COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

16 NOVEMBER 2020

DAY 307

Gauteng Transcribers

Recording & Transcriptions

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PROCEEDINGS RESUME ON 16 NOVEMBER 2020

CHAIRPERSON: Good morning Mr Pretorius, good morning everybody.

ADV PRETORIUS SC: Morning Chair.

CHAIRPERSON: Are we ready?

ADV PRETORIUS SC: We are ready Chair. The proceedings for today will be commenced with an application for the recusal of the Chair and I take it that Mr Sikhakhane will address you first.

CHAIRPERSON: Yes before he does that I think maybe he can just place on record that they are here and they represent the former President and before we start with the – with argument I would want to read some statements that I told Counsel about.

ADV PRETORIUS SC: Yes Chair.

CHAIRPERSON: Yes. Maybe he should come to the podium. Somebody must just sanitise before you do Mr Sikhakhane. I just take this opportunity to remind everybody about social distancing. There is enough space for people to leave quite some distance between themselves. Covid-19 is still with us. Mr Sikhakhane.

ADV SIKHAKHANE: Good morning Chair.

CHAIRPERSON: Good morning Mr Sikhakhane.

ADV SIKHAKHANE: Thank you for your time. Mr Msepe, Mr Sikhakhane and Mr Masugu and I are briefed by Mabusa

Attorneys to appear on behalf of President Zuma who is the application in the recusal application.

CHAIRPERSON: Thank you very much. Before we start with the application for recusal I would like to read into the record a statement that I have made. I have informed Counsel in chambers about it. It is a statement to address the issue of personal relationship between myself and Mr Zuma as raised in his affidavit filed in support of his application for my recusal. Copies of the statement will be given to Counsel and then we will proceed. The statement has been made following a precedent that was established by the Constitutional Court in the case of Dr Luyt and Sarfu or in the case of President Mandela versus Dr Luyt and Sarfu.

In that case Dr Luyt had made an application for the recusal of the President of the Constitutional Court Justice Arthur Cheskalson the Deputy President of the Constitutional Court at that time Justice Pius Langa and four other Justices of the Constitutional Court and he had raised a number of matters on the basis of which he sought their recusal.

They prepared a statement of facts or clarification of certain matters and read it – or it was read into the record by the President of the Constitutional Court.

So I have sought to follow that precedent. The

statement read:

"Personal relationship between myself and Mr Zuma.

1. It is true that Mr Zuma and I have known each other from the early 1990's when I was still in private practice as a lawyer in Durban and Mr Zuma was one of the leaders of the African National Congress in KwaZulu Natal. My interactions with Mr Zuma from the early 1990's to the time of my appointment as a Judge in 1997 were connected with my work as an attorney in my association with the ANC of which I was supporter.

2. After my appointment as a Judge in 1997 my interactions with Mr Zuma were of a personal nature and largely occurred when we met in government functions. Our personal relationship has been a cordial one – has been a cordial and pleasant one over the years but did not generally speaking involve discussions of any serious matters. This had to be so because we would normally interact when we met at the opening of Parliament or

other government or state functions. However there were two or so occasions when Mr Zuma was not in government when he asked for a meeting with and I agreed to him. I think that this would have been somewhere between 20-5 and 2007. He was staying in a hotel in Durban and I met him. There was one time when I also asked for a meeting with him about the 13 or 14 years ago when he was still out of government and I met him in his Forest Townhouse in Johannesburg. On that occasion I wasted to raise with him a matter that I considered of public importance.

3. I do not think that I had any other one on one meeting with Mr Zuma other than the ones referred to above. I leave out one that I deal with under the topic of Professional Relationship. The meetings referred to above all happened more than 13 years ago.

4. As far as I recall I never had any one on one meeting with Mr Zuma throughout the period of 9 years when he was President.

5. When Mr Zuma's late wife had passed on many years ago maybe 18 or 20 years ago I like many other people did go to his official residence as the then Deputy President to see the family.

6. As far as I remember I have been to Mr Zuma's residence referred to above on the limited occasions mentioned. However I may have been to his Durban residence once.

7. Although Mr Zuma and I have a cordial relationship and have over the years interacted with each other pleasantly wherever we met mostly in government functions Mr Zuma's statement that we are friends is not accurate. In this regard I highlight the following:

   a. Mr Zuma has never been to any of the houses in which I have lived with my family since the early 1990's and I have never invited him. He only met my wife at the opening of Parliament or other government function. He has also never been to any of the places in Gauteng in which I have lived over the past 23 or 24

years since my appointment as a Judge in 1997.

b. Mr Zuma and I do not socialise and have never socialised together. I accept that there are functions especially government functions which he attended and I attended and that on such occasions we would greet each other and have brief conversations. After I had been elevated to the bench in 1997 in January 1998 my law firm held a gala dinner in Durban for my farewell from my law firm and many people were invited including his Majesty King Goodwill Zwelithini. But Mr Zuma was not among those who were invited. I have never invited Mr Zuma to any family function including my birthdays since I met him in the 1990's. He has also never invited me to any of his birthday parties since we got to know each other.

c. Mr Zuma does not get told when there is a death in my family as a result he has never attended any of the family funerals we have had since I got to know

him. Even though from the early 1990's to date I have lost four siblings and my mother. I have never attended the funeral of any member of the Zuma family nor does Mr Zuma inform me when there has been any death in his family. To the best of my recollection since the 1990's I have never shared any private meals with Mr Zuma.

d. I have never been to Mr Zuma's presidential office when he was President nor did I go to his official residence.

8. In paragraph 29 of his affidavit Mr Zuma says and I quote:

"I can recall an occasion when Deputy Chief Justice Zondo was elevated to the bench. We discussed whether our personal relationship would jeopardise his judicial caveat. We agreed that we would relate in a manner that would ensure that his judicial caveat is not adversely affected. I understood and appreciated that he wanted to draw a line in my relationship with him that would create the public perception that

he relied on me as President to rise in his judicial caveat."

9. No such discussion ever took place nor could have taken place between myself and Mr Zuma when I was elevated to the bench. My elevation to the bench occurred in 1997. Mr Zuma says that he understood and appreciated that I wanted to draw a line in my relationship with him so as not to create the public perception that I relied on him as President to rise in my judicial caveat. Mr Zuma was not President in 1997. He was MEC for Economic Development in KwaZulu Natal. As he was not President and was only an MEC he could not have had any influence on my rise in my judicial caveat.

10. Mr Zuma says the personal relationship between the two of us is such that I should have declined my appointment as Chairperson of the Commission and that it renders me biased against him. In 2011 as a Judge of the High Court in Pretoria I heard an application concerned a contested mining right where one of the

one of the contesting companies belonged in part to Mr Duduzane Zuma; Mr Jacob Zuma's son. I heard full argument in that matter and gave judgment against among others the company in which Mr Duduzane Zuma had an interest. There was never a complaint that I should have recused myself in that matter or that I had found against Mr Duduzane Zuma's company because I was biased against Mr Zuma's family. That was the Sishen matter. From November 11 – from November 2011 to May 2012 when I was an acting Justice of the Constitutional Court and during the past eight years since my appointment as Justice of the Constitutional Court I have sat in a number of matters which involved Mr Zuma as President in which the court has given judgments. Sometimes against him and sometimes in his favour and Mr Zuma has never complained over all these years that I had the close relationship with him which disqualified me from sitting in matters in which he was involved. In none of those matters did Mr Zuma ever bring an

application for my recusal.

12. Some of those cases are

a. Economic Freedom Fighters versus Speaker of the National Assembly and Others 2016(3) SA 58063 Nkandla Judgment.

b. Economic Freedom Fighters Speakers and National Assembly and Others 2018(2) SA 57163.

c. Democratic Alliance versus President of the Republic of South Africa and others 2013(1) SA 248CC. I think that is the matter involving the appointment of Mr Menzi Simelane as NDPP.

d. Sigcau versus President of the Republic of South African 2013(9) BCLR 1091 CC.

e. Nxumalo versus President of the Republic of South Africa 2014(12) BCLR 1457 CC.

f. Makiti Wana and Others versus President of the Republic of South Africa and Others 2013(11) BCLR 1251 CC.

g. United Democratic Movement versus Speaker of the National Assembly and Others 2017(8) BCLR 1061 CC. Some of these matters were matters where the – Mr Zuma as President was cited but he did not take active part.

Professional Relationship between myself and Mr Zuma.

13. While I was still in private practice as an attorney in the 1990's I did interact with ANC leaders in KwaZulu Natal including Mr Zuma on matters relating to the ANC and civic matters. However Mr Zuma was never my client in his personal capacity. I – however I would have discussed with him and other ANC leaders some legal issues on an informal basis even if no legal proceedings were instituted. My partner in my law firm would also have interacted with ANC leaders including Mr Zuma. I confirm that Mr Zuma and other ANC leaders approached me at the time and asked me to provide legal services to King Goodwill Zwelithini but I suggested my partner Mr Marta be the one

because he had family ties with the Royal Family. In 1996 I did have a one on one meeting with Mr Zuma in my law firm when I had been instructed by a certain client to institute certain legal proceedings against him and we met to discuss the matter. I ended up not instituting those proceedings because I got appointed as an acting Judge in the Labour Court before instituting proceedings and my client had to find another lawyer.

Announcement of 21 September 2020.

14. The announcement I made on 21 September 2020 was not made in a media conference. It was made at the commencement of commission proceedings on the day when Mr Zuma was supposed to have appeared before the commission. Mr Zuma's attorney had prior to that sent the commission a letter dated 1 September 2020 a copy of which is attached marked AA. It also occurred after the failure by Mr Zuma to comply with a Regulation 10.6 Directive dated 27 August 2020 a copy of which is attached marked BB and giving no

explanation why he had not complied then not apply for an extension of time."

That is the end of the statement. Copies will be made to and given to Counsel and all, all, all concerned. I place on record that although I discussed with Counsel the statement in chambers they had not seen it because it only got ready this morning. That I mentioned that I would read it and I would circulate to Counsel. Thank you. Mr Sikhakhane. My Registrar must just make sure that copies are given to Counsel for the former President.

ADV SIKHAKHANE: Chairperson thank you for your opening statement.

CHAIRPERSON: Thank you Mr Sikhakhane.

ADV SIKHAKHANE: I would like to get a couple of things of the way.

CHAIRPERSON: Yes, yes.

ADV SIKHAKHANE: Partly because...

CHAIRPERSON: But I must also before you do that I must also thank you and your team for understanding with regard to the statement that had not been given to you in advance.

ADV SIKHAKHANE: Thank you Chair we will – we will look at it.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: You make a good point in the

statement. You [00:19:03] out the relationship.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: You contextualise it.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: And of course we know that in recusal application there is something called a waiver. It means you give even raise it at the beginning.

CHAIRPERSON: Yes. Ja.

ADV SIKHAKHANE: And so although we are going to look at your statement and I am not going to cross-examine you about it.

Chair I think I should get a couple of things out of the way.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Because this matter has been talked about a lot of people have pontificated about what it is we doing. And I thought this opportunity I must use first to say contrary to public speculation we advised and brought Mr Zuma here to demonstrate to you that he was never going to defy you because he understands the nature of your job and respects the summons that you issued and he was never going to defy that even if we told him to defy you.

Secondly Chair since the letter of 28 September 2020 which indicated that we would this application so

much as I said has been said out there and most of it has been an attempt to deal with the subject that even scholars – legal scholars tell you how difficult it is. Because it is not an open and shut case.

Recusals are difficult and they are difficult because in order to approach Judges as I do today you first must approach someone you respect which I do and you must tell them that you think they have made errors. And it is no easy task. And this subject is difficult because the precedent as I will rely on Safu as you have already mentioned it I have my own difficulties with Safu because I do think one Judge should have recused himself there.

But be that as it may I will raise these because they are difficult. They are not as easy as analysts and journalists have been saying. Partly because the rules, the precedent are set by the judges themselves judging those who judge them.

And so judges create rules of how we should them and they tell us – they remind me of someone who gives you a slap and tells you how to cry. And so they are difficult for that reason.

And I am going to raise today a number of things because first Mr Zuma does not do this lightly we say this. And unlike many recusal applications which go the integrity of the judge both my team and Mr Zuma would never come

here to say the reason we asking for your recusal or a way to deal with this matter in a particular way as I have deal with [00:11:14] it is because our application is about your integrity.

That is unquestioned by me or Mr Zuma and Mr Zuma.

Lastly Chair a number of issues have been raised about whether or not this can be brought and whether we are attacking you. Well Chair I do not need to remind you that none of the people who have been making that analysis on television claiming all sorts of things are as close to you as I am or as related to you as I am or would defend you as I would.

So none of them can claim that I would bring a frivolous application to you to question you. Let alone the fact that we come from the same village.

Chair that is what I thought I should get out of the way because there is a misconception about this by people who think they are defending you from a Zuma attack which it is not.

And Chair what I am going to do in relying on the principles about recusal as I said they are difficult because many think we raise this because we say you are biased. And we have set out in the affidavit that actually that is not the test.

The test is whether a reasonable person sitting in an environment that we lawyers take for granted because we are familiar with it can apprehend that he is not going to get a fair hearing. Now that has nothing to do with the integrity of the judge.

The next issue about that is this. When you raise a recusal application one of the things you saying to the Judge which is the most difficult part not just because of judges because human beings are not good at self-reflection is to ask the Judge not to check whether he has integrity but to ask the Judge to dig deep into his or her humanity to check whether – given the hostile environment for a witness his conduct – I do not like this word because it is associated with something bad but his demeanour, his comments and it is not because I am not going to list your comments because I think they are bad. We lawyers do this when we cross-examine people because we take advantage of our powerful position and we forget that they are vulnerable.

And so as much as I am going to rely on these principles largely a recusal application Deputy Chief Justice is bought to a Judge precisely because you have – you trust them.

It is brought to that Judge precisely because only a Judge with integrity can sit and listen to him – to people

telling him that he may have made a mistake.

And I want to say to you Deputy Chief Justice I will – as I have done in the affidavit look at your comments and the context of those comments is that as much as this environment is easy for you and me and Mr Pretorius it is not easy for a client or an ordinary citizen who is sitting as an accused. Because it does not matter what we say about Mr Zuma the narrative is that he sits as an accused and therefore that is the context within which you must look at his apprehension about this commission's choice of witnesses.

This commission's comments during testimony of those witnesses. This commission's approach to issues that he has raised to the commission. And as I raise those I also raise the fact for a person sitting watching a powerful environment in which he is the accused basically I want to persuade you Chair first that I want to walk with you and look at your comments from the perspective of a person who sits watched by millions of people who thinks he symbolises corruption.

And that is the context. So when the test says let us look at the reasonable person Chair will see I will share this with you because it is something that gets missed in the analysis that a lot of scholars like Grant Hammond and others let us forget the judgment – the judgements tell you

that a recusal application and a test that a person must be a reasonable person is also context specific. And the context I am giving you is a Mr Zuma who all of these people sitting here most of them journalists the narrative they have come for is that here is the man who messed up our country. That narrative on its own – I do not want to get into its merits – is the context within which Mr Zuma views this environment.

And therefore the test about a reasonable person who is not too sensitive is also the test as in the Commonwealth they say of a reasonable lay person not a lawyer, not a judge.

Chair I am going to address three things. The last of which is what you would love me for because it is about how do we get out of this? It is about remedy. How do we get out of this and have a commission in which each and every person particularly the person who was central in the remedial action. You finish this with his contribution and without him fearing as he fears now. And that I will discuss with Chair right at the end because I think apart from the animosity out there which is political you and me have a duty to ensure that a legal process called a commission inquiry whether other people see it as a political platform to destroy their enemies is not our concern as lawyers. Our concern is a billion rand or so

has been poured into this process are you going to be fair if at the end that report is driven by a narrative which simply accepts that there is one version.

So the first issue I am going to raise Chairperson is to take you through the cases.

