Soni has not said anything to deny what he said there.

MS MAKHUBELE: Yes then I – then I consulted.

CHAIRPERSON: But he has not asked for an opportunity to do anything about it by way of an affidavit. So – so I am quite prepared to stand down the matter so that maybe you
20 can go obtain authorities and Mr Soni you could look at authorities simply on the question of whether a recusal application in this situation relating to an evidence leader is applicable. Even if it is not the evidence leader in a commission any similar position – any person occupying a position that may be compared to an evidence leader.

We are at quarter to one. I think I will adjourn until three to – to – so that I can hear if there are any authorities on that legal point. Okay we are going to adjourn then – let us do that and then we resume at three o'clock.

MS MAKHUBELE: Thank you Chairperson.

CHAIRPERSON: Yes. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

ADV SONI SC: ...all has been a sort of prosecutorial round.

10 This is the evidence leader.

CHAIRPERSON: H'm?

ADV SONI SC: But the better view, I am told, is that we do not play that role. We are, in fact, legal practitioners representing a particular client, in other words, the Commission.

And the test in that case Chairperson is; firstly, you cannot have a recusal of somebody who is not a decisionmaker. You can ask for the withdrawal of the person but not the recusal.

20 The second learning that comes from the Commission's research on this is, as far as legal practitioners go, there are two broad grounds on which one can ask for the withdrawal.

One is on account of confidentiality. They possess confidential information. And the second is that the evidence or their role will not be a role performed in good

faith.

I am also told Chairperson that as far as - and I say I am told because it is been researched. It was done by the Commission's office, that as far as these matters are concerned, it is common for there to be disagreements during consultations and that cannot be a disqualifying factor.

And the overriding question, really, is one of these. It is fairness to the Commission. It is fairness obviously, to
10 somebody like a witness. So that is the one set of circumstances.

The other Chairperson is, where one is given a prosecutorial role. The test there is, the constitution says the prosecutor must be an independent person but that is taken at a different level of independence.

All that they get to ensure is that an injustice is not done. They cannot, for example, hide information and things like that. There are three cases that I would like to refer you to Chairperson.

20 **CHAIRPERSON:** I will tell you what I propose we do at a practical level. I think what we should do is, one, that I do not make a decision on this "recusal application" now today.

I fix a date this week by when the applicant in the "recusal application" should file written submissions. And it is a date by when the Commission's legal team must file

their written submissions and I make a decision on it at a later stage.

But also, there is a possibility if I deem it fit, I may decide to deal with the matter at a practical level in which case, if I deal with it at a practical level, what I have in mind is, if there is somebody who will be available to take over from you in regard to this witness then I might not need to decide whether the application is a good... has good grounds or not because that would mean that Judge Makhubele's
10 concern falls away.

Another approach might be to decide the application, okay. But in the meantime, what I have in mind is that we could proceed today but you would not lead Judge Makhubele's evidence. You would not question her today.

I will give her a chance to put her side of the story and then I would have questions for her and because we are starting at the time that we are starting, we... I do not think we will finish anyway.

Then we will adjourn to another date in order to finish.
20 If on that date you - I have decided that you should continue and lead evidence and question her, then that is what would happen.

If I decided that that should not happen, then it should be somebody else. If I have decided that for practical purposes and reasons, we will just have somebody else.

Then Judge Makhubele's concern will fall away. So that is what I have in mind. You have something to say about that?

ADV SONI SC: Chairperson, I have nothing to say save this that it will ensure that the entire day is not wasted.

CHAIRPERSON: H'm-h'm-h'm. Ja, that is part of the consideration.

ADV SONI SC: Yes.

CHAIRPERSON: Where we use whatever time we have
10 today. Thank you.

ADV SONI SC: And then in a sense Chairperson, it will address Judge Makhubele's question because as I understood my learned friend, she does not want me to lead her.

CHAIRPERSON: Ja.

ADV SONI SC: And so that concern falls away.

CHAIRPERSON: Yes, yes, yes. Mr Nxasana, let me hear what you have to say to this proposed way forward.

ADV NXASANA: Chair, thank you.

20 **CHAIRPERSON:** Yes.