CHAIRPERSON: Just one second before you do that Mr Sikhakhane. Sorry about that Mr Sikhakhane.

ADV SIKHAKHANE: No problem at all Chair.

CHAIRPERSON: Thank you. You know, I... You said you are now going to take me to the cases and so on. So I have a particular copy of SARFU that I had looked at and you know when you look at one ...[intervenes]

ADV SIKHAKHANE: Yes.

CHAIRPERSON: ...on which you have not made any underlining's, it is not as helpful as the one that you have used.

ADV SIKHAKHANE: Yes, absolutely.

CHAIRPERSON: But that is fine.

ADV SIKHAKHANE: Chair, I will - depending on what the Chair - I have the file of the cases that we look at. It is the cases that the Chairperson knows but I can share that file.

CHAIRPERSON: No, no. That is fine. I just wanted the SARFU. But I will get it because ...[intervenes]

ADV SIKHAKHANE: Yes.

CHAIRPERSON: ...I have made some notes.

ADV SIKHAKHANE: Okay thank you.

CHAIRPERSON: But it is fine.

ADV SIKHAKHANE: So Chair, what I will do is to first summarise those. That is the first thing.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Having done the intro, I wanted to get those things out of the way.

CHAIRPERSON: Yes, okay, okay.

ADV SIKHAKHANE: Because they are important to note and to deal with the principles of the recusal, as they emerge from literature and legal scholars and cases. And I will tell the Chairperson why I am very reluctant about case law on recusal.

As much as it guides us, it is actually unreliable because the judges are telling the world: When you judge me, judge me this way. There is something intellectually dishonest about that, but that as it may. I am going to take you to the principles so that we can debate whether we need the test.

Second. I will not dwell much on this Chair but I wanted to trace the genesis of the Commission. I have done it in the affidavit. We have it. And so I will not waste your time on that. But I do this because contrary to popular views are the – and I have had it the very first time when I wrote the letter or Mabuza wrote the letter.

There are a lot of [speaker not clear], analysts speaking

about this saying you do not do this in a commission of inquiry. Chair, I am going to do this for one reason.

One has to read the remedial action of Advocate Thuli Madonsela and the judgment of the North Gauteng High Court, to know that the reason the Executive, the President who has the constitutional duty to appoint the Commission of Inquiry had that task removed from him. It was precisely because impartiality or the perception of impartiality was at the centre of the appointment of the establishment of this Commission.

So no analyst should tell our public that when it is a commission of inquiry, impartial, it is not important.

Secondly. We ask a judge to lead it because Chair you can never strip yourself, the principles and your oath just because you are now leading a commission of inquiry into [speaker not clear].

The reason we ask a judge is to borrow from a profession that those ethics and those standards of impartiality are slightly higher than the ordinary person.

And so the third issues I want to deal with and probably the last before I deal with remedy, is to take you to your comments that have raised concerns during these proceedings.

And we raise them not because those comments, as I said at the beginning, mean that you are going to find in a

particular way because the recusal application that deal with the fact that there has already been an outcome.

I think most of the cases, the BTR, Delaysey(?) [speaker not clear] and Others. All of those cases tend to deal with a situation when a person *post facto* is unhappy with the finding.

And there are other recusal applications where people say this judge has a personal interest in the outcome, either a pecuniary interest or it is an interest on the outcome because you are relying to it.

That is not our contention in this matter. We do not really... We do not make this submission that you have an interest in the outcome and therefore you will go that direction.

And so what we do Deputy Chief Justice is to say to you is that reduced to its essential elements, this application seeks to persuade you.

Maybe it will not be for Mr Zuma but for the continuation of this one, to look honestly and sincerely at some of the comments that we will identify and we content to you that they would find an litigant who is sitting – not litigant, a witness – who is sitting before you.

And Chair here are the principles that you and me know as the test for bias. But as I have indicated to you Chair. Let us start with bias as a concept before we get to

reasonable apprehension.

Is that the difficulty with bias for psychologist, for lawyers, for human beings is that it struggles two domains, at least for your purposes.

It struggles the domain of law and the domain of psychology. And that is what it makes it difficult. I say the domain of psychology because I am appealing to your psych here. I am appealing to your honesty about your own errors.

It is law because we look at how to tighten claims of bias that are raised by lawyers and litigants, simply to disqualify a judge. And so it is important that we make that balance and because it is not made clear.

So bias is the state of mind. But what are we to do when a ask a judge to recuse themselves because we have a reasonable apprehension of bias?

When there is a case, it is *R v S*, Canadian Court of Appeal. [speaker not clear]. It is a court of appeal case Chair which accepted the definition that is in *R v Bertram* about defining bias as a start. It says:

> "It is a tendency, inclination and/or predisposition towards one side or another for a particular result. In its application to legal proceedings, it represents a predisposition to decide and issue or cause in such a way which does not leave the judicial mind perfectly open to conviction.

> Bias is a condition of state of mind which sways judgement and renders a judicial officer unable to exercise his or her functions impartially in a particular case."

Let me make an example for your purposes. Chair, may I make this example? Our judges in criminal courts sit and listen to the most gruesome crimes. Gruesome. More gruesome than what our judges in the civil courts listen to. And I think the public and you and lawyers who are honest will agree with me.

Those judges sit, compose themselves, keep quiet, listen, really comment for one reason, because they understand that once you comment and you fork outrage, in way or the other, you create in the mind of the person who is sitting vulnerable in your court or your forum, an impression that they are right inside the slaughterhouse.

And so Chair, I am citing our magistrate's and our judges in criminal courts because they mastered this. They keep quiet when someone is testifying about the rape of a three-year-old. They keep quiet, compose themselves.

Our judges in the civil courts throw their hands in the air because there are no *board minutes* [speaker not clear], because people may have stolen money.

I am not saying that crime is small. What I am emphasising DCJ is the obligation to create in a forum and

environment that does not frighten a witness. That is bias. It is that inclination.

And therefore, as I will show in your comments. When Mr Zuma is sitting, watching at home the narrative playing itself here that his years of President were nine wasted years and he watches the Chair ...[intervenes]

CHAIRPERSON: Of course, I have not said that.

ADV SIKHAKHANE: [laughing]

CHAIRPERSON: [laughing]

ADV SIKHAKHANE: No, Chair you have not.

CHAIRPERSON: I have not said that. [laughing]

ADV SIKHAKHANE: Chair, you will understand that most people believe that what we must do for my client is to give him orange overalls and walk him to Kgosi Mampuru Prison. But I am raising this because Chair I am not saying you have said anything of that nature. I am not suggestion you have pre-judged this matter in any way.

I am saying to you, in your comments in his absence, I want you to walk with me and look at whether a reasonable person accused as he is would be – it would be unreasonable of him to feel that the forum seeks to punish him. Seeks to lynch him. Seeks to agree with people who have come here to lynch him, basically.

Seeks to agree with the political project to destroy him as a symbol of a particular political narrative in society and

therefore, for me, that is the test we must use.

Now in the same case that I have quoted in the Court of Appeal, it accepted that partiality can be described as the inability of the decision-maker or judicial officer to prevent his or her biases and dispositions in conducting the matter from making a decision. That is not where we are Chair because it is not about the decision and therefore, we are not dealing with whether or not your decision is necessarily changed [speaker not clear].

We submit this. That this inability that is stated in *R v S* in the Canadian Court of Appeal, is akin to the South African principle that despite his or her bias or predisposition, the decision-maker or judicial officer must bring an open mind. So that Chair is an acceptance that all of us in this room are biased including judges.

And the reason people are appointed judges is because they are slightly more honest than we are about their bias. They have the ability to confront them.

And so what emerges from this case is the fact that what is asked for in a recusal is self-reflection. And very, very few human beings have that, lawyers, politicians and journalists are the worse.

And so, what that principles tells the Chair is that the inclination that it talks about may well be justified outrage. I am not going to stand here Chair and tell you that you

cannot justify to be outraged by some of the things you hear. You are.

What I am asking you is. In that outrage, like the judge listening to the rape of a two-year-old. What are you supposed to do? Now before I get misinterpreted as conflating court in this forum. Chair, it does not matter what forum it is.

I understand fully that you have a difficult task here than you have in your court. In your courts you must make a decision based on what is in front of you. Commissions of inquiries are difficult because they turn a judge, who is supposed to coldly look at the facts and make a findings, they turn you into an investigator.

So they are both adjudicative in some way and inquisitorial and in a way you have to strike that balance and I appreciate your difficulty but I, honestly, suggest to you through the quotes that I will make Chair, that there have been time when even I sitting watching think – have thought the DCJ has crossed that line. Not of bias but the line of how to express outrage when you hear it as a presiding officer.

And Chair, the last point is actually made in the SARFU case, so that we bring it closer to home. Chair I said it earlier about SARFU. I know it is the final decision that was made and we cannot – it cannot be appealed but we can

criticise it because it is a very big subject.

In fact, the last author who has produced a book on this subject, as I said Grant Amon. It is new. He tells us in his last chapters that this is not open and shut for intellectuals, for true intellectuals. It is not.

And here is what happened at SARFU. The Chair said earlier that - and correctly read the statement because that principle comes from it. Now of course, the principle they say, is this. They say at the beginning at paragraph 35 of the judgment:

> "A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to judicial and administrative procedures."

I pause there to make this point because our public has been fought this narrative by people who want to see their faces on TV for two reasons. To say impartiality is not required outside court. And so it continues.

It says:

> "Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias (which is not our case) or the appearance of bias in the official or officials who have the power to adjudicate disputes."

This rule against bias is fundamental in our system. It is fundamental whether we are recusing Mr Pretorius where he works. We want to discipline him. Every human being facing a tribunal at work, requires impartiality of the adjudicator.

We submit that an affected person or let us say, directly implicated, in our case. The applicant is entitled to an impartial commission and chairperson.

In this regard, we make the point that it is the comments and conduct of how he is treated, singled out, subjected to press statements that singles him out to fear the platform.

And then in the case of *Daniel and Another v Speaker of the National Assembly*, the following is said, paragraph 16 thereof:

> "There is a lot of fundamental breach of the common law rule of natural justice by the ad-hoc committee, namely the [speaker not clear] rule.
>
> This rule requires that an affected party must be heard by an impartial and unbiased tribunal.
>
> For purposes of the rule, there should not be a reasonable suspicion that the ad-hoc committee was biased."

So equally important is that the commission and the chairperson are obliged to observe natural justice principles because recusal applications have their jealousies in the

trust that natural justice governs all legal proceedings.

This is because – and it has been said on each and every case that I have cited, the South African cases included. This is because they must not only meet our justice fairly but must be seemed to be doing so.

And Chair, that is important of what I have said earlier, of creating an environment that would make this report you are going to produce not a report that political enemies out there expect.

I mean, we can tell now what Mr Zuma's political enemies want the report to say, that he was responsible for State Capture, nine wasted years. That is what they want and if you do not say that Chair, they will review you.

What we want, and I think everyone who thinks honestly about this without prejudice, without hating – is that this report must be able to assist our nation in future against possibilities of plunder. Not by one side. By everybody.

No one, when we make policy in future, must be able to do whatever you will have find has been done. I assume that the Chair has not found so far.

CHAIRPERSON: I have not found. [laughing]

ADV SIKHAKHANE: Absolutely. And Chair, I am going to raise this point again about justice and what we need here and I am going to quite a theorist, a political theorist and a lawyer. I have been quoting judges. Rosanna(?) [speaker

not clear] says something about a right of freedom of expression, exercised by journalist and everybody. At the end of writing about freedom of expression, [speaker not clear]says:

> "Actually, the right to freedom of expression is the right that should be enjoyed by people who we dislike and disagree with."

Justice – and this is my quote – we are not just when we are judged against how we treat people we like. The real test about commitment to justice by a judge, by a citizen and anyone that is worth the term human.

Justice is how you treat those at the bottom of your pecking order. How do you treat people you despise? How you do you treat a man that you have already assumed messed up your country? That is justice. Do you treat him humanly when you have brought him into a process? And this what these cases are about.

Is, we as lawyers and judges, have to guarantee society that when people walk into this process, they are judged out there. People do not make evidence that Mr Zuma was corrupt. They have written about it. They say he is. That is the political game here because we are a modern society.

Mr Zuma, even if he is at the bottom of the pecking order of people we like, it is how we treat him that we are judged about our commitment to justice, not how we treat the

darlings and sweetheart witnesses that have come here, pretending they were not party to what they are saying. Telling others to connect the dots. Accept their dots.

It is how we treat every witness. And so that is Chief Justice that principle is what guides what we are saying. And the test, as I have said, has to components. One is the one I said I dislike because it is judges telling those who judge them, how to judge them. It is impartiality.

And one of the difficulties I have in this court, apart from the fact that I am the first one briefed to tell the second in command in the country judiciary to recuse himself, is that I have to climb the mountain of the presumption of impartiality and I accept that that is a mountain to climb for any recusal application and it goes like this.

I am supposed to presume that you are impartial. That is not what you do. I start there. And so that presumption is important and that I why I started where I started Deputy Chief Justice. That this is not about your integrity because I assume your impartiality as a person.

And then the second leg of this test is what gets murky about is, when am I reasonable apprehending that I am not having a fair forum? And this must be judged Chair, not from the position of those who love Mr Zuma, who have affection for him. No.

Nor must it be judged from the position of those who

seemed to have a natural anti-party towards him. Those we should discard. Both those sides. Because they want nothing that law wants.

What we must test today is whether a reasonable person in the context of how this Commission was started and how Mr Zuma has been defined when coming here. That is the context.

And the reasonable person is a difficult concept because it introduces the concept I am talking about and that context is not generally applicable to everybody. It is specific to a particular litigant but I accept that it is an objective test.

So Chair, and that is why when they say in SARFU that – and in many other cases – the principle is like a deformation. We should not judge this because Mr Zuma or any litigant who seeks a recusal is a high sensitive human being who just wants to walk into forums that are friendly to him. That type of person is not a reasonable person.

The other is what you find in the other cases *BTR and Others*, where lawyers themselves and litigants who have lost or seek a forum shopping, seem to come with things to judges, just to get rid of them.

One such case here, I think, is a case where people simply said: I did not like the judge's demeanour. He was talking to me in a rude way. Right? And so what we the test tries to do is to balance those extremes and abuses of the

legal system by us lawyers and litigants.

And so it say that we just judge it in a manner that takes into account the context which I have explained and the person must be reasonable.

Chair, I am going to say reasonable, because only yesterday, a lot of people got into this forum today about whether Mr Zuma will come because it is an assumption. I do not know why. There is an assumption that he will not.

And that context Chair is important when you analyse what is reasonable for Mr Zuma as he faces what you will see tonight on TV because he can do no right. That kind of litigant sitting before you, has his context about this forum.

And I want to invite you to look at yourself and the comments that I am going to raise that you make, not because you were judging but because you may have created an environment that enforces in his mind, reasonable be so, that this forum is an extension of the narrative about him that everything wrong in South Africa is attributable to him.

And Chair, so what is the real test that you have to do when judging this? Apart from the fact that I am going to rely on your capacity on self-reflection is, that the starting point is an analyses of, how does this Commission start? Who is central?

I have been told by two courts already that: No, the

reason the function of the executive was moved to the judiciary is because Mr Zuma could not be allowed to appoint a judge. I am not raising this because of the ground. I am raising it because it is that you must take into account.

I have been told by two courts that they do not presume impartiality on their part. That a judge appointed by Mr Zuma would have been partial. I have been outraged by this suggestion because I have seen judges not relying on the presumption of their own impartiality.

And therefore, that context for Mr Zuma and the history when he is removed from a decision that he thinks he must make, is the first start.

And so Chair, that context, when you analyse the reasonableness of his claim is important. IN BTR, they deal with actual bias actually. And the AD said: Actual bias in the sense that the litigant and he had approached the easel before him with a mind which was in fact prejudice or not open to conviction.

Chair, this is a bit too far and it is not the case I am making to you. The case I am making to you is slightly lower than that. It is a case about - because they all evolve around the same. May I say to the Chair, the Bernert v Absa Bank case, as important as it is, it talks about shares, a judge who had shares and therefore has no application here but it may be important for the

Chairperson to look at it.

The other case that we rely on is the SACCAWU case where the Constitutional Court slightly expanded the test for recusal against the judge and my I just read this and then the other cases I will cite for the Chair to note because you were part of some of them. I think.

CHAIRPERSON: Oh, okay.

ADV SIKHAKHANE: But I am not going to ask you to recuse yourself from those. So it says:

"In formulating the test..."

This is paragraph 12 of the SACCAWU case.

> "In formulating the test in the terms quoted above the court observed that two considerations are built into the test itself. The first is that in considering the application for recusal the court, as a starting point, presumed that judicial officers are impartial."

I have already stated that.

As later emerges from the SARFU judgment, this inbuilt aspect entails two further consequences. On the one hand it is the applicant for recusal who bears, as we do, the onus of rebutting the presumption of judicial impartiality.

On the other, the presumption is not easily dislodged, it requires cogent and convincing evidence to be rebutted. Chair, when I said I had the mountain to

climb, I made this.

CHAIRPERSON: Ja.

ADV SIKHAKHANE: And, Chair, I say this because many of us would argue that a slight comment by a judge – I mean, many of us have faced more cantankerous judges in this country and you are not one of them and we know they make comments about people but let me give this example.

If you went on Rule 43 application in spousal dispute about maintenance and you sit there as a mother asking for maintenance and the judge flippantly said you know, you women are gold diggers, of course that comment, Chair, does not mean the judge will decide in a particular way, he can say no, I was just making comment. but I want you to put yourself in the shoes of that women with kids, who is asking for maintenance for survival, hearing a judge say, you know, you guys are just gold diggers. That comment, even if it comes from a – let us call it a flippant place, it was a – you misspoke, the fact that you misspoke does not reduce the effect of your misspeaking to the litigant who is facing a barrage of situations.

And so, Chair, I will not go to the test for actual bias because I do not have to meet that test. Chair, I want to take you – and the other cases, as I said, is the Tshabalala case, I would like the Chair to look at that, the

other case that the Chair has already mentioned is the SARFU case.

Chair, may I suggest as well because I am not being disrespectful to judges and their judgments, is that literature by legal scholars, who are not judges trying to defend themselves, it is much more important here and I can share with the Chair some of the literature that comes from someone who is not a judge, who is a scholar, who is not trying to defend the club, the class called judges because they are much more objective in the tests. The last chapter of that book called Judicial Recusal by Grant Hammond has a whole reading about how to – what route to be taken because it recognises that this matter has not been debated as thoroughly as it should be because the leaders of the debate are the subjects of the attacks.

And, Chair, so what have you done? What exactly have you done that has caused us to come here? What have you said that has made Mr Zuma believe, reasonably, that this forum is not good for him?

CHAIRPERSON: Before we get to that and maybe we will take the tea adjournment and then [inaudible – speaking simultaneously]

ADV SIKHAKHANE: As the Chair pleases.

CHAIRPERSON: But I wanted to raise – we will go to the comments as you have indicated in due course. You know,

when I was still new in practice as a lawyer going to the lower courts, appearing full of enthusiasm, coming from university and, you know, one of the experiences I had in some of the courts in which I appeared were cases where I would appear before a presiding officer and I present argument and the presiding officer just keeps quiet. I go on and on and I quote authorities, in this case, this is what happened, in this case, this is what happened, these are the principles. The presiding officer just sits and keeps quiet. I never get to know whether – what he or she is thinking, I would never get to know and then maybe one question there but sometimes no question and at the end of argument, either immediately or later, judgment is given and when I read the judgment I say, you know, I do not think he or she understood the argument. If only she had engaged me and questioned the submissions that I was making because then we would have had an engagement and I would have clarified some of the things.

ADV SIKHAKHANE: Yes, Chair.

CHAIRPERSON: Of course, somebody sitting there could say oh, this magistrate or presiding officer is very impartial, he said nothing, she said nothing, she just listened, you know? But I must say that I preferred those who would question what I am saying so that we could engage in a debate because then I could tell if I was

persuading him or her and also I could tell when he or she puts up a point for which I have no answer, you know, so when you get the judgment you feel that look, I was heard properly because whatever difficulties the presiding officer may have had inside, as I presenting my argument, he or she verbalised them and I was able to address them, but the one who keeps quiet throughout, you might think she or he has no problem, but maybe she does have problems but she does not tell you and you feel the unfairness when you see the judgment.

ADV SIKHAKHANE: Yes, Chair.

CHAIRPERSON: So but I raise this point in relation to the issue of comments, to which we will come, to say one of the benefits of the Commission proceedings being televised and so on is that persons, whether implicated or not, can listen or watch as a particular witness gives evidence and sometimes I put certain questions, I put certain remarks, because I am thinking when the person who is being implicated comes here, hopefully they are listening or they will read the transcript, I want them to know what was going on in my mind as I was listening to this witness, so that they can address it, I am not hiding it from them.

ADV SIKHAKHANE: Sure.

CHAIRPERSON: If I like I could just sit quietly, do not

indicate what I am thinking but the benefit to the implicated person, if I speak, is that they can, when they come and say you know, Chair, when this witness who implicated me was speaking, this is what you said, I want to take this opportunity to show you that that is not the position. So at least it is meant as part of transparency rather than just keep quiet and say so this person that they are talking about is such a bad person but, you know? So I just mention that and ...[intervenes]

ADV SIKHAKHANE: Yes, Chair, I appreciate that.

CHAIRPERSON: And you may address it ...[intervenes]

ADV SIKHAKHANE: Chair, can I say a parting shot to that?

CHAIRPERSON: Yes, sure.

ADV SIKHAKHANE: I would not differ with you on all of that. The reasons all of you are called Judge, it is because the term means, unlike me and everyone here, you can – being a judge is a centrist position, it requires you not go for those extremes but to seek to strike that balance because sitting quietly and doing nothing, I only have a Zulu word for it *uktuba*(?) it means you have decided oh, you do not want to me to talk so I will sit quietly and say nothing. That too is wrong. All the comments that are made flippantly without self-restraint have the same effect, so a judge who decides to go either

extreme may be immature to say because I am questioning your comments, alright, I am going to sit and say nothing.

What is required are comments that seek to understand, to intellectually engage but what we are raising – Chair, let me tell you, Deputy Chief Justice, because it has happened to me. We go – I go for Mr Zuma to many courts. Only once, and I have had a lot, I have had a judge doubt my integrity, that I am corrupt because I represent him. Now those are comments that you do not want because you can be engaged intellectually for the whole day, I do not mind. What I mind is when a comment crosses that line and I think for a judge too, there is something about being called Judge that is about striking the balance in society about extremes and we make those as examples here not because any malice.

CHAIRPERSON: Ja. No, no, no, that is fine.

ADV SIKHAKHANE: Thank you, Chair.

CHAIRPERSON: Let us take the tea adjournment, we are at 18 minutes past eleven. Let us resume at twenty five to twelve.

ADV SIKHAKHANE: As the Chair pleases.

CHAIRPERSON: We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes, Mr Sikhakhane?

ADV SIKHAKHANE: Thank you, Chair. Chair, can I just briefly go to the beginning of when you read your statement?

CHAIRPERSON: Yes.

ADV SIKHAKHANE: As Chair acknowledged that maybe I did not know that you were going to turn yourself into a witness. And secondly – and I want to consider whether – because now you have read a statement in which you have a version about your relationship with him...

CHAIRPERSON: Ja.

ADV SIKHAKHANE: I would like to get time to consult with him because as Chair will agree it is possible that the two of you have different versions about that relationship. But I have no instruction at the moment, I have no time...

CHAIRPERSON: Ja.

ADV SIKHAKHANE: I just ask the Chair after today or tomorrow I may have time.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: And will tell my learned friend Paul if it is uncontroversial.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Your versions about the two of you.

CHAIRPERSON: Ja.

ADV SIKHAKHANE: Your versions are consistent.

CHAIRPERSON: Yes. No, no, that is fine.

ADV SIKHAKHANE: Thank you.

CHAIRPERSON: I think in the SARFU matter the statements were given to – by the justice of the court to counsel and counsel and their clients accepted the statement of facts. So that is what happened there, ja.

ADV SIKHAKHANE: Chair, yes, I am not even suggesting that there is something in it.

CHAIRPERSON: Ja, yes.

ADV SIKHAKHANE: I do want to just at least for integrity of the process to do that.

CHAIRPERSON: Okay. Okay, alright.

ADV SIKHAKHANE: Chair, the grounds that we have raised in our affidavit, in Mr Zuma's affidavit – oh, the other issue, Chair, there is a replying affidavit.

CHAIRPERSON: Oh, yes.

ADV SIKHAKHANE: That Prof Mosala filed an affidavit on Saturday.

CHAIRPERSON: Ja.

ADV SIKHAKHANE: I am not sure much turns into it but we have answered it, I have given – I want to place it on record, it is unsigned at the moment.

CHAIRPERSON: Oh. Ja, let me have it. But from what you say it looks like I might not need to bother to read now because you do not say much about it in your address.

ADV SIKHAKHANE: Chair, we do not because it is done

this morning and two, quite frankly, this is not one of those cases where we are going to deal with – it may rely on how deal with the principles of Plascon Evans.

CHAIRPERSON: Yes, yes.

ADV SIKHAKHANE: That is why I am saying the difficulty of your statement is if my client tells me that your version is not consistent with his.

CHAIRPERSON: Yes, okay.

ADV SIKHAKHANE: Yes, Chair. Chair, you will see that in the affidavit, this process where we deal with the grounds is set out from paragraph 33 of the affidavit.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Chair, what it does without – I do not want to take the Chair - to read it.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Paragraph 33 up to I think paragraph 47.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Without reading that, what that ground says read – or considered together with all the other grounds and the pattern that they form, is that when this Commission started ...[intervenes]

CHAIRPERSON: I am sorry, I just want to make sure I have got the right page.

ADV SIKHAKHANE: Yes, Chair.

CHAIRPERSON: Oh, I think I went to 33 at the bottom but you meant 33 at the top?

ADV SIKHAKHANE: Yes.

CHAIRPERSON: The red numbers, is that right?

ADV SIKHAKHANE: Yes.

CHAIRPERSON: The red numbers?

ADV SIKHAKHANE: The page number? I am looking at paragraph 33 of the affidavit, I am sorry, Chair.

CHAIRPERSON: Oh, okay, okay.

ADV SIKHAKHANE: Chair, you will not need to go there.

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

ADV SIKHAKHANE: I am hoping to summarise this, rather than spend too much time on them is that, Chair, I am raising this first ground because on its own it is a weak ground, on its own, if I were to bring this case to you simply on this ground and I am saying I want you to look at this ground in the context of the other grounds and how this whole thing started and the pattern that it takes.

Chair, Mr Zuma submits that this Commission, when it started, as he has said before, is that it starts - because he is alleged to be at the centre of a crime that is not found in any other statute in South Africa, it is called State Capture. Of course we all know it is not in POCA, it is not in Criminal Procedure Act, it is a political concept that political opponents have created to deal with

misdemeanours of the other political opponents but it does not exist in law. And of course I know that, Chair, you fetched or two experts from America, the most captured State to come and tell us the dangers of this crime.

Now how do we identify witnesses from the position of my client? This Commission starts with witnesses who aligned themselves with the narrative, with the version that there is something called State Capture and Mr Zuma is responsible for it.

If the Chairperson looks back at the witnesses that were picked by this Commission – and the reasons may well be good, I do not know the reasons - when a State is captured, Chair, suppose – I hope we never get there in this country, when a State is captured, you need a wide range of perspectives about what exactly happened in it. You do not need to call only Barbara Hogan and Pravin Gordhan and Mcebisi Jonas, who are proponents of that theory.

If intellectually you want to deal with this subject - because it is not a legal subject, it is purely a political concept. Our suggestion is that the Commission lined up right at the beginning proponents of this theory called State Capture and I am not suggesting that Mr Zuma should have been called first for his version, I am suggesting that if one really looks at the beginning, the

first days of this Commission, we were listening to horror stories of people on the rooftops telling us they are not corrupt, they are angels, there is this thing called state capture, they may be right, but that selection of witnesses by a commission, by this Commission, for a very long time who parrot one version, gives the impression that a decision – no, that their version has been accepted, that there was state capture, has been accepted.

And so that selection on its own, even in the cabinet, if we look at the people who were picked to come to this Commission and spend two days, truly, truly spewing their political theories about their opponents, it was people who are proponents of a particular narrative in the South African body politic and I am not saying they are wrong, I am saying this Commission lined them up in a way that is un-intellectual, that would not have encouraged debate about this difficult subject.

And therefore, my client, sitting at home, having been head of state, listening to witnesses most of whom are people who have an axe to grind with him, either because he fired them or he did not intervene in some HR issue they were involved in, truly that selection created an impression that a particular version may have been accepted.

What you will find in those paragraphs is that we

cite at paragraph 31.1 up to 35.9 and I do not really want to denigrate those witnesses because they did not select themselves, I hope, is that if you look at them, Chair, the ones are picked and the ones – the star witnesses of this Commission when it started, Mr Pravin Gordhan, Mcebisi Jonas, Nhlanhla Nene, [indistinct] Mahlodi, Vytjie Mentor, Trevor Manuel, Ms Barbara Hogan, Themba Masego and Fikile Mbalula, right?

And I want to be clear, I am not criticising the testimony of those witnesses. I am saying if one looks at what they had come here to say is a particular narrative about Mr Zuma.

This Commission, the question may be, what could it do because Chair, you were at pains asking people to come and I think you were at pains because you wanted all versions but they were not coming.

But, of course, we know that your Commission could have gone to different people in that cabinet, some of whom have a particular opposing theory on the subject matter. I do not personally agree intellectually with the two theories you brought from the U.S and I would suggest that their version is not the end of the story about this difficult concept. So that is the first ground.

But, as I said at the beginning, this ground is weak on its own, you will see it when you look at the pattern of

other things. And so the first ground, Chair, was that that selection lined up people that truly had a gripe and an axe to grind with Mr Zuma.

CHAIRPERSON: I recognise the concession, I do not know if it is a concession, but the point you make that standing on its own this is not your strongest point but I do want to raise this question.

Is it open to a witness or a person such as Mr Zuma to complain about those – or what emerges from those witnesses in circumstances where he had the opportunity to apply for leave to cross-examine them and get somebody like you to basically deal with their versions and by the time they leave the witness stand there is a complete picture that has emerged from the picture they may have painted at the beginning but chose not to do so.

ADV SIKHAKHANE: Yes.

CHAIRPERSON: In other words, there may be an argument that says it does not matter what sequence different witnesses follow in being brought to give evidence as long as there is a fair opportunity given to the people they implicate, for example, to challenge their evidence and cross-examine them and show them to be persons who have maybe some gripe with them or some scores to settle, that is why they say a, b, c, d about them.

Of course, if you do not that, you to come and

actually cross-examine them, challenge what they have to say, whatever evidence they have given might remain in the minds of the people whereas if you had used that opportunity, what would remain is what the picture looked like after an effective cross-examination.

ADV SIKHAKHANE: Chair, you are taking me to a complaint about you I did not want to raise because it is not here.

CHAIRPERSON: Ja.

ADV SIKHAKHANE: In fact, Chair, you know, had I apply to cross-examine Mr Jonas who spoke for two days and it has happened here, I would have been given an hour to deal with someone who speaks for two days.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Insinuating my client.

CHAIRPERSON: Well, not necessarily an hour. What is done is – well, I think actually the counsel who cross-examined him ultimately cross-examined him for no less than two hours but, you know, an application is made and argument is addressed and we take into account what you have to say.

ADV SIKHAKHANE: Yes.