ADV NXASANA: Chair, I think that leaves me with a decision to make but I think I have, with the leave of the Chairperson, have to consult the client first and then ...[intervenes]

CHAIRPERSON: Okay, do you want to ...[intervenes]

ADV NXASANA: Because I do not know what kind of evidence or testimony ...[intervenes]

CHAIRPERSON: Ja, okay. You want to talk to her while I'm here.

ADV NXASANA: Yes. Chair, thank you, once again.

CHAIRPERSON: Yes.

ADV NXASANA: Chair, it would seem that Chair, therefore, that my role will end here because I will just be a – I won't be part ...[intervenes]

10 **CHAIRPERSON:** A spectator.

ADV NXASANA: I will be a spectator. There is nothing that I meaningfully contribute in the proceedings. And unfortunately, Judge Makhubele will also, again, be left without legal representation and she will have to proceed on her own.

CHAIRPERSON: H'm.

ADV NXASANA: Yes. In the circumstances Chairperson, I am reluctantly withdrawing as attorney on record.

CHAIRPERSON: Okay, okay. No, thank you Mr Nxasana.

20 **ADV NXASANA:** Thank you.

CHAIRPERSON: Thank you. Judge Makhubele, Mr Nxasana has not been able to say anything about the proposed way forward because he is withdrawing. Are you able to say anything about it? I accept, of course, that it means that you are without legal representation. That I accept. That is the

...[intervenes]

JUDGE MAKHUBELE: Well, if that is the position where Chair wants to put me, there is nothing I can do but I can... I will have to address on you that, that my best efforts to exercise my constitutional rights are being ...[intervenes]

CHAIRPERSON: Yes?

JUDGE MAKHUBELE: Are being undermined Chairperson.

CHAIRPERSON: H'm.

JUDGE MAKHUBELE: You have not made a ruling. You
10 have made proposals but none of those proposals, obviously,
would have suited my attorney because he would have to sit
here and...

The regulations say he must assist me active and unless I am reading the wrong legislation. So for me to pay an attorney... you can imagine what his fees are. To come and sit here and just... it is not fair Chairperson. I must say.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: If I have enough time, I can and...
and then again, it will be whether there is anything legally
20 that renders me to be someone who is not entitled to legal
representation.

CHAIRPERSON: But you ...[intervenes]

JUDGE MAKHUBELE: If the fact that I am a judge is a reason, then Chairperson make a decision. Then I will deal with it but as of now I am exposed. I came here with an

attorney with the best interest and throughout the day we... everything will say and I must repeat what I have stated in my affidavit.

My letter... in the history of the Commission, there is no matter that as simple explanation or anything as dramatic will last the whole day Chairperson but ...[intervenes]

CHAIRPERSON: I am sorry. Just repeat that last point. I did not hear it.

JUDGE MAKHUBELE: What I am saying, even on the 24th,
10 my matter lasted the whole day because my attorneys could not reach you Chairperson because they have not consulted with me.

Even today, the same with Mr Nxasana. And I am saying, I watch the proceedings of the Commission. There is not one matter that last one day, the whole day.

But I accept Chairperson, whatever ruling you make, I am under your hands. I will simply request time to adjourn and consider my options.

CHAIRPERSON: H'm. Well, as I say that I accept that my
20 decision to dismiss the postponement application meant that subject to the "recusal", the so-called "recusal application" that was then moved, that may have to be decide at some stage.

But I think the way forward which I have come up with takes care of your concern when you say because of

certain... particularly what happened on the 9th of July when you had a consultation with Advocate Soni.

You have an objection to him being the person leading you and questioning you. And I have said that argument decide later if need be.

But we can use part of the day today for you to tell me your side of the story and I will ask some questions and we do not... we probably will not finish but we will have used part of the today.

10 We will adjourn to another day. Actually, I do have a possible date in mind but we might have to start at two because there are other witnesses in the morning on the 17th of August which is a Monday and it will go beyond four o'clock if necessary, to try and finish.

So I am just mentioning to you what is in my mind, that we might do it that way. And in the meantime, both yourself or your counsel can file written submissions on the "recusal" point and the legal team can file their written submissions.

20 And of course, I accept that because you are a judge, you may be having matters that have been allocated for you for that particular day.

So if any adjournment is made to a specific date, it would have to be subject to the Commission consulting with the judge president that on that day you can be released.

He has previously said that if he... or previously he had

said if he got at least two days' notice, he would be able to make a plan.