CHAIRPERSON: Very often – I have said this recently – very often counsel who have cross-examined have found - have been able to cross-examine within that hour or two

hours. I cannot remember – I remember one, I do not know if it is the one who was cross-examining Mr Jonas, who had some concerns but the discussions ended up with him saying no, it is fine, you can send some submissions.

ADV SIKHAKHANE: Ja.

CHAIRPERSON: So the idea is to try and strike a balance with taking too long but at the same time try and make sure that there is fairness. So you would have applied, Mr Sikhakhane, and if an hour or two hours was not enough, we would have looked at ...[intervenes]

ADV SIKHAKHANE: Chair, I digress, it was not fair of me to raise that complaint to you because we did not apply.

CHAIRPERSON: Ja. No, that is alright.

ADV SIKHAKHANE: But the point I was making, Chair, I think it is because you and me are lawyers that you say it does – the order does not matter. Chair, the order does in environments of this nature where for two years you call people who parrot a particular narrative about people. It may not apply to you and me as lawyers because we sit here and deal with cases and we – usually we forget about the world of propaganda out there against humans beings but I think when you line up witnesses for 18 months who parrot a particular version in an environment of this nature about somebody, it may have an effect on them but the point I wanted to dispel, Chair, because it is – we have

seen letters from Prof Mosala, for instance, and before that. This notion, it ended at 12 last night and the last statement that Mr Zuma will not come here was issued by some foundation related to one of the witnesses.

This issue that Mr Zuma refused to come here, Chair, is with respect false, it is untrue. What has happened in this – I am saying the Chair is telling a lie, I am saying it is peddled that Mr Zuma – it is in the papers of this Commission, letters to us, asking us, even incompetently, to give guarantees whether he will comply and you can see what that is.

Chair, I have been before you with Mr Zuma. And, Chair, I have not asked him whether I should tell you this, but let me tell you. In the time since Mr Zuma was here, called in that particular way, he has had two moments of serious illness for which you saw the need that he would meet his doctors and there I say to you, Chair, had you met his doctors, the entire approach to how he is communicated, how he is talked to by your Professor Mosala or somebody else would be different because you would know what he was facing between September last year and now.

The second incident is that Mr Zuma for reasons that probably did become public changed lawyers in the middle of Covid 19. I only saw him three times since then

and when he changed lawyers – and those who are practicing advocates, who are not peddlers of narratives out there know this, when you attorney is fired, you have no brief at that point and for moments – for months of that exchange and the interaction, the handover was difficult because of circumstances of the change of legal representatives and Covid and so it is not true that there has been refusal.

Up to now I can tell this Commission, as I make these bold suggestions, Chair, about how you have run this Commission and things you have said, that Mr Zuma up to ten minutes ago still tells me he believes that this Commission at some point must hear his version and so there are circumstances, Chair, that happened – and I do not want to blame the Commission because we too are to blame as Mr Zuma's lawyers because there were problems on our side that just made it difficult for us to present things to you. So I want to dispel that notion. That is my argument against your assertion. He did not refuse to take the opportunity.

CHAIRPERSON: Okay.

ADV SIKHAKHANE: And then, Chair, having dealt with the part about the selection of witnesses, the next ground you will see, Chair, is also that Mr Zuma came to this Commission, made serious allegations about this

Commission factually and what he thinks or what he thought then and still thinks today were problems with this Commission that would have concerned you and he apprehends that those themselves seem to have been ignored, the fact that he came here and raised serious issues about this place, this Commission, being an extension – and I am making no suggestion, Chair, about you and my learned friends, I am saying it is not impossible, Chair, it is not impossible in politics that as we sit here we are all pawns in a very big intelligence game. It is not impossible.

We do not know that because we are lawyers, we do not know that world, the world of smokescreens and I am saying when a witness who is at the centre of what you are investigating appears and says to you, do you know that we are presiding over a project whose outcome is to deal with certain opponents? And I am not saying that version was necessarily correct. So a number of those were not taken up with him in the letters that we got.

CHAIRPERSON: Mr Sikhakhane, I am sorry to interrupt you.

ADV SIKHAKHANE: Yes, Chair.

CHAIRPERSON: I just want to note the second ground without going to the affidavit.

ADV SIKHAKHANE: Thanks, Chair.

CHAIRPERSON: Did you want to just to mention it ...[intervenes]

ADV SIKHAKHANE: Chair, it is the fact that he gave testimony, very serious testimony about what you are presiding over.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: And, Chair, he is of the view that that was ignored, disregarded, ridiculed because it does not align itself with the dominant version that was given by the earlier witnesses.

Now, Chair, let me move to the comments that you have made.

CHAIRPERSON: Yes, well, just one point. The affidavit I think does not say how – what it is that should have happened between the time he gave evidence and now to reflect that the Commission has not ignored it. Obviously you cannot – you cannot give evidence, lead evidence but I am just raising that I have seen that in the affidavit.

ADV SIKHAKHANE: Yes, Chair.

CHAIRPERSON: But, I mean, I – you will remember I allowed him, you know, time to say what he had to say until he said well, it is fine for now.

ADV SIKHAKHANE: Yes.

CHAIRPERSON: I will see some other time. So – and of course one was going to wait for him to come back and

then take it from there.

ADV SIKHAKHANE: Yes, Chair. Ja, it is difficult because we are both in a precarious position of having to give – but let me risk it. Chair, I said in this Commission that there are times when I personally feel the right hand does not know what the left hand is doing and I think, Chair, there is a way you and this Commission can assure him that you are investigating the claims – your investigators are investigating the claims that he made about how we are here, that this is the grave to bury him. I am not saying that is necessarily true but that is the allegation he makes and I am saying, Chair, I challenge you and this Commission and its investigators who sit behind it whether they have gone as gung-ho as they have on the claims made by the earlier witnesses that I referred to and the claims he made and it is this Commission that can inform me that the claims that he made are being investigated and if that is done, as the Chair did about his presentation, I will be the first to say that ground is not good.

CHAIRPERSON: Yes. No, no, that is fine. You know, last week, I think on Friday, the witness or least one of the witnesses – the only witness, I think, who was giving evidence was Mr Zuma's former attorney, Mr Mantsha, and evidence had been given that affected him in relation to when he was Chairperson of Denel and evidence had been

given from last year to the effect that certain executives were suspended at Denel and the board that he was chairing was involved and that they were suspended for no reason, it was part of getting rid of people who were not prepared to do certain wrong things and so on.

So last year we tried a number of times to get Mr Mantsha to file an affidavit and respond to the allegations or evidence by Mr Saloojee, for example, and so on, but he did not. So when he came to give evidence on Friday and then I think he came after – there may have been a Regulation 10.6 directive issued - he then said they were dismissed for misconduct and then he said – put up a certain story about what they had done and I said, you know, I just wish he had come and responded last year because at that time we still had a lot of time to investigate what he was saying they were dismissed for, but he was now telling us towards the tail end of the last [indistinct] of the Commission, some of the investigators are gone, others are still happy to do whatever. So sometimes there are challenges when things come late, but I am just mentioning ...[intervenes]

ADV SIKHAKHANE: Chair, I assure you, I assure you as I did now, that this is not brought frivolously and also, may I place this for the record? I think, Chair, you have had a difficult time because people do not cooperate with

investigations naturally and, Chair, when we come and make these grounds, these are not sweeping grounds about the fact that in every respect – I think in 90% of this Commission it has done what it can in a very difficult political context. I do not underestimate that.

The point I am making is this, is that with the witness telling you what he did and with the circumstances I have told you, Chair, and I think, Chair, if you are frank with me, that undertaking, ruling of yours, to meet his doctors, I know you were reluctant but I think, Chair, you missed a golden opportunity yourself, just like we have missed our golden opportunities because I think this belief that he does not want to come here and that all of these delays since September last year were because Mr Zuma is ducking and divings, others are even making attempts at history, that it is Stalingrad, but it is not that, Chair.

And so we make that knowing all of those difficulties and, Chair, as I said, I still say today, this Commission has missed the opportunity to get – well, not missed, it is not the right word – the central issues in your terms of reference, it is the Guptas and what is alleged to have happened and must be investigated and the centrality of the head of state then.

Chair, you are going to finish this report with no version from the Guptas, right? And I understand the legal

issue that well, if you do not give me your version I will just to – but, sir, without the version of such people, I appreciate the fact that it weakens the Commission. Without Mr Zuma giving a version here in an environment that he trusts, the reports may be great, may be good, but it may not assist in going forward and it may open itself up to difficulties that we do not need.

I have raised it with Mr Pretorius that, you know, if we were playing the Stalingrad, everyone thinks Stalingrad means a delay, Stalingrad was the shortest battle, it was just fought strategically, is this. If you blow us, today, you do not agree with us – as I have said, I have a mountain to climb – what happens? Do we get Mr Zuma here as a guarantee? No, no, if we are approached that way, we will just – even if we lose, we will review you, we will go as far as wherever and that is not helpful.

If you force me to bring him here without the climate being created for him to believe that he is not being charged. Well, I put him there, Chair, and he will exercise his right to nothing and I think those two things as strategic as they may be for me as a lawyer to get my client out of this place I think the country deserves the climate that can interrogate the subject matter without judging the people we already dislike, and I think those – that is the pattern I am giving without judging you, it is a pattern that I am

giving not just to you, because you have investigators, you have evidence leaders who have their particular styles and prejudices and beliefs, and I am suggesting that there is a way to protect a process like this, because it is big, and so when Mr Zuma raises these issues about your comments some of your comments look mild in a situation where the person is not an accused, but I am going to take you to your comment when Barbara Hogan was here, Ms Barbara Hogan for instance.

We set it out there in the paragraphs that are – but eventually at some point you said this to Ms Hogan, we have this ...[intervenes]

CHAIRPERSON: So we are on comments now?

ADV SIKHAKHANE: I am comments Chair, your comments.

CHAIRPERSON: Ja, okay. Shall we take that as the third ground or what, the comments?

ADV SIKHAKHANE: Ja, your comments. Just your comments in general and the pattern of your comments and what apprehension they may raise.

CHAIRPERSON: Okay.

ADV SIKHAKHANE: It is paragraph 53.2 for affidavits.

CHAIRPERSON: What paragraph?

ADV SIKHAKHANE: It is 53 of the affidavit, point 2.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: So I am going to read it for you.

CHAIRPERSON: Okay no that is fine.

ADV SIKHAKHANE: I am going to read the particular comment not the whole excerpt.

CHAIRPERSON: Yes, okay.

ADV SIKHAKHANE: With Ms Hogan having said this to you at some point, and I quote:

> "The President is a genial person we know that, I cannot put aside the fact that probably dealing with women who held views might have been an uncomfortable experience for him but I was careful to be respectful all the way through."

And Chair after that you say this:

> "But on the face of it, it seems to me, and you are free to comment, it seems to me that unless you tells us something else that happened, that might have a bearing on this it seems to me that what you were told on the phone by the former President amounted to saying Mr Marora going to continue as CEO of Eskom and there was nothing really to be done about as far as the President was concerned about the Board's view that he had offered to resign and they had accepted that."

Chair I know that you said it is better to have the judge who tells what he thinks, and I accept that you may well

say I express what I think on this issue.

The problem with putting a proposition because it looks like a proposition from the Judge it is not volunteered by the witness, it is extracted out of the witness by the Chair, and so that proposition on its own gives the impression that the Chair has a particular concluded version or proposition to make to the witness. Now I appreciate the fact that you have a role to ask questions but I think it is in the nature of the questions and comments.

The second one ...[intervenes]

CHAIRPERSON: Well before you go to this is that the second one the passage or another passage?

ADV SIKHAKHANE: No not on the part, we can deal with that.

CHAIRPERSON: Oh okay, you see I think what was happening here is I had listened to the witness, she had said certain things about what Mr Zuma had said to her in the telephone conversation and I sought to clarify from her whether my understanding of what she was telling me was correct, and you will see that I see on the face of it this seems to me to be what you are saying but also it seems when she responds it is quite – seems important she does not say yes that is what I mean, she says that is one possibility certainly. Another possibility is that – she puts

another possibility, which might mean I sought to have clarification of what she meant and in responding she said well it could mean two things. I just mentioned that ...[intervenes]

ADV SIKHAKHANE: No Chair, I think you are correct, I think Chair these are not open and shut questions, but that is the danger of a presiding officer putting a proposition rather than – I will never fault Mr Pretorius for putting a proposition. You are a very powerful man sitting there Chair and when you put a proposition to witnesses once they assume, especially if it is a proposition once they assume that the Chair is with me here it is one of those things you can leave to the evidence leader, because that witness will latch on what they think is your proposition, is your predisposition and therefore I am not criticising Chair that as a blanket issue your comments are bad, I am saying these comments that are put as propositions open themselves to the risk of witnesses who come here to take chances sent by as political missiles of others are offshoots of a particular agenda, and when they see that you put a proposition about the man they really want to see go down they may latch onto that and think that is the route they want to take because the Chair seems inclined and even if Chair it is not your intention and may I say this one of the difficult things about recusal is also that who

are we to know your intentions.

One of the things missing intellectually in the debate about recusal is how do we determine that someone can say you know what I am biased, so I did not come here to present expecting that answer to anybody, not because you have no integrity, because human beings have a very low capacity for self-reflection because we don't see ourselves.

So Chair I am saying that comment on its own, not with the background I have given, may look mild.

CHAIRPERSON: Ja, okay.

ADV SIKHAKHANE: The next one Chair you say did you get an impression that there might have been private meetings between the President and Mr Marora. Chair we put that with the others because there again a proposition is put and it is a proposition in the context where this witness of course has come to tell you how bad Mr Zuma is. None of them, they all have come to tell you that, all of them that they perfect is not, and so when you put that proposition you actually plant in the mind of a witness as Chair what I said an understanding by that witness that a-ha here is the inclination of the chair he thinks this, let me go there, and for a witness who is watching you who is accused about whom they are talking spewing all sorts of things from their moral high ground he sits believing

reasonably I think that this is an engagement between you and people who are parroting a version that the Commission finds convenient.

And then Chair she says of course exactly what I am saying, she says yes and that impression it is in paragraph, it says something, I forget which paragraph, it is just the example to say I underline that to show to you what political witnesses who come here before you because all of them are due to latch onto a proposition from you that they think is an inclination they have come to give you, and then later Chair you say this to her, of course it is polite, you have to thank her, but we say this because we also have noticed that those witnesses were treated with a certain level of deference about what they say, and then you say this Chair to Ms Hogan right at the end, and I am going to move away from your engagement with her.

Thank you very much Ms Hogan for those words, she had just praised that she appreciates it and thank you all for the remaining of these three days instead of one that was envisage,. All sorts of things.

And then Chair you say this to her, thank you very much Ms Hogan for those words and I don't think that is our complaint and I think you on behalf of everybody in the Commission who all of whom appreciate your words. I

also, I have no doubt from the interactions that I received from ordinary South Africans every day, whether I am in a mall or in any public space, and many South Africans who happen to have their way of sending messages to me , the messages that I get from them are amazing. The sentiments that you have expressed about the Commission I can assure you that there are shared by very, very ordinary South Africans.

Of course a very great number of the South African population is Christian and so there are lots of people who say we are praying for you. Chair it goes on and on. What is the complaint about this polite engagement. Is the Chair having the context of your discussion with her and what seems to be her inclination and your kind of consideration of the approval received from outside the four corners of this room itself appears, I will not use the word improper, appears irrelevant to say to this witness you thank because of the – how you are appreciated when you walk down the mall in all of those, and so read that whole paragraph without taking you Chair, we have underlined it, the point we seek to make, we want to make is that that comment and the others we will refer you to Chair the next one is Mr Gordhan, paragraph 53.6, and we say it was more evident when Mr Gordhan was here, it was obvious that the Chairperson seemed to accept his *bona*

fides and viewed him as a conveyer of universal truth about State Capture, and then Mr Zuma says in the affidavit I do not say this lightly but rely on the transcript which reveals that this disturbing deference to Mr Gordhan in particular where the Chair, the comment of the Chair to him:

> "Thank you, you may be seated. Thank you very much. Before Mr Pretorius begins I just want to thank you Minister Gordhan for coming forward to assist the Commission. We have been making a call to all South Africans who may have information about the matters that we are investigating to come forward and we have made a call to President, past ministers, deputy ministers, we are ..."