So if we adjourn to that date today, that gives about two weeks' notice. My expectation is that he will be able to release you but it can be subject to that. Yes?

JUDGE MAKHUBELE: Chairperson, you did not listen to my application in its entirety but you did it piecemeal but if you had you would... I have provided my duty roster as annexure and this week, JP Mlambo released me because I have
10 requested ...[intervenes]

CHAIRPERSON: No, no Judge Makhubele ...[intervenes]

JUDGE MAKHUBELE: No, I want to say that ...[intervenes]

CHAIRPERSON: No, no, no, no.

JUDGE MAKHUBELE: ...I cannot ...[intervenes]

CHAIRPERSON: No, no, no. The JP is the one who allocates matters. He is the one who... or the DJP but the JP has indicated that the work of the Commission is important and that he will do his best to release you when the Commission needs you.

20 And I am saying that if I adjourn the matter to a specific date, it can be on the understanding that the Commission will check with him and I do expect that he will do whatever he can to make you available.

JUDGE MAKHUBELE: I am not denying that.

CHAIRPERSON: Okay, so what is your point?

JUDGE MAKHUBELE: I wanted to tell you that Judge Makhubele ...[intervenes]

CHAIRPERSON: Yes, yes.

JUDGE MAKHUBELE: ...when I leave here... because I have my duty roster now. You do not even to go to... I have my duty roster.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: What I wanted to tell you is, this week, as I sit here, I have been taken off a roll where I am
10 supposed to... on Wednesday, we are attending to a criminal trial where the accused persons have been waiting since December for me to sentence them and if I lose this week, it means they will stay in custody until maybe December or even next year.

So whatever you and JP now decide, take into account my judicial functions, which at the end of the day, will be held against me that I am late with my judgments, I adjourn matters for long periods.

So I am on my own. So for my best interest, once I
20 leave here today, I have to go and make an application for a longer leave Chairperson.

CHAIRPERSON: H'm. Okay.

JUDGE MAKHUBELE: Because this means, the first, today, tomorrow in court.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: It is prejudicing me where I cannot concentrate.

CHAIRPERSON: Okay.

JUDGE MAKHUBELE: Tomorrow I am supposed to be in court. When am I going to read files for tomorrow? I mean, besides the fact that we have already talked about.

CHAIRPERSON: Okay.

JUDGE MAKHUBELE: And then, if you are saying on the 17th, for instance, I must come here at two o'clock. In the morning, I must go to court and for a day before, I must know concentrate on adjudicating matters. It will not work Chairperson. Let me ...[intervenes]

CHAIRPERSON: Well, he would release you for a day.

JUDGE MAKHUBELE: Let me talk to JP Mhlango and rather that conflict preparation for some time.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: If it means two months of work because it is bearing on me Chairperson.

CHAIRPERSON: Yes.

20 **JUDGE MAKHUBELE:** I cannot... I am not... I cannot multitask.

CHAIRPERSON: No, no, no. That is fine.

JUDGE MAKHUBELE: So let ...[intervenes]

CHAIRPERSON: [laughs] I will tell you what we do.

JUDGE MAKHUBELE: I am saying that, you know

...[intervenes]

CHAIRPERSON: No, what we can do ...[intervenes]

JUDGE MAKHUBELE: I do not want to set you and JP Mhlango or some collision caused.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: But then there is me, then there are, besides the litigators, and they have the right to have their the judgments deliver at time. Last week, I was sitting in the opposed motions. I have picked up some judgments.

10 Now, if I must... now and again matter is stopped here. Then those judgments will... and you will be the first, I mean, as head of the second in command where you will check that these things...

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: This Judge Makhubele hands

CHAIRPERSON: Is not giving judgments timeously.

JUDGE MAKHUBELE: Yes, Chairperson.

CHAIRPERSON: [laughs]

JUDGE MAKHUBELE: So can we... can I ...[intervenes]

20 **CHAIRPERSON:** No, this is what I am suggesting ...[intervenes]

JUDGE MAKHUBELE: I am just pleading that ...[intervenes]

CHAIRPERSON: No, no. That is fine but this is how I think we should do it.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: I can fix a date such as the 17th on the understanding that I can be approached to change it if there are good reasons to change it to another date.

So once there has been that consultation, you can come back if there are good reasons not to proceed with that date. But if, after all the consultations, it seems fine, we can still continue.

So it will accommodate you talking to the JP and putting the proposal that you have come up with as well. So let us...
10 I think what I will do, I will say that your side should submit written submissions on the “recusal”, this... by close of business, this Friday.

And the Commission’s legal team must submit their written submissions by close of business, Wednesday, next week in relation to the “recusal application”.

If, in the meantime, I decide that I can deal with the matter at a practical level, everyone will be informed. At the end of the today, we will adjourn to a specific date, but on the understanding that one, the Commission will be in
20 consultation with the judge president.

Two, you might be talking to the judge president, as you indicated. And you will be free to approach the Commission with a view to another date being fixed if there are good reasons not to stick to the 17th, okay?

JUDGE MAKHUBELE: Can we, maybe to... because you...

remember this application I drafted the notice on my own without legal... you may say I am a judge but I do not know everything.

CHAIRPERSON: Well, you were senior counsel. [laughs]

JUDGE MAKHUBELE: When it is a matter you ...[intervenes]

CHAIRPERSON: You practised for 19 years or so. [laughs]

JUDGE MAKHUBELE: When it is your matter, you... because when we were disbursing with my... briefly that
10 maybe the word “recuse” could be along the context that Advocate Soni had described, within the functions of the legal casting because there is a definition.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: So it is within the context of their functions.

CHAIRPERSON: Ja, ja.

JUDGE MAKHUBELE: So I do not want us to belabour the word “recuse” ...[intervenes]

CHAIRPERSON: Ja. No, no. I ...[intervenes]

20 **JUDGE MAKHUBELE:** It should be ...[intervenes]

CHAIRPERSON: No, I think we all understand what you would like to achieve.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: What you want to achieve is that Mr Soni should not be the one leading you and questioning you on

behalf of the Commission.

JUDGE MAKHUBELE: Yes, because they are appointed by you.

CHAIRPERSON: So whether we call it “recusal” or “withdrawal” ...[intervenes]

JUDGE MAKHUBELE: Withdrawal.

CHAIRPERSON: Yes. I think nobody is making an issue of that. Ja, I think Mr Soni was mentioning it simple because I may have mentioned that... the so-called “recusal”, you
10 know. But nobody does not understand what you want to achieve.

JUDGE MAKHUBELE: Yes, it is ...[intervenes]

CHAIRPERSON: So the substance stays.

JUDGE MAKHUBELE: Within the definition of their tasks of the legal team.

CHAIRPERSON: Ja, ja.

JUDGE MAKHUBELE: Because they have certain functions and they are appointed by you.

CHAIRPERSON: Ja.

20 **JUDGE MAKHUBELE:** You can appoint anyone, you can recuse anyone.

CHAIRPERSON: Ja, ja.

JUDGE MAKHUBELE: But the one point I want to make in that submission, Chairperson, that it is not only – the reasons are not only what Adv Soni read into the record, it

only concerns how he executed his functions before you when he appeared here.

CHAIRPERSON: On the 24th.

JUDGE MAKHUBELE: On the 24th.

CHAIRPERSON: Okay.

JUDGE MAKHUBELE: I was at pains not to use the word lie.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: But there is no other description
10 unless if I speak in my mother tongue but in the language
that we are using, it is lies and I have provided evidence
and so it is not only what happened at the consultation but
also his submissions.

CHAIRPERSON: On the 24th.

JUDGE MAKHUBELE: On the 24th.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: No, no, that is fine. So that is the way
forward then. We have dealt with that. Where I might ask
20 Mr Soni to assist now as you give me your side of the story
about these allegations and maybe as I ask questions is
where I need a certain document he might be able to say it
is to be found in his bundle at what page but otherwise he
will not ask you only questions or lead you today. So this
is an opportunity for you to just tell me your side of the

story, you ...[intervenes]

JUDGE MAKHUBELE: Well, Chairperson, I also do not have documents and I think because when I came here the only documents I had prepared – you remember the manner of presentation of documents for witnesses is by emails.

CHAIRPERSON: Oh, yes. Ja.

JUDGE MAKHUBELE: So I do not have bundles.

CHAIRPERSON: Okay.

JUDGE MAKHUBELE: I may need to familiarise myself
10 with the bundle.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: But then again, I will have to make it – I will still, on my own – remember now I do not have an attorney.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: I do not have an attorney, I will have to request you, Chairperson, that is it – to make a request to you that I am not refusing to give you my version.