And then at the end you say:

> "And we are grateful for that, and we are grateful that you also have come forward. Thank you very much."

Viewed on its own it is not a problem, but you have said in that comment to him that there are people who have not responded, including the President and so the comment to him, that defence to him and the comment that we made a call to the President is in line with what I said is false, that he does not want to come and therefore it gives that impression, and then you say to him ...[intervenes]

CHAIRPERSON: You refer to the President – oh – oh ...[intervenes]

ADV SIKHAKHANE: Yes, you do.

CHAIRPERSON: Oh I think that must – well I am not sure but I am thinking it may have been presidents, meaning past ministers I am not sure but one may have to – I doubt that I meant a specific president, I doubt that. But ...[intervenes]

ADV SIKHAKHANE: Chair I won't doubt your – but I am saying that is the risk we face.

CHAIRPERSON: Ja yes, ja.

ADV SIKHAKHANE: That I have to present to the very person, the only one who knows his intelligence.

CHAIRPERSON: Ja, ja.

ADV SIKHAKHANE: Then Chair you say okay that paragraph appears to me, and you must tell me if you understand it differently, appears to be an acknowledgement by the ruling party that the leadership structure that it had up to that stage were failing to arrest corruption, and these are the practices that are mentioned there, is that your understanding of the paragraph as we?

Now this comment is similar to the one I was saying about Ms Hogan where you may – it is a question and I know maybe Chair you say if and you say the *prima facie* view but the fact of the matter I would like the Chair to

read them together with an open mind and see what impression they give and then after at the end you say that now straight about we have no doubt here that which President you meant, unlike the other paragraph, you say ...[intervenes]

CHAIRPERSON: Yes.

ADV SIKHAKHANE: I take it from what you say in paragraph 34 last sentence in the event it would appear that he ignored this suggestion, and take that the former President did not articulate his views in regard to the suggestion you made about what processes you were thinking ...[intervenes]

CHAIRPERSON: I'm sorry where are you reading now? I want to check this time because of the reference to President ...[intervenes]

ADV SIKHAKHANE: Yes okay Chair let me give – if you go to paragraph 53.6 of the affidavit.

CHAIRPERSON: Yes, yes.

ADV SIKHAKHANE: And go down to the comment ...[intervenes]

CHAIRPERSON: Oh okay yes, now I see yes, yes, yes.

ADV SIKHAKHANE: And there can be no doubt which President you meant here. You say I take it from what you say in paragraph 34, last sentence, in the event it would appear that he ignored this suggestion, I take it that former

President did not articulate his views in regard to the suggestion you made about what process you were thinking should be followed, and then he says – and I am reading both because of what I say witnesses are likely to do when they think you are so inclined.

Well in the event it was ignored I think, well at that stage, and then Mr Nene needs to tell you what followed after the elections. Chair those two comments that exchange between you and Mr Gordhan of course he as much as you phrase it as a question to him but he sees an opening about your inclination and I am not talking about your intention, he sees an opening in your comment about the President who is not there, and so that comment itself is phrased as proposition that may give – well that does give reasonable apprehension to the person and witness in the position of Mr Zuma.

CHAIRPERSON: Of course when one looks at excerpts or extracts from a transcript such as this it is important to have the whole context, because this would have been a witness, an exchange when a witness is on the witness stand and that witness has put in an affidavit where he has told the story and it may be that a question is put in a certain way, because everybody understands what is written in the affidavit, so it may well be important to have that affidavit in order to have a full context of the extracts.

ADV SIKHAKHANE: We do Chair, we do. I think Chair should be comfortable that we have read and we followed and we watched that interaction, so we are not taking this out of context and as I say I want the Chair to look at them later with an open mind and connect them and say they will be that the Chair, because only Chair knows his intentions.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Will tell me that is not what I intended and I have no way to dispute that.

CHAIRPERSON: Okay, okay.

ADV SIKHAKHANE: And then Chair that interaction with him I would like the Chair to go through it, I don't want to read these excerpts because what I say – what I submit they indicate is a mind that is inclined to agree with a particular witness about another who is not there, and Chair as you keep saying to me correctly, but I need to find out what is going on.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Chair I am asking you to do something very difficult, it is difficult for me, it is difficult for you, is that as I said I am not asking you to go to the extremes, in those comments and those propositions you will find that – because you are human, you will find that in the heat of things and the outrage that you feel about the testimony because you are human there is a line you may

cross, and the crossing of that line is not because you are a bad person or you intend punishing people, it is because you are outraged by a particular – and I have seen you outraged in these proceedings, justifiably so sometimes, so I think Chair what I am asking you to do is to look objectively at your comments from the position of someone who is accused number one whether we like it or not in these proceedings.

This was started to get him and that is how he sees it, and so his position is important for the Chair to take into account, then take into account those who love him and those who hate him because they are pursuing something else, and then Chair you will see that paragraph 53.7 is another quote where you put your view, expressed as a question you say with the involvement of the presidency right at the bottom, at the foot of the page, of the presidency in the appoint or reappointment of members of boards, SOE's have been an normal thing, is that a normal thing or not?

Now Chair that question as I said contains what outrages you, sounds like the suggestion that the Presidency would interfere right, because we are talking about accusations that were made before you that Mr Zuma was interfering with Boards of SOE's, so seen in that context he views this comment and many others as the

Chair's inclination to agree with these witnesses and that we are disinclined to agree with the counter version because Chair I think there is a counter version in society, there is a counter narrative that makes the entire body politic and this process which is to help policy making must not be determined by the dominant views of what in South Africa is a dominant class and its media and their views, is that if you want to get out of this morass of policy uncertainty, which is what your task is, is our ability to thoroughly interrogate different narratives that are out in society and how they lead to fraud that you are to investigation, corruption and this thing called State Capture. I keep referring to it as a separate issue Chair, because as a matter of political science all states are captured, all states. The reason here is a contest between clusters in society even here is that they are contesting to capture the State, some for good reasons, others for bad reasons, so State Capture is a notion that is weaponised comes as a notion that is designed at a time Mr Zuma must go, but what the Chair is tasked to do is to cut the veil, go beyond the different classes that contest the State since its inception is to look at this State as we speak now is captured, this State, particular one, beyond Mr Zuma, long gone and elsewhere in Ukraine but what the Chair must look at is what forces, what do these forces do with the

State, what is the fraud, and what is the corruption and I think these comments demonstrate a mind that has accepted a particular version that Mr Zuma facilitated wrongful capture of the State, that – whose intention was to – was ...[intervenes]

CHAIRPERSON: Let us assume that they reflect an acceptance of certain evidence that has been given, would you accept that there would be nothing wrong with that if that acceptance is provisional, in other words until I hear the other side, until I hear what has happened, in other words well maybe this is – maybe this version without contradictory evidence may be it is too – but I will wait until I have heard all the evidence and I can change my mind, I am open, in other words isn't the fundamental thing whether whatever you think of a certain witness evidence at a particular time that you must at least keep your mind open and be prepared to change whatever you thought once there is good contradictory evidence or arguments and so on.

ADV SIKHAKHANE: Chair I accept that.

CHAIRPERSON: Ja, I am just posing it ja.

ADV SIKHAKHANE: No Chair intellectually as a way of engaging people I would accept that you may hear one version and agree with it and then hear another, but here is where I part ways with your answer, it is like Ms Jones

Ms Mkhiza was talking about, who is sitting in court listening to a judge talking about the fact that she wants maintenance. It may well be that when you make a comment that you think she is a gold digger, you will then say to her you may persuade me otherwise, but it is no comfort from a judge to make that comment and say, and give the explanation you are giving me, that no sit comfortably there, I am calling you a gold digger for now but when you come you may well tell me you are not.

That explanation Chair it is sound the explanation you give, but in an environment where you sit in that powerful position with people who sit here, others is heroes and others is accused, those accused persons do not feel that statement you make the way you say it because for them it is not an intellectual engagement, they are being accused.

And so I want to Chair, I know it is your explanation but I want you to look at it and see whether a judge can give that answer for commenting flippantly to someone and no but I was still going to change my mind, I don't think it is a legitimate explanation to a witness.

CHAIRPERSON: Yes, of course if we go back to our earlier example, much earlier before tea break and of course when you make, I mean how you make a comment is also important you know. If you talk about – if you

contrast that example of a judge or magistrate who says you know women are gold diggers then you have another one who actually thinks like that inside but doesn't say it.

ADV SIKHAKHANE: Both are wrong.

CHAIRPERSON: So that ja I guess one needs to be sensitive.

ADV SIKHAKHANE: Absolutely.

CHAIRPERSON: One needs to be sensitive to all of these things.

ADV SIKHAKHANE: Chair you have come to the nub, maybe you have expanded without noticing, unfortunately you are no precedent. Maybe you have created precedent for this nebulas concept, sensitivity, because when we sit where we sit it was not a flippant comment when I said there is something intellectually dishonest about the fact that precedent about this subject matter we get it from people who are the subject of our criticism, they tell us how to criticise them, and so Chair you have come to the nub of what I think reasonable apprehension of bias stems from. It stems from a need for sensitivity and the need for sensitivity Chair comes from a recognition of the tenets of natural justice and that justice must not be done but they must also be seen to be done, and so a witness may well Chair think of what you say differently if it is said by an evidence leader, so I am saying Chair some of the

propositions in your difficult job you are doing have been propositions that a small person sitting – and when I say small people will say Mr Zuma is not small, Chair lawyers we think our environment is easy, because we are here every day, everyone who is not a lawyer is small in an environment like this, intimidating. It is only nice to those who see their enemies squirm, but to a person who is an ordinary citizen to sit in this room is no ordinary task and so sensitivity I wish you could bring that as an element that really, really pricks, that should guide how we deal with the apprehension of bias, that judges must be sensitive even if they are correct, and all of these things you say here by the way Chair, I am not suggesting they are wrong, I am not suggesting you shouldn't believe them, but we don't express everything we believe. It is the reason we don't tell our grandmother her cookies are not nice, we just don't want to hurt them.

So sensitivity is an important component of how to deal with small people in a powerful environment with a Judge.

Chair all of those codes, because Chair if – I don't want to – I assume you have read them.

CHAIRPERSON: I have read them, I can assure you.

ADV SIKHAKHANE: And Chair what I want to do so that I don't take you through each one of them, I didn't come

here to tell you, you spoke, is that that entire area in which we traverse your comments I invite the Chairperson to look at them the way you have just phrased why there is a need for sensitivity in an environment of this nature.

And Chair I want to suggest that we ask you to recuse yourself, mindful of the crisis it would create for this important task, and I said to you we have two reliefs in our notice of motion, the second relief may seem contradictory to the first one because of course we always put this as lawyers further and alternative relief. Chair it is put more sincerely than we do it as lawyers out there, because we – when I say we I think my client acknowledges this – he takes this stance reluctantly, he takes it because this place, even when he is ill did not seem to believe him, it did not, they wanted to let's see the doctor and so in a way it may not have been the intention of the Commission, but when you say to someone now you say you are ill I want to check your doctor.

CHAIRPERSON: But I think we must talk a little bit about that because I saw in correspondence and the affidavit that I am accused of having disbelieved or not believed that Mr Zuma was not well, and yet my recollection that I never said anything that suggested that I didn't believe it Your referred earlier on to the fact that I reluctantly agreed to the offer to meet with the leader of his medical team. That

reluctance I think was mainly about whether we should go that far, but my understanding was that the – Mr Zuma and his legal team wanted that to happen, but I expressed my reluctance even when we came back, we discussed in chambers but when we came back in the open hearing I pressed that reluctance but I said I'd accept it.

ADV SIKHAKHANE: Yes Chair, no let me do this, let me say that I am – I don't think it will be fair to accuse you of having disbelieved him, I think if that was put in some – I don't think it is as clear as that, I think Chair it is a series of things in how he is treated when he says he is here. Mr Zuma won't be believed even I say he collapsed here, they will say he faked it, and so in a way you are dealing with the a situation where I think that reluctance of yours to do this, as much as it may have been misinterpreted, was that it was clear that saying Mr Zuma isn't ill does not convince a judge or those in the forum and therefore that offer was made to say you know we don't know if judges don't believe when a former head of State says he is ill, when a doctor puts up something to say so, from the State, well they may as well have a meeting but I accept Chair that on its own I wouldn't like to question that because you did say you were doing it reluctantly and I think you are reluctant – I would like to view as having been in good faith rather than in bad faith, but Chair you will ...[intervenes]

CHAIRPERSON: Yes, yes.

ADV SIKHAKHANE: And Chair so all of these comments that I want the Chair to look at, I raised them because I think you have helped me with the case now, that I think a lot of them, my submission is that a lot of the comments you made about which Mr Zuma complain may not be because maliciousness does not fit but may have been insensitive in circumstances of a witness who has come to what he believes is a slaughterhouse, reasonably so by the way.

And so Chair I am not raising this lightly, I am raising, I made an example earlier Chair the difficulty of representing Mr Zuma and for him to be believed a judge in this country has questioned my integrity in court for representing a client, it never happens to a white lawyer, but it happens to me and I am saying that on its own creates circumstances for him that he is disbelieved. I have just told this Commission now that our second remedy, I mean relief demonstrates that this is an act of frustration with the process, but it is no act of defiance of you Chair or this country and its citizens who need to know what it seeks is to correct an environment that I think has been distorted by your comments and sometimes the excitement that I have seen when people cross-examine someone they think is a scum, and I think an environment

must be created for you because Chair I don't care about the people who sit in this commission behind the scenes. When this Commission is reviewed Chair us who are close to you, who have known you rise as a brother you will be criticised, not them, not the agenda they are pushing behind the scenes, ethnic of racial, it will be you who will be criticised and they will run away and we will have to defend you, and the point I am making is this, I am asking you Chair to look at your comments but the second relief we seek there I am asking you in your thinking about how do we remedy this situation I said to Mr Pretorius I am prepared to sit with him and look at how Mr Zuma can have an environment here where the citizens who deserve his version can hear it and I would like you Chair to creatively together with all of us look at that remedy and see even if you accept that some of your comments may not have been appropriate or may not have been sensitive I am asking you in that second relief to look at creating an environment not just for Mr Zuma maybe for others to come here and feel they are not accused, and that is why I said to Mr Pretorius when lawyers sit and talk about remedy we do that because we want to assist the judge to come to some sort of conclusion that is just and equitable.

As I said earlier I can sit down now Chair and you blow me and I will review you and it goes nowhere, it will

be the end of Mr Zuma or I bring him here and tell him to sit there and say nothing and that is a stalemate I can do, but it is unconstructive and I want you to look at the second relief and see having considered the things we have said and Chair I would like lastly to look at the statement you made this morning and see whether it is important for me and my client to look at this version, and then we will tell you probably tomorrow or any other time.

Chair I thank you for giving me this time, it is a difficult task, probably no one has said to us the second in command in the judiciary, judge you are doing a good job.

CHAIRPERSON: Well I can tell you that in two and a half months time I will be finishing 24 years on the bench and this is the first time an application is brought for me to recuse myself, but it is brought by you, but you know there is nothing wrong with an application for recusal when people feel aggrieved, it is a remedy that is available and should be considered so – but I was just saying that in 24 years this has not happened, but there is always a first time.

ADV SIKHAKHANE: Chair in 20 years of practice I haven't been asked to ask someone I know, I come from the same village with, to recuse themselves, so I thank you for giving us the opportunity and those are our submissions and we are pleased to have discussions. There is an

affidavit we gave Chair to the extent that we take the technical approach about whose version in terms of Plascon Evans should prevail, I will hear Mr – it is there, but I would like some time to look at your statement.