20 **CHAIRPERSON:** Ja.

JUDGE MAKHUBELE: But, you know, I will not finish coming to this Commission, the approach that you want to take to start today for one hour because remember you acknowledged that there are certain documents that – I think you, in your words you said the oral testimony was

akin to ...[intervenes]

CHAIRPERSON: Substantially the same as the affidavits.

JUDGE MAKHUBELE: But I have a right, Chairperson, to look at that because when I look at the definition of evidence in the room, it comprises of that oral testimony and when you are sitting alone, I will not be there, the legal team will be assisting you to summarise the evidence and what – I am not saying I do not trust you but you are to be assisted by the legal team if arguments and everything
10 when you write your final report.

That evidence will find its way there and I have not been given an opportunity to have a look at it, Chairperson. And it means you have also acknowledged and you said arrangements can be made for me to get the results of that whatever they obtained from the cell phone service providers. It means – and I think just before we adjourned there were arrangements being made that that will be provided. So it is – the picture will not be complete and remember, Chairperson, I mentioned a notebook that I
20 said I need to talk about. Here is the notebook.

CHAIRPERSON: Oh, I do not remember hearing about a notebook, ja. What is the notebook about?

JUDGE MAKHUBELE: No, I said there is the evidence that I want to supplement, it is contained ...[intervenes]

CHAIRPERSON: In the notebook.

JUDGE MAKHUBELE: In the notebook which I must obviously transcribe and maybe give to the Commission. That is in relation to the evidence of Ms Ngoyi and Mr Dingiswayo which part of it is in the statement of complaint against Advocate Botes. But what needs to be beefed up, if I may use that word, is what is in here because, Chairperson, I can sit and relate the story to you but I need an opportunity to properly file a statement.

And the point I am making is I need to – because
10 whether I proceed without – maybe when we adjourn here I will be able to convince Mr Nxasana to still represent me, I do not know, but my request to you, Chairperson, is that can I supplement my statements and then testify on the date that you will give and maybe - because it is evidence of five people, I do not think we will finish in one day and then I can ...[intervenes]

CHAIRPERSON: Well, it is evidence of five people but I will tell you what – as far as I am concerned, the evidence is not, as far as I recall, is not wide-ranging, too wide-
20 ranging because to a very large extent Mr Dingiswayo and Ms Ngoyi are talking about the same thing in regard to you and I think Mr Dingiswayo largely just confirms or corroborates what Ms Ngoyi says.

The one part which I do remember that Mr Dingiswayo mentions is that at a certain time, I think

November 2017 or maybe – I think November 2017, he spoke to PRASA's attorneys, he wanted to talk to them about the Siyaya matters.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: And the attorney said they had been told not to talk to him. I think to a very large extent that is that. I am not sure that he adds anything that Ms Ngoyi has not been saying.

And then, of course, Mr Mogashoa, I do not know
10 how much of his evidence you have a problem with.

JUDGE MAKHUBELE: Well, with Mr Mogashoa, actually talks about the termination of his mandate.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: Who terminated his mandate.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: Which is not me.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: So the only thing in his evidence I can deal with is our interactions.

20 **CHAIRPERSON:** Yes.

JUDGE MAKHUBELE: I think we had two meetings.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: That is what I will have to ...[intervenes]

CHAIRPERSON: And then Mr Botes, he has given his

evidence and then there is Mr Achmat. So but when it comes to Ms Ngoyi, Mr Dingiswayo and Mr Mogashoa, it seems to me that certainly with regard to Ms Ngoyi and Mr Dingiswayo it is largely the same evidence covering the same things.

JUDGE MAKHUBELE: Yes. No, we have – the actual – because the issue is – well, now we are talking about the matter, but I do not have a problem, Chair.

CHAIRPERSON: Ja, we are trying to look at
10 ...[intervenes]

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: When you say it is five people, so I am saying ...[intervenes]

JUDGE MAKHUBELE: Yes, the issue with Ms Ngoyi and Mr Dingiswayo, the circumstances leading to the settlement of that case.

CHAIRPERSON: Ja, yes.

JUDGE MAKHUBELE: That is contained in what I have ...[intervenes]

20 **CHAIRPERSON:** Provided.

JUDGE MAKHUBELE: Submitted to Pretoria Bar.

CHAIRPERSON: Yes and that is ...[intervenes]

JUDGE MAKHUBELE: So the only thing that I am going to add there is what is in this notebook.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: When one has regard to their evidence where they say when I arrived at PRASA the first thing I asked them was these Siyaya matters. I am going to ...[intervenes]

CHAIRPERSON: To add to that.

JUDGE MAKHUBELE: To lead new evidence and prove, Chairperson, that that was not the first thing. Actually, we had interactions about a whole lot of things and Siyaya was not the issue.

10 **CHAIRPERSON:** Ja.

JUDGE MAKHUBELE: So that is when I am talking about transcribing certain things from his group.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: Which, Chairperson, in all fairness must be in a statement so that the Commission is able to take it back to Ms Ngoyi and Mr Dingiswayo to say this is what he is saying. I do not know if you will end with me but ...[intervenes]

20 **CHAIRPERSON:** Well, we have – you can leave it to the legal team, they know how to do their job.

JUDGE MAKHUBELE: But it is something very serious, Chairperson, the allegations I am going to make require investigation and I will insist on an investigation.

CHAIRPERSON: Yes, when we see them or when we hear them.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: That is when they can take it from there. Maybe what we should do is, if – well, one option is that I can ask you some of the questions that I would like to ask.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: For today and still on when the day when you come back you can still get a chance to put your version as you would have put it today but you – or for today you just answer those questions that are uppermost
10 in my mind. That is in another way and I think that is questions that you should have no difficulty answering. Is that alright? H'm?

JUDGE MAKHUBELE: Oh, Chairperson ...[intervenes]

CHAIRPERSON: Is it fine with you? It is the two of us talking.

JUDGE MAKHUBELE: Oh, I thought it is ...[intervenes]

CHAIRPERSON: No, no, no, I am proposing that if you think you might have difficulty in just presenting your side of the story this afternoon, maybe I should ask you some of
20 the questions that I want to ask and then you can answer and on the day that you will come back you can still present your side of the story the way you would have been presented it today.

JUDGE MAKHUBELE: I do not have a problem, Chairperson, but obviously on proviso that I am going to

still get ...[intervenes]

CHAIRPERSON: An opportunity.

JUDGE MAKHUBELE: To attend to the issue of legal representation and that the legal representative will still have an opportunity to do what they are supposed to do.

CHAIRPERSON: Ja, no, I ...[intervenes]

JUDGE MAKHUBELE: But you are entitled to ask me questions and as I say, I do not have the documents before me but these matters are in my head.

10 **CHAIRPERSON:** Yes.

JUDGE MAKHUBELE: You can ask me and if I need – it is something that I need to refer to a document I will tell you that can I have an opportunity.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: To properly look at the documents and answer you properly, Chairperson.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: Yes.

20 **CHAIRPERSON:** Well, another option is you may have heard that we decided that we might have what I call evening sessions in order to try and use as much time as possible because we are limited in terms of time.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: I made the announcement I think last week, it has been in the media. And by evening sessions,

what I have meant is, we might have a witness who gives evidence during the day from morning – or witnesses who give evidence in the morning up to four o'clock and then we start with another witness and go up to maybe seven, half past seven or eight because we are pressed for time.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: That is something that I announced last week.

JUDGE MAKHUBELE: Yes.

10 **CHAIRPERSON:** So another possibility might be that we adjourn now but sit before the end of this week. We could sit on Wednesday. That would give you time to look at the documents and whatever you want to look but we would still – and then we would then have what I call an evening session but we would still adjourn to a date.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: Such as the one that I have mentioned, 17th. So but we would just make sure that we have got something that we have covered.

20 **JUDGE MAKHUBELE:** Yes.

CHAIRPERSON: What do you say to that?

JUDGE MAKHUBELE: Well, Chairperson, as someone who knows my story, I would not have a problem to draft my own statement.

CHAIRPERSON: Ja, yes.

JUDGE MAKHUBELE: Even without – I am saying this obviously without prejudice or ...[intervenes]

CHAIRPERSON: Yes, no, no, I accept, ja. I accept, ja.