CHAIRPERSON: No, no that is fine, we are ten to one, thank you Mr Sikhakhane, thank you very much.

ADV SIKHAKHANE: Thank you so much.

CHAIRPERSON: Thank you, thank you. Yes Mr Pretorius?

ADV PRETORIUS SC: Chair may I suggest that we take the long adjournment now and come back when you direct.

CHAIRPERSON: Ja, okay it is ten to one, let us take the lunch adjournment and then come back at two.

ADV PRETORIUS SC: Thank you Chair.

CHAIRPERSON: Yes, we adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: I am sure you are ready Mr Pretorius.

ADV PRETORIUS SC: Yes I am Chair.

CHAIRPERSON: But I am going to ask Mr Sikhakhane to come back so that I can raise certain legal issues with him and then he will come back later.

ADV PRETORIUS SC: Thank you Chair.

ADV SIKHAKHANE: Yes Chair.

CHAIRPERSON: I am sorry to bring you back when you thought you were done.

ADV SIKHAKHANE: I thought I had a second chance.

CHAIRPERSON: I noticed that you paid particular attention to your prayer number 2.

ADV SIKHAKHANE: Yes Chair.

CHAIRPERSON: In the Notice of Motion. May – I have some questions about prayer number 1 and this is the question and I think from your address I could tell that you do expect me to ask certain questions about it.

The question is whether as a matter of law recusal for the Chairperson of a commission who is the sole member of the commission is competent? So some commissions you have got two or three members of the commission as a panel.

It may be that if there is a witness who feels that a particular member of that panel is biased that that witness may apply for the recusal of that member for the duration of his or her evidence. But even there it may be that it cannot be done but maybe it is a better situation. But where you are dealing with a situation such as that of this commission where the commission consists of one member – sole member if I recuse myself what happens?

ADV SIKHAKHANE: Chair I did not think it was my decision but it is fine. I think Chair it is a difficulty you had when you

were asked here about Advocate Soni. You were exactly in my situation because he did not know whether to ask him to sit down then.

CHAIRPERSON: Ja.

ADV SIKHAKHANE: Or wait for him to make a judgement.

CHAIRPERSON: Ja. Yes.

ADV SIKHAKHANE: Well let me start here. That is why we have spoken about how this commission was formed. Is that Chair ordinarily I am surprised that a commission of this nature in this country probably the biggest after the TRC has – only has one person. That on its own was a political blunder dare I say but this was made by Judges.

I think to have one person in a matter that is so vulnerable to contradictions like the one that has arisen should not have been done. As I said earlier the solution to something like that is that it would – it would really relate to the evidence that – I mean – that relates to Mr Zuma.

I do not know what Chair would you do? But it is competent there is – I cannot be stopped from raising a recusal application simply because you and the President do not know what to do with – let us say you find in my favour. It is truly something you and the President must look at as to – let us say I am correct on my grounds.

But that is why Chair – so I do not know what you would do. But it does not nullify my grounds if they are

good.

We put number 2 there Chair out of – I think it is not mine it is Mr Zuma himself who puts that because he says I do not want to destroy this commission. Is there no way where this can be done and all of this?

So we put number 2 purely out of his own sense of responsibility and I think it solves that problem Chair we can work around how do we make sure that the close to R1 billion paid here for this is not for nothing.

So I think Chair I do not know the answer but what you and the President would do if I am good on my grounds and I do not want to offer the solution.

But I think if you looked further in the reliefs we seek you will see that we have not shut the door. The stalemate I spoke about is a stalemate that I can do for my client. And it is a stalemate but we do not want to go there. And so I think Chair in crafting your order even if we are right or even if we are wrong I would still plead with you that craft it in a way that does not sink this commission. That is my answer.

CHAIRPERSON: Yes, no, no.

ADV SIKHAKHANE: But legally my recusal cannot be incompetent because you and the President do not know what to do if you are wrong and I am right.

CHAIRPERSON: Well you see it might not be a question of me and the President particularly in the context of this

commission. Maybe the same issues would arise with another commission but this particular one because remember that the – the remedial action the Public Protector said that the commission which would investigate all of these issues must be chaired by a Judge selected I think solely by the Chief Justice obviously appointed by the President.

Now you said earlier on that you referred to the fact that maybe the commission should not have consisted of one member because of its importance.

When I – when I – after I had been appointed I applied my mind to that issue to say this is a very big commission should I request the President to appoint others members maybe one or preferably two members of the commission so that I am not the only one. And when I considered whether to make such a recommendation or request the problem that I foresee was that if there were two members added it could result into a situation where when the report is made the member of the commission that had been selected in accordance with the remedial action of the Public Protector could be overruled by the members of the commission who had never been contemplated by their remedial action and that could cause problems.

And then of course there was the question if you make it too there could also be challenges. And of course there is the issue that we are not just dealing with what the

remedial action of the Public Protector said there is an order of court which reinforced that remedial action.

So there is an order of court effectively which says – which said the President must appoint a Judge selected by the Chief Justice. So if I were to for argument sake say I think Mr Sikhakhane has made out a very good case for recusal I must recuse myself that means that there is a vacuum or do I say okay what should happen? Should another Judge be appointed to hear Mr Zuma's evidence and then the question is how would that work because I am the one who has heard other witnesses who may have implicated him. How does it happen now if another Judge is going to hear his evidence responding to those witnesses who were heard by me? Will that Judge have to re-hear those – it becomes complex.

And of course the President even the appointment of that Judge who must appoint that Judge because if the President appoints there might be a question whether that is proper given that the remedial action did not have that or that is not proper. There may be all kinds of argument.

So there are those issues and I think part of what you have been saying you have said to me is; is that it may be that a recusal would collapse the commission.

So you – you then say to me but Chair if my client has got good grounds to complain that you may be biased;

that he fears that you may have made up your mind on certain issues what happens?

It may be that the answer in circumstances such as these is this one and one would accept that it might not be the best answer. It may well be and you must just indicate what you – what your submissions are that in a situation such as this you are expected as the aggrieved witness to complain later in a review application because if you complain later in a review application maybe if you are successful the court can set aside findings that relate to you if nobody else has complained the other findings stand.

I am just thinking aloud and I would like us to look at it. I know you have thought about the issue.

ADV SIKHAKHANE: I have.

CHAIRPERSON: And that is why I – I want to benefit from ...

ADV SIKHAKHANE: Ja. Chair

CHAIRPERSON: Your submissions.

ADV SIKHAKHANE: Let me start with the last one that I may review later therefore there is that option. The reason I would not accept that option not me I am saying it would not be acceptable in a legal process like this is that you making your problem mine in the sense that because there is a conundrum my grounds to come before you must be regarded as incompetence simply to make things convenient for you.

I do not think that would be the best way to look at it but it is an option available. But it does not help because it will not deal with the problem and I have no desire that this commission be collapsed because it is very important.

The other thing Chair what you are asking me now is truly what I have been trying to say to Judges to no avail. There is something wrong with how this thing was established. It was not thought through. It was politically motivated in the thinking and the challenges you and me face now are challenges caused by the fact that those who thought about this thought about sinking Mr Zuma and nothing else.

And I think if we get those out of the way one of the things to be done for a process like this like we would in a court if we are responsible is to say, maybe in some respects Chair I am correct in my grounds. And maybe in some respects I am not so correct. Could we collapse this commission simply because it is a draw between you and me? And maybe the – let me call it the third way.

Maybe the third way is to look at – because this is not a court you can craft things to save this as we – as we want is what can we do to ensure that Mr Zuma not accounts because it is wrong to say a commission is a place of accountability. Professors say this out there; they have never been inside a court.

Basically it is not a place of accountability but it is a place of explaining to the investigator that is you and if we create an environment in which and we can talk about this – I can talk to my client. What is the best way of doing this in such a way that we are responsible in the national interest not thinking politically? And I think – may I make this – because Chair we never did – we have been accused – I heard you saying we did in five things.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Can I tell you Chair that we were on page 200.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Of the submissions to you when he hit Covid; lawyers were changed.

CHAIRPERSON: Oh yes.

ADV SIKHAKHANE: And the situation but basically we not here to disrupt this place. We were willing – we can produce 500 pages for you of his perspective but we had to place before you the fact that we believe that in some of your comments and the environment that we think are politically driven not by you but other people. You create an environment where politics contaminates a legal process.

And so if there is a way of doing – and you will craft it you are good at this – you are better than me at this – at crafting what alternative just and equitable way forward can

be created that Mr Zuma can cope with if he is right on his grounds.

Of course if he is wrong on his grounds he will blow us. So I think that relief be Chair tries to deal with this problem that was always going to arise when a commission is created for the purposes it was created.

And so I put it here to this commission that it is a discussion I have raised it with Mr Pretorius; I have raised a bit with you on remedy that let us look – none of us are perfect in this process and so let us – if we look at it that way there may be possibility of creating an environment in which submissions can be made if you heed that.

But if I am right on my grounds on all of my grounds of course I would like to [00:17:17] them.

CHAIRPERSON: Ja.

ADV SIKHAKHANE: But Chair.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Relief number 2 is truly –

CHAIRPERSON: [Inaudible talking over one another].

ADV SIKHAKHANE: But it is not because the first one is incompetent.

CHAIRPERSON: Yes ja.

ADV SIKHAKHANE: And it cannot be incompetent because you are – you have a conundrum. There has got to be another reason why the relief is incompetent rather than to

say I do know what to do?

CHAIRPERSON: Yes. Yes.

ADV SIKHAKHANE: Thank you Chair.

CHAIRPERSON: Okay no that is alright. So maybe let me hear Mr Pretorius and it may well be that after I have heard everybody there might be a need for a discussion irrespective of what would happen with the application.

ADV SIKHAKHANE: Chair thank you yes.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Two discussions will happen Chair as I have said I really need to take instructions about your earlier statement.

CHAIRPERSON: Yes, yes.

ADV SIKHAKHANE: And all of that. Probably tomorrow I will know but I will try not to waste any time.

CHAIRPERSON: Yes. Yes.

ADV SIKHAKHANE: And then there may be a discussion about what relief gets us out of here as lawyers.

CHAIRPERSON: Yes.

ADV SIKHAKHANE: Because we here now we do not know what political people were thinking when they created this but we here now we have got to give this process the integrity it deserves without disrupting it.

CHAIRPERSON: Okay thank you Mr Sikhakhane.

ADV SIKHAKHANE: Thank you Chair.

CHAIRPERSON: Mr Pretorius.

ADV PRETORIUS SC: Thank you Chair.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: Firstly in response to the discussion that has now taken place I would obviously like to think about it and

CHAIRPERSON: Yes.

ADV PRETORIUS SC: Prepare an answer for you.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: But our initial view is clear Chair that if there are grounds for your recusal you must recuse yourself. There is no halfway in these circumstances where you can negotiate how to proceed with a particular witness despite the fact that that witness has proved or shown that you are guilty of such bias as to warrant recusal. I am afraid in that sense if you are however guilty of bias then there may be room for dealing from a practical point of view but we would need to think very carefully about treating a witness differently from another witness simply because they might be implicated or have fears about what your final findings might be.

So let me think about that and we will come to you Chair.

Chair I am afraid there is another matter that I must deal with and that is the reply that was served on us this

morning.

CHAIRPERSON: Sorry Mr Pretorius. I am not sure – not completely sure that you are right and Mr Sikhakhane is also right when you say if a witness has shown that in this case there is a reasonable apprehension of bias I should recuse myself. That it always follows it cannot be otherwise.

The reason why I am raising that is that we – we all know that there are circumstances where somebody – a Judge who is disqualified from sitting is allowed to sit because there is no other one who will not be disqualified to sit the doctrine of necessity.

ADV PRETORIUS SC: Yes Chair.

CHAIRPERSON: So – so I am – I just want to raise that because I do not want you or Mr Sikhakhane to necessarily think that I accept the proposition that if we reach a point where it was to be said that there are reasonable grounds. It seems to me on the fact of it and now I am talking principle – it seems to me that you may well have a case where you say well you have to sit conflicted as you are if you talking about conflict and you just have to do your best to be fair. I mean you – we – we know cases where judges hear cases dealing with legislation; dealing with their own salaries where they are all conflicted because this legislation is about their benefits. But there is nobody else whoever hears the case has to be a judge. So they have to do the

best they can to – to be fair and to disregard their own interests and give judgments.

ADV PRETORIUS SC: Chair we are not here dealing with the conflict of interest.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: We dealing with a notion of situation where it has been shown that you are guilty of bias in relation to central issues Chair.

CHAIRPERSON: Hm.

ADV PRETORIUS SC: Let me put it this way. Subject to the doctrine of necessity and we will address you on the doctrine of necessity because it is part of our approach and it is in our heads of argument. That is a separate issue.

But certainly the solution cannot be given the principles that apply it cannot be that you can then negotiate with a particular witness in a particular situation ...

CHAIRPERSON: Leave out negotiate. Leave out negotiate.

ADV PRETORIUS SC: Well you do not negotiate.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: But that is the invitation. The invitation Chair is let us talk about a different solution other than your recusal on the basis that you are guilty of bias in respect of that particular witness. For us we have difficulty with that proposition but we will deal with it in due course.

CHAIRPERSON: Ja. Okay. No that is fine.

ADV PRETORIUS SC: Because there are – there is not one person with an interest in the proceedings that are before you.

CHAIRPERSON: Of course.

ADV PRETORIUS SC: There are hundreds and there are thousands and any one of them might come and say but you were conflicted you proceeded and you treated that witness with some special dispensation notwithstanding that you accepted that you were guilty of bias in respect of him.

It raises all sorts of problems for a later review which you have been told Chair is coming. In any event Chair may I move on? We will address you properly on that.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: And we do not act or take issue with the principle of necessity that even though you may be conflicted but that is a matter of general application involving or not necessarily one witness who complains of bias.

Chair we were served with a replying affidavit this morning. My learned friend said we do not have to worry about it but I am afraid unless it is withdrawn we do have to worry about it because in it the applicant makes allegations firstly that the secretary is not authorised to depose to the affidavit and the legal team is not authorise to intervene in this matter. So that – there are two allegations.

One that and if I may refer you; do you have it before you Chair.

CHAIRPERSON: Yes I do.

ADV PRETORIUS SC: If you go to paragraph 14 line 4 takes issue with the fact that the legal team is defending this application. It says:

> "The fact that they have installed themselves as my opponents disqualifies them from performing the functions expected of them leading evidence."

Now whether that is without merit or with merit is something that we can address.

The allegation is made in paragraph 15 that the second respondent has no legal standing.

Then paragraph 23 complains that the second respondent was assisted by the legal team.

Paragraph 28 it is denied that the second respondent that is the secretary has any authority whatsoever to depose to the answering affidavit and is challenged to provide authority.

CHAIRPERSON: But the whole concept of respondent in this application ...

ADV PRETORIUS SC: Well the second respondent was cited as a respondent.

CHAIRPERSON: Well both the first respondent and second I

did not raise this with Mr Sikhakhane because it did not occur but at a practical level it might not mean anything you know. My understanding is that if you bring a review application for a – an application for recusal before the particular presiding officer that precedent will say it is not a respondent. You do not cite them as a respondent. You cite them a respondent when you go on review to set aside their decision not to recuse themselves.

Of course the secretary I am not sure...

ADV PRETORIUS SC: Well Chair.

CHAIRPERSON: Why would – why they would come in.

ADV PRETORIUS SC: In essence if I may go on to paragraph 82 it says:

> "That neither the second respondent – well the second respondent has no basis or authority to respond to the recusal application."

And then paragraph 89 it was neither for the second respondent nor the legal team to respond to the recusal application.

Chair the basis – as a matter of fact both the secretary and the legal team have been given instructions by yourself to deal with the matter in the way it is being dealt and perhaps that should be placed on record that may deal with the situation.