JUDGE MAKHUBELE: Because you may think you would be able to do it but I may be able to tell my story but obviously where my attorneys will help me would be with cross-examination of the witnesses.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: But telling my story, I
10 ...[intervenes]

CHAIRPERSON: Ja, it is not a problem.

JUDGE MAKHUBELE: I think you have read my ...[intervenes]

CHAIRPERSON: Ja, I have.

JUDGE MAKHUBELE: My documents.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: I articulate the issues.

CHAIRPERSON: Yes, ja, ja.

JUDGE MAKHUBELE: And because sometimes when you
20 still want to brief someone that process itself takes time.

CHAIRPERSON: Yes, yes.

JUDGE MAKHUBELE: You have seen that with the previous legal team and their witness.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: But if I have sufficient time on my

own without the pressure of work, I promise you, Chairperson, you will have all my statements.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: And I will be able to present to you in the manner that you wish because I believe when I file a statement you may say it may reduce the length of time when I make oral presentation.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: So hence, Chairperson, I would
10 request that I – the date that you had in mind, at first, the 17th, the in between I will be able to draft – this is a promise I am making to you, not through any intermediary, that I will be able to give you the statement. Yes.

CHAIRPERSON: Yes. Yes, no, no, I want us to use sometime this week to make some progress but I am not saying we should abandon the 17th or any other date that I might change to.

So I am saying if the legal team, if we adjourn now, you get given the bundles, I think those are the ones
20 behind you, get given the bundles. I suspect that a lot of documents that are there are documents that have been exchanged that you know because the statements of various witnesses and annexures have been sent to you but you get to familiarise yourself with the bundles and, of course, tomorrow – I mean the rest of the week the JP has

given you – has released you.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: So we would then say tomorrow you have a whole day and then Wednesday we could agree like five o'clock. I think during the day I will hear evidence from other witnesses about other matters when they stop, then at five o'clock we start with you, you will have had tomorrow to familiarise yourself properly with the bundles. If by Wednesday when you come, you have prepared your
10 statement, it is ready, it is fine. If it is not ready you can finish it – you can make it available when ...[intervenes]

JUDGE MAKHUBELE: Some other time.

CHAIRPERSON: Ja, but we can continue.

JUDGE MAKHUBELE: I do not have a problem with that.

CHAIRPERSON: You do not have a problem with that.

JUDGE MAKHUBELE: It is just regrettable that we would waste time with withdrawal application but if you are inclined to without making findings to release Advocate Soni and his stead get somebody.

20 **CHAIRPERSON:** Yes.

JUDGE MAKHUBELE: Or if we can proceed with you and me.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: And because that in itself, having to make a decision which – I do not know which way it will go.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: I may now want to still [inaudible – speaking simultaneously] that decision.

CHAIRPERSON: Yes, yes.

JUDGE MAKHUBELE: But I do not know, Chairperson.

CHAIRPERSON: No, no, you are right, that is why I factored that option in.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: That I might decide that I am not going
10 to decide the recusal application because for practical purposes maybe I decide that I will let another member of the legal team take over from Mr Soni for purposes of leading your evidence and questioning you. So there is that possibility, so I am looking at all options.

JUDGE MAKHUBELE: And, Chairperson, I – if you proceed in the - you know, because I understand you already dismissed – I take it as an absolution from the instance that I should have indicated that this person and that person. So I do not want to come back with the same
20 objection.

CHAIRPERSON: Yes.

JUDGE MAKHUBELE: Having with evidence view to say this particular one, here is evidence, Chairperson what do you say.

CHAIRPERSON: Yes. Ja, ja, ja.

JUDGE MAKHUBELE: So I am ...[intervenes]

CHAIRPERSON: So you prefer the other option.

JUDGE MAKHUBELE: I do not want you to – and maybe again, Chairperson, you know, sometimes when you ask a question without it being seen as perceived with ulterior motives, it is a simple question. It is a simple question to say Ms Ngoyi and – I am not revisiting that but I am just saying that when you see me coming back with evidence when it is something that can be done amicably, do not
10 close my door and say Ms Makhubele is trying to delay the functions of the Commission but it is up to you, Chairperson, to say what are the charges against this woman and who is bringing them?

The person bringing them holds legal instructions from PRASA and you can challenge me but I will beat the challenge, Chairperson, because I have had access to PRASA documents and I still have this PRASA document, I know who did work for PRASA but I do not want to embarrass you.