My fear is that if the situation is not dealt with and you then rely on statements made without authority in the answering affidavit and you rely on submissions placed before you by the legal team then there may be a problem if it turns out that their status to deal with the matter before you is not clarified.

So I raise the matter so that it can therefore be clarified either by a statement by yourself that you direct us to act as we have done as you have already done as a matter of fact and clarify the matter or Mr Sikhakhane who says that we need not have worried about the affidavit can just withdraw the allegations in the affidavit and we can proceed. But I do think the matter needs attention.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: I do not want it to be brought up at a later stage.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: Not having been dealt with.

CHAIRPERSON: Yes. Well I think proceed and Mr Sikhakhane will still come back and reply so he can indicate what his position is.

ADV PRETORIUS SC: So then, do we have your assurance, both the secretary, so I can rely on the answering affidavit, and the legal team that we are acting under your direction?

CHAIRPERSON: Yes, you are.

ADV PRETORIUS SC: Thank you, Chair.

CHAIRPERSON: H'm.

ADV PRETORIUS SC: Chair, having listened carefully to my learned friend, whose submissions before you ranged from detailed submissions of fact and reference to the record, through to allegations of political conspiracies and the like.

Fortunately, our approach is that the law will provide an answer. Fortunately, in situations like these, however contested and by whatever extreme views they may be contested on either side, the law does provide an answer and we will deal with it by reference to legal principles and facts.

At the outset Chair, listening to my learned friend in his address. It was difficult where we need to draw the line between what the case being brought before you for recusal was and what the case was not.

First it was clear that – and it is necessary to draw that line because I think in attempting to draw that line and to understand where the case of the applicant lies in respect of that line, there may be an answer to this application.

Firstly, it was no indication of actual bias. As I understood my learned friend. He did not say as a matter of fact you are bias. He did not doubt that – the applicant does not doubt your integrity.

On the contrary Chair, he insists that the recusal

application is brought precisely because he believes you as the Chair has the capacity and the integrity to, here on out, to hear contrary arguments and to come to a fair decision.

In other words, you have, on the version of the applicant, the ability to be persuaded by argument by facts put before you notwithstanding what it might be said your views have been, as expressed on the record.

Secondly Chair and crucially, it is not being alleged that at the end of the day the Chairperson will not be open to persuasion. That is not part of the case.

It is not being alleged that you are not open-minded in your approach to the evidence and you may not been persuaded, in good faith, to come to a particular conclusion one or another.

In fact, as we understand the argument, that claim has been disavowed. It was unequivocally stated in my learned friend's address that there is no allegation that you have pre-judged the matter.

On the contrary. As I understand the address. You have been reassured that the applicant has no doubt that you are able to be even-handed and impartial in your assessment of the evidence.

The problem is, says the applicant: From what I have seen and heard, I have an apprehension that I will not be treated fairly and I have an apprehension that my views will

be rejected and other views will be accepted in their stead.

And that is something different Chair. That series of submissions and concessions as a matter of law, takes the case below the bar for a recusal application because that set of allegations does not pass the test.

The apprehension of adverse findings, the reaction to comments from the record, is not relevant in the assessment of bias Chair. The test is not in what you have said.

The test is, has or will your conduct show that you cannot bring an impartial mind to bear on the evidence? That is the test.

In other words, before you will be able to recuse yourself Chair, you must be satisfied that you cannot, and it has been shown that you cannot, and it has been alleged that you cannot bring an impartial mind to bear on all the evidence, once you have assessed all the evidence.

It is not an enough to say, for an applicant to say: In my possession as a victim of a conspiracy, I fear. That is not enough. And I will come to the detail of that in due course.

So whether a reasonable person might apprehend that you might make adverse findings, given what you have said on the record, does not pass the test.

So Chair, the test which has been stated in the authorities is clear. It is: Will you or will you not bring an impartial mind to bear, a mind open to persuasion by the

evidence? Ultimately, Chair.

When you have heard the evidence, all the versions, including the versions of the former President. That has not been alleged and on the papers, nor do I understand it as having been alleged in the argument.

So in the SACCAWU case upon which my learned friend relied Chair. It was said by the Constitutional Court:

> "Absolute neutrality is something of a shimmer in the judicial context. This is because judges are human.
>
> They are unavoidable the product of their life experiences and the perspective thus derived inevitable and distinctively informed each judge's performance of his or her judicial duties but callous neutrality which is the standard (of which is being demanded of you Chair), stands in contrast to judicial impartiality which is the test.
>
> So impartiality, importantly, is that quality of open-mindedness, open-minded readiness to persuasion without unfitting adherence to either party or to the judge's own predilections, preconceptions and personal view.
>
> Impartiality, thus, requires that judges will be able to disabuse their minds of any irrelevant personal believes of dispositions."

Again, not alleged. Again, certainly not shown on the papers. And as I understand my learned friend's argument, not put before you.

So the plan before you Chair is not that the Chairperson's mind is made up and not open to persuasion. It is not been said to you Chair that what you have said is not open to being persuaded that you can change your mind.

If that is the case, the test will of recusal is not met. In that case, there is no ground of the reasonable apprehension of bias but merely an apprehension by the applicant that adverse findings may be made against him.

We will deal with the detail in relation to the tests and where the bar is and if the case put before you actually reaches that bar or not

Chair, you have before you our written submissions but before going to ...[intervenes]

CHAIRPERSON: Well, I am not aware that I do have. Are they here?

ADV PRETORIUS SC: No, I am just told you do not have Chair. I presume that you would have been given. It looks like everybody else has been given.

CHAIRPERSON: Do I have Mr Sikhakhane's ones as well because I saw him reading from a notebook. I assumed he did not have any but I do not know. Mr Sikhakhane, do you have them?

ADV SIKHAKHANE: Chair, I am so sorry. We do. Okay. I will leave a copy for the chair.

CHAIRPERSON: Okay thank you.

ADV SIKHAKHANE: Yes, I will leave a copy for the Chair.

CHAIRPERSON: Thank you. Thank you. Okay. Yes, Mr Pretorius.

ADV PRETORIUS SC: Thank you, Chair. In the first section of those heads of argument we summarise what the contentions of the legal team are in this matter.

The first point is that the burden rests on the applicant to show bias or reasonable apprehension of bias. It is the law, as my learned friend has conceded, a heavy burden.

Secondly Chair, the test for bias is objective. It is not what the applicant fears. It is not what the applicant thinks. It is what a reasonable observer would reasonable conclude. Two hurdles to overcome in relation to reasonability.

CHAIRPERSON: I think SARFU says: Reasonable, objective and informed.

ADV PRETORIUS SC: On the correct text, yes.

CHAIRPERSON: Ja, on the correct...

ADV PRETORIUS SC: So it is a reasonable observer ...[intervenes]

CHAIRPERSON: H'm.

ADV PRETORIUS SC: ...making a reasonable conclusion, looking at the correct facts. It is not based on conjecture,

conspiracy theories and the like. So it is based on correct facts and it is based on reasonable observation and it is based on reasonable conclusions made by that reasonable observer from those facts.

Chair, as far as the relationship between the applicant and the Chair is concerned. Again, it is not entirely clear what the case has but practically speaking, any reliance on that grounds seems to have been disavowed notwithstanding the claim in paragraph 15.1 that you should not have accepted the position as chair.

It seems that the applicant has contrived his recordal to the historical, professional and personal relationship between yourself and the applicant. There is no allegation to link those circumstances to bias. Nowhere is it said ...[intervenes]

CHAIRPERSON: I may have misunderstood Mr Sikhakhane. I got the impression that he was not relying on that but maybe he was. Maybe you should address it in case ...[intervenes]

ADV PRETORIUS SC: No, Chair I do not intend to go into any detail.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: Simply to point out that there is no allegation that links any relationship, professional or personal to any allegation of bias.

There is nothing that says because you know the former President. Therefore, you will be bias for whatever reasons and the like. It is just an allegation in the air.

Ultimately, Chair the applicant relies on the record of proceedings of the Commission to date Firstly, he complains about the selection of witnesses and says this shows bias.

In oral submissions before you, the allegation seems to have changed somewhat into the order of witnesses because I think, having read the answering papers, it must be conceded that having called 257 witnesses, it could not possible be said that all those witnesses have been called according to a predetermined plan or project Chair.

But what is worth noting is that amongst those 257 witnesses that have been called, is the son of the former president, Duduzane Zuma, Ms Dudu Myeni and others who clearly do not fall into the category of witnesses that has been put before you as being a category of witnesses, and we do not admit that for a second Chair.

But as we will address you Chair. The selection of the witnesses in the order because that appears to be the complaint now that they record, is logically explicable by the mandate that you were given.

You were told Chair to investigate the allegations called as relevant in the Public Protector's report. You were told to use the Public Protector's report as your starting point and

you did that.

Having heard those allegations, the scope of the inquiry then, inevitable, widened and very, very early on, in 2018, you approached the former president for a version in respect of the evidence that have begun to be led. Without explanation, there has been no response to that.

Chair, then the applicant relies on the exchanges between yourself and the witnesses during the course of hearings of the Commission and very selective passages are relied on we will deal with some of them.

The applicant's accession reveals two aspects, however. First, we submit to you that there is a lack of appreciation of the duties of the Chair in an inquisitorial setting.

It is your job Chair, not the job of the legal team, to interrogate witnesses, to put versions to them, to make sure you understand what their version is and to highlight what issues of concern you have, not only for that witness but for other people observing the proceedings who might or might not be implicated. If you did not do so Chair, you would be failing in your duties as Chair of an inquisitorial proceeding.

Secondly, Chair, the selection of passages shows clearly a misreading or a misunderstanding of the very passages relied on and we will go there to show that. Ultimately, there is nothing in the record that remotely approaches bias or a reasonable apprehension of bias.

Put differently Chair. If the applicant hears the proceedings or reads the record and conclude that adverse findings might at some future date be date against him, that is no ground for recusal.

And then there is no merit in the remaining grounds, some of which were advanced in argument, press statements, matters related to the medical admission and the like and we will deal with matters related to the medical condition and so-called press statements or press conferences which did not happen.

Then Chair, the applicant also appears to suggest that you, somehow, been dealt harshly or unfairly because this Commission is insistent on him appearing to testify.

Again Chair, it is important for all to understand that this is not an adversarial process such as a criminal trial or a civil trial, where if a party remains silent, the other party wins or the party remains in silent might face a conviction if it is a criminal trial.

This is different. This is a commission of inquiry. Here the Commission must deal comprehensively with its mandate and its Terms Of Reference as an inquisitorial body. In short. Mr Zuma must be heard and his version must be considered. Why this should constitute bias, we fail to understand Chair.

If one looks at page 83 – paragraph 83, rather Chair, of

the answering affidavit.

CHAIRPERSON: That is different from – that page number is different from the paginated number.

ADV PRETORIUS SC: Yes, Chair the Commission paginated the papers. So my learned friend, and although they got an electronic copy, we have, for convenience, both been referring to paragraphs, rather than pages.

CHAIRPERSON: Oh, okay. Okay.

ADV PRETORIUS SC: But if I may follow that?

CHAIRPERSON: Okay.

ADV PRETORIUS SC: We accept the fundamental basis of the application ...[intervenes]

CHAIRPERSON: I am sorry. I am trying to locate the answering affidavit. Is that in the ...[intervenes]

ADV PRETORIUS SC: Sorry, Chair.

CHAIRPERSON: ...the red file?

ADV PRETORIUS SC: Yes, it will be in the red file at the back.

CHAIRPERSON: After what – which divider?

ADV PRETORIUS SC: After the first divider, I would imagine and it is a page red 78 Chair, if that helps. But it is paragraph 83. That is how I will refer to both.

CHAIRPERSON: Are you able to give me the paginated number, the red numbers?

ADV PRETORIUS SC: Yes, 78 Chair.

CHAIRPERSON: 78. Oh, I thought you said the answering affidavit. 78 is the applicant's founding affidavit. So I was looking for the wrong ...[intervenes]

ADV PRETORIUS SC: Sorry, I am talking about the answering affidavit Chair.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: If you bear with me for a moment?

CHAIRPERSON: Okay I have got it.

ADV PRETORIUS SC: Sorry, if I may just refer you to the answering affidavit. I gave you the incorrect reference. My apologies.

CHAIRPERSON: [No audible reply]

ADV PRETORIUS SC: What is important Chair about the necessity ...[intervenes]

CHAIRPERSON: What is the right page or paragraph?

ADV PRETORIUS SC: Page 665 Chair.

CHAIRPERSON: The red numbers?

ADV PRETORIUS SC: Red numbers, 665.

CHAIRPERSON: No, Mr Pretorius. I think your team did not put in the answering affidavit here. I have got 646 here, 647 and then the next is 697. There is something missing. I read it last night. So.

ADV PRETORIUS SC: Yes, Chair. The simple thing ...[intervenes]

CHAIRPERSON: But you can ...[intervenes]

ADV PRETORIUS SC: ...what has been raised before and you are familiar with the ...[intervenes]

CHAIRPERSON: Ja, I am familiar. You can read it.

ADV PRETORIUS SC: It is not sufficient for the applicant to say: I have seen several Rule 3.3. notices. I have elected not to respond to those notices. Because, he says, he is not implicated by them.

He does not have to answer, which is quite a different proposition to the proposition that we now hear about those witnesses, who quite apart from conspiring to harm the former president, have given, what appears in essence, a set of false submissions or evidence.

But be that - that contradiction is there for the record among others, they implicate the former president or they do not. If they implicate him, as it appears to be the very basis of the recusal application, your comments on that evidence.

Then they should have been dealt with through applications for cross-examination and to put the version. At least, that opportunity was open to the former president. He could have done so. He elected not to do so.

But where the former president does not have an election in relation to evidence is when he is summonsed to do so, either in terms of Regulation 10.6 or in response to a summons.

There is no question of an election and your reason for

calling the former president is manifest and it is necessitated by your mandate Chair. You have to hear his version. It is necessary for you to properly complete your work.

There is no bias in that approach Chair. You are obliged, with respect, to do everything within your power, lawfully within your power to compel the presence of the – the appearance of the former president and to hear his evidence.

Chair, if I may turn now to the written submissions and go immediately to the legal principles which I have averted to in the introduction and my learned friend has relied upon the South African Rugby Football Union case which is a binding and clearly set of principles.

The test is highlighted in paragraph 14.

> "The question is whether a reasonable, objective and informed person would on the correct facts...

I am sorry Chair. Do you have it? Paragraph 14?

CHAIRPERSON: I have got it ja.

ADV PRETORIUS SC: Yes.

> "The question is whether a reasonable, objective and informed person would on the correct facts, apprehend that the judge has or will not bring an impartial mind to bear on the adjudication of the case. That is a mind open to persuasion by the evidence and the submissions of counsel."

Whatever you say and whatever *prima facie* views you may held, not the test. The test is whether, at the end of the day, you are still capable of being persuaded and you have an open mind in that regard.

That test is established against the background of the presumption. We deal with that in paragraph 15, the *Irvin and Johnson* case, *SACCAWU and Irvin and Johnson*.

Again, my learned friend relied upon that, the decision of the Constitutional Court. The first point is that:

> "In considering an application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating complaints."

It that presumption that must now be displaced. Firstly by allegations and secondly by a convincing argument that you Chair will not retain an open mind. We do not think that that submission has been made at all.

The second is that"

> "Impartiality does not entail absolute neutrality. That is rather the quality of open-minded readiness to persuasion."

So if no case has been made out or you remain unconvinced Chair that you cannot be persuaded, you do not have a discretion. You may not recuse yourself particularly in these circumstances.

There is a double requirement of reasonableness.

> "Not only must the person apprehending bias be a reasonable person but the apprehension itself must be in the circumstances reasonable."

In other words, its objective on two grounds. Firstly, objectively speaking, there must be an apprehension of bias, not subjectively speaking. Not based on – and we will show ironically subjective bias – but based on objective correct facts.