20 Hence, I am saying in your privacy with the people that you have appointed, you just do your – I am not telling you how to do your work.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: But the last thing you want is me bringing that hard evidence to you and you now having

your option to now indulge me whereas when it is done in an open manner to say no, yes, we acknowledge people are getting instructions from PRASA, people are being briefed by Ms Ngoyi, however – and then I accept and we move on, Chairperson.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: But the aggression with which my request is being made, it is a challenge, that when I get back home, I have mountains and mountains of documents
10 from PRASA, I will simply bear your challenge. So it is something that I want you to consider.

CHAIRPERSON: No, no, that is fine.

JUDGE MAKHUBELE: So that we deal with it ...[intervenes]

CHAIRPERSON: That is fine.

JUDGE MAKHUBELE: ...in an amicable manner and that whoever you assign, you ascertain that Ms Makhubele is not coming back with now evidence, Chairperson, I am not saying – I do not even know who I can – I have already
20 disclosed that someone who would be representing me here open up about his conflict.

CHAIRPERSON: Ja.

JUDGE MAKHUBELE: And I can also tell you that even if Adv Maleka had not left, he would not be doing my case because my board consulted with him and it is something

that I was going to discuss, Chairperson, so I am saying do not take what I am saying ...[intervenes]

CHAIRPERSON: That is fine, yes.

JUDGE MAKHUBELE: With – as a strategy to ...[intervenes]

CHAIRPERSON: No, no, no, that is fine. Okay, I think we are agreed about the way forward. Namely that you will file written submissions on the recusal application by close of business on Friday this week.

10 **JUDGE MAKHUBELE:** Yes.

CHAIRPERSON: And the Commission's legal team will file their written submissions on the recusal application by close of business on Wednesday next week.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: And that we are going to adjourn now but we are going to adjourn to Wednesday this week at five o'clock. You will be here at five o'clock and for us on that day to do what we were going to do.

JUDGE MAKHUBELE: Yes.

20 **CHAIRPERSON:** Now which means if by Wednesday I have made a decision at a practical level that somebody else other than Mr Soni will be questioning you.

JUDGE MAKHUBELE: Yes, me talking to you.

CHAIRPERSON: Yes, yes.

JUDGE MAKHUBELE: Answering your questions.

CHAIRPERSON: Yes but in the meantime, the adjournment to Wednesday is out of the reality that we are now at eight minutes to four o'clock.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: And I want us to use the time that we have and we have these evenings that I have decided upon and you are quite happy to cooperate in that regard.

So if there is somebody other than Mr Soni that can lead the evidence on Wednesday then that will happen. If
10 not, you will get a chance to present your version, I will have questions but you will have been able to go through the documents as well, the bundles that the Commission will give you. Alright?

JUDGE MAKHUBELE: I have no objection.

CHAIRPERSON: You have no problem, ja.

JUDGE MAKHUBELE: To that, Chairperson.

CHAIRPERSON: Okay.

JUDGE MAKHUBELE: I will attempt to put together what I can.

20 **CHAIRPERSON:** Ja, ja. No, that is fine. If in the meantime ...[intervenes]

JUDGE MAKHUBELE: For our Wednesday engagement.

CHAIRPERSON: Ja, that is fine, that is fine. If in the meantime, if by Wednesday when you come here you have put together – you have drafted a supplementary affidavit

or statement taking into account the contents of your notebook, that is fine. If you have not been able to, you will do that later on but we will continue on Wednesday.

JUDGE MAKHUBELE: Yes.

CHAIRPERSON: Okay, alright. We are going to adjourn so the legal team must just make sure that Judge Makhubele has got all the necessary bundles so that she can prepare properly for Wednesday.

We are going to adjourn then the proceedings on
10 that basis. The idea of the 17 August still remains but whether we adjourn to that date or not is going to be something to be looked at when we finish on Wednesday but if you want to start talking to the JP about the 17th.

JUDGE MAKHUBELE: Yes, I would.

CHAIRPERSON: You may do so, so that maybe – and the Commission will talk to him as well.

JUDGE MAKHUBELE: Yes. Thank you.

CHAIRPERSON: Okay, we are going to adjourn then until five o'clock on Wednesday this week. We adjourn.

20 **INQUIRY ADJOURNS TO 4 AUGUST 2020**