And secondly, that apprehension must also pass the test of reasonableness. We deal in the next section Chair with the presumption of impartiality.

And in paragraph 19.2 of the heads we say that that presumption is not easily dislodged. What the case has said is that it requires cogent and convincing evidence for that presumption to be rebutted.

Then we make the point in paragraph 21 Chair that impartiality does not entail absolute neutrality. Impartiality does not require absolute neutrality but rather an open-mined readiness to persuasion.

So Chair, a judge can have views. A judge can express those views. That is not the rest. As long as that judge is capable of being persuaded to a contrary view or to his own view, that passes the test and defeats any reliance on bias or presumed bias.

So the Constitutional Court in *SACCAWU* emphasised:

> "Callous neutrality stands in contrast to judicial impartiality. Impartiality is that quality of open-mined readiness to persuasion. Impartiality requires, in short, a mind open to persuasion by the evidence and submissions of counsel."

And what the extracts of the record show Chair is precisely that. You raise a concern, you raise your interpretation on the evidence. You might even say: I might rely on this evidence or I might rely on the view. What do you say?

And this is where you role Chair as an inquisitor comes in. It is your obligation not to remain silent. You are not an empire who says out or not out. That is not your job.

Your job Chair is to raise. You are the investigator, not the legal team. The legal team is there to assist you. It is your job, if I may say without presumption Chair but this is for the purposes of the argument, not a lecture.

You may say Chair that I should remain silent. I must hear the opposing parties and there are no opposing parties in this matter and I must be – I must decide who is right and who is wrong.

That is not what an inquiry is about. It is your job Chair, with respect, to investigate. To ask questions, to interrogate, to test versions, to put contrary versions to raise your concerns and you have done no more than that.

Chair, then in the next section we deal with the double requirement of reasonableness and we talk about the test for recusal being objective in two respects. It is the reasonable observer making a reasonable conclusion on all the correct facts.

So mere apprehensiveness on the part of a litigant that a judge will be biased, even a strongly and honestly felt anxiety is not enough and what you have before you, Chair, and we will show that by reference to the papers is a hugely subjective assessment of what has occurred in the submission.

So what the law does, it imposes on the fears and apprehensions of an individual litigant in an adversarial context or any witness in this context, it imposes enormative assessment. It says your fear – your apprehension must be tested against two objective requirements of reasonableness based on the facts. It must be a reasonable person, not you, and it must be a reasonable assessment.

Chair, then we go to the application of this test in the context of the Commission and we make the point in paragraph 29, to which I have alluded, that the Commission is a judicial commission, it should not be confused with adversarial court proceedings. This is not a court of law, that is stating the obvious, Chair. It is important to

understand –again perhaps so that this argument and what your duties are can be understood in the public eye, Chair, here there is no dispute brought before you by a party in an adverse relationship with another party. There is no case presented to you which one party seeks to prove and the other party seeks to contradict.

So your job, Chair, in that situation might be to sit back and listen to the parties to weigh up the evidence led and the case put before you by either party and to determine who is right or wrong, not the situation here at all. Your situation, Chair, is as the main inquisitor and, in fact, the only inquisitor, to dig deep into the versions of the parties and to make sure that the public out there know what the concerns are that need to be addressed in this Commission.

So, Chair, when a party remains silent in a civil trial the other side might win. When a party remains silent in a criminal trial, a conviction might follow. You have been invited by the former President, Chair, to make whatever findings you determine in the face of failure to answer the versions put implicating the former President.

But that invitation is not good enough. The version must be put before you before you can say I have done my job comprehensively. It would be entirely second prize for you to accept evidence in the absence of counter evidence

from the very person who claims that he is at the centre of the allegations.

So, Chair, your job would then be in the inquisitorial process to uncover the truth, having heard all the versions so the public can be satisfied that the recommendations you make to the President, which are not binding, by the way, but the recommendations ultimately that you make to the President can restore some public confidence in the institutions and processes of government as a whole.

So, chair, according to the authorities, the Commissioner - and I am referring to the Corruption Watch Arms Procurement case where the court laid down quite extensively the duties of a Commission of Inquiry. The Commission has duty to squarely test the veracity of the evidence before it rather than asking only peripheral questions. You cannot remain silent as enjoined in argument, Chair. It must, subject the account of implicated persons, to rigorous scrutiny in an attempt to arrive at an accurate set of findings. There is not one but there are hundreds of examples of that happening in this Commission.

The same applies to witnesses who accuse others, their version must be tested. If, Chair, you are concerned that a witness before you has given clear and convincing evidence, there is nothing wrong, in fact it is probably your

duty to say so as a matter of concern for others who might be implicated by those witnesses, so they are alerted to the fact that they need to come and give contradictory evidence.

So, Chair, when the Chairperson places on record his understanding of the import of the evidence, both for the witness and for implicated or concerned parties, he is acting entirely appropriately, particularly in an inquisitorial context.

And it may well go further, Chair, you may have an obligation to do so which, if you fail, may lead to questions being asked about the propriety of the Commission's proceedings.

So, Chair, although the test for recusal remains the same, whether this is an adversarial trial or a Commission of Inquiry, the application of the test must, according to the authorities, take place or take account of the specific institutional setting of a Chairperson in a Commission which is different from that of a judge in court.

Chair, I am not going to deal with the allegations in relation to the relationship between the parties, I accept what my learned friend says about the purpose for which those allegations are made in the founding affidavit.

But, Chair, from paragraphs 36 to paragraph 47 the issues are dealt with in detail and of course it bears

mention that all the circumstances relating to the personal relationship were in place long before you were appointed to your current position as Deputy Chief Justice or even before you were appointed to the bench, Chair.

Then, Chair, the nub of the complaint giving rise to the claim for your recusal is dealt with in paragraph 48 and following. The applicant says first the selection of the Commission's witnesses exhibits bias and I must correct that because from my learned friend says, gives rise to an apprehension of bias and it is not just the selection or not the selection *per se* but the order in which the witnesses were called.

Secondly, the Commission has allegedly ignored Mur Zuma's testimony.

Thirdly, the Chairperson has made prejudicial comments against Mr Zuma.

Fourthly, Mr Zuma was treated unfairly during his appearance before the Commissioner.

Fifthly, the Chairperson doubted Mr Zuma's *bona fide* as regarding his ill health, and

Sixthly, the Chairperson's press statements concerning the applicant are justified and exhibit bias. That is a very rough and broad summary but included in paragraph 48.3 are the comments raised in the founding affidavit and our submission is that these grounds for

recusal are simply without merit. Even if taking cumulatively no reasonable person would apprehend bias when observing the conduct and record of the Commission.

We deal in paragraph 50, Chair, under the next heading with the issue of selection of witnesses. The allegation is apparently that the Commission has exhibited bias in – or raised an apprehension of bias in its selection of witnesses and that was qualified this morning to the extent that the allegations appears to be that the order in which these witnesses were called raises an apprehension of bias and of course that concession of necessity had to be made. It was pointed out in the answering affidavit that 257, not 9, witnesses have been called and amongst those witnesses are those who could hardly have been said to have held the type of view that the applicant and his legal representatives pin on the witnesses who have give evidence in the category complained of.

Chair, the first answer to that proposition is that you have done no more than execute your mandate. You were given the report of the Public Protector, you were told to investigate the allegations of the witnesses who gave evidence before the Public Protector, to use the report as your starting point and you did not more than hear the witnesses who - hear many of the witnesses who fell into that category and then began to explore the evidence

arising.

Secondly, Chair, you are dealing with allegations of state capture, corruption and fraud It is necessary for you, with respect, Chair, as an inquisitor, to understand those allegations, you must hear what those allegations about, you cannot make any presumptions as what those allegations are about, you cannot rely on external sources, press reports, what people may say out there, you need to hear first hand and you have done that, Chair.

The logic behind the Commission's work is also clear. Witnesses who give evidence before the Commission were initially at least identified by the investigators in consultation with the legal team and finally determined by yourself. You give directions as to who should be called to testify and witnesses who come before the Commission are those that are called upon to testify after investigation and those voluntarily come forward to testify. Ironically, the former President has not offered himself to give evidence at any stage let alone at the beginning stages of the inquiry.

In paragraph 53 we point out that amongst the 257 witnesses, excluding Mr Zuma, that have presented evidence before the Commission including Mr Duduzane Zuma. There is no complaint that he was unfairly treated, at least that we know of. Ms Dudu Myeni, Ms Nomvulo

Mokanyane, Mr Mosebenzi Zwane, Mr Des van Rooyen, Mr Richard Baloyi. That is a preliminary list. There are many others who cannot at all be accused on whatever conspiratorial basis of belonging to a category of witnesses designed to further the aims of a political project.

Secondly, Chair, what appears to have been ignored are the repeated calls made by the Chair of the Commission to the public for people to come forward and give evidence. You have not said those that believe in this political project and conspiracy please come forward, you have made it quite clear that anybody who has any information from the highest office to the most humble office should come forward to assist. You have said that not once but many, many times and you have expressed on occasion your disappointment that there has appeared to be a reluctance on the part of some to come forward.

Chair, in the following paragraphs at page 15 and following, we deal with the specific context which must be notified in accordance with the authorities or must be noted in accordance with the authorities that the person against whom bias is alleged must be judged in the context within which that person acts. In other words, in this case, in inquisitorial proceedings and the authorities we quote at paragraph 56 and following. In short, Chair, as

Chairperson you are obliged to be more inquiring than a judge would be in an adversarial setting.

So, Chair, in paragraph 58 we refer to The Standard Bank case, a judgment of the Supreme Court of Appeal which says that a supine approach - in other words, the silent umpire approach towards litigation by judicial officer is not justifiable either in terms of the fair trial requirement or in the context of resources.

Chair, in paragraph 58, the Bernert and Absa Bank case, the following was said by the Constitutional Court:

> Judicial officers will put questions to counsel or their legal representatives based on those impressions."

In other words, impressions that you may form or you may have been requested to form.

> "...and thereby provide litigants with the opportunity to rebut any correct impression formed. This does not give rise to a reasonable apprehension of bias."

Simply put, Chair, if you gain an impression or you are asked to accept an impression and you express that, that does not mean that there is or can be a reasonable apprehension of bias.

So it is not bias for a judge to say what he has been asked to think. It is not bias for a judge to say what in the course of a trial he is thinking. It is only bias when he

shows he can never change his mind and he is open to persuasion. But, Chair, the very reason you raise those issues is to invite persuasion and contrary views and that is clear from the record. That really is the crux of the case, Chair, because that bar has not – or that hurdle had not been passed.

So, Chair, we expand on that notion of a judge inquisitorial legal systems or in an inquiry of this nature. In an inquisitorial legal system – and this is an inquisitorial process, Chair, the judge takes the lead. Counsel, legal representatives are there to assist and ask questions later not in the beginning.

So, Chair, it is perhaps surprising that the applicant can rely on the passages that have been relied upon in the founding affidavit to show bias rather than a truth seeking exercise and at sometimes a forceful truth seeking exercise where you raised issues and you insisted on answers.

So the active questioning of witnesses, the testing of propositions, the provisional acceptance of propositions is part of your duties, with respect.

Chair, we have searched in vain for any display of hostility as alleged towards Mr Zuma in any public comment that you might have made. There is not unkind public comment that you have made and in any event it

would have to be shown that those comments, whatever they were, rendered you incapable of maintaining an impartial mind and that is not part of the allegations that you have to deal with.

So, Chair, it is difficult not to conclude that the real reason the applicant is before you in this application is that he has an apprehension that there might be findings against him. That is dealt with in the SARFU case, Chair, and paragraph 71 of our heads where it said:

> "It needs to be said loudly and clearly that the ground for disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice rather than that he will decide the case adversely to one party."

There is a fear that things are not going too well but the evidence is mounting, but that evidence seems to be convincing, even if you say that, Chair, that is not enough. It is the absence of an impartial or prejudiced absent approach to all that evidence.

So the test for recusal, according to Bernert in the Constitutional Court does not permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her, it is still less, said something in relation to evidence that might not sit well with the particular complainant concerned.

Chair, you have made no findings in relation to what some may call a political project nor have you expressed any view in that regard. You have made no finding in relation to a conspiracy. We can assure the applicant, although I do not want it to go too far into what the investigators do, because the regulations preclude that, that following in the evidence of the former President at the last hearing in July of last year extensive steps were taken by the investigators to take statements in regard to the evidence given by the former President on the first day. Not only that, there has been response from certain witnesses implicated by that evidence who have come forward and give evidence. That is a matter in process. I do not want to go into too much detail but, Chair, the matter has been dealt with and is being dealt with, as we must, Chair.

Secondly, Chair, the applicant has not been singled out by the Commission for any special treatment. If anything, he may complain that he has been given favourable treatment and treated gently. There is no doubt that, as my learned friend concedes, that the performer President is central to the work of the this Commission and any potential findings and that is why, Chair, you want to hear his evidence and that is why you have called for that evidence whether in written or verbal form throughout,

persistently and from the latter part of 2018..

We sent out in paragraph 76.1 the reasons why Mr Zuma's evidence is so important to this Commission, we do not need to repeat them, they have been stated many times.

CHAIRPERSON: I wanted to say something, Mr Pretorius, but, as I say, it is more for Mr Sikhakhane to hear so that when he comes back, when he replies, he has thought about if he needs to think about it and he can deal with it.

Well, Mr Sikhakhane has said that the case is not that of bias, as such, it is apprehension of bias but of course I think some correspondence – and I do not know whether the affidavit as well, but it is some correspondence suggested, as I read it, that it is bias and I was concerned – and of course there was some correspondence, I think that he was talking about predetermined outcome and things like that and I was thinking, you know, if you are – if I am biased against a particular witness and that witness has been given 3.3 notices and has elected not to challenge the evidence of witnesses who implicate or may be said to implicate him, if I am biased against that witness, seems to me the easiest way would be not to insist that that witness should come but to say okay, just take all the evidence against that witness because of course my findings when he has not

brought his evidence to put his side of the story, that is going to based on that. But when you want to hear all sides, one wants to weigh everything so that you do not make findings based on just one side of witnesses, I would have thought that it would be seen as somebody who really wants to hear all sides before making a finding rather than say well, you got a change to challenge this evidence, you have elected not to challenge, so it is fine, we will go ahead with the witnesses who have given evidence. So but based on Mr Sikhakhane's submissions, I think that may have fallen away, but he might be able to say something.

ADV PRETORIUS SC: Yes, Chair. In fact, Chair, if you were a judge in a trial you could adopt that attitude, you could say if in this civil trial the defendant does not want to give evidence as an umpire of the contest that I see playing out before me, I am entitled to decide, you would not in ordinary circumstances be entitled to force a party to give a version before you, I stress in ordinary circumstances. But the approach that you have adopted is not because, with great respect, Chair, you are nice person or you are a fair person, it is because you have to. In an inquisitorial situation you have to cajole, compel, do whatever you have to, to conclude your mandate because, quite frankly, without all the evidence, the findings that you will make ultimately must be appropriately qualified and if

someone is keen to see this Commission work, that person should be knocking at your door persistently to say I have a version, I have facts, I want to put them completely before you and I want to deal with all the evidence of this conspiracy against me.

And with respect to the former President, the impression being placed before you is that he does seek to cooperate. Well, that is not the history of the facts before you, Chair, and those have been set in the summons application as summarised in paragraph 77 where we are now. You asked right at the beginning of the proceedings of the Commission in relation to the very first witnesses, Mr Zuma, please give me your written response to the evidence of Ms Mentor and Mr Maseko, you have not got that response. You have asked again, please can I have that response? You have not been favoured with a response or an explanation for the failure to give the response.

In July of 2019 an undertaking was made that you would receive a response to the areas of interest document. You were told today that well, there were Covid difficulties and there were difficulties in relation to attorneys being changed. I am afraid, Chair, that explanation has never been proffered before you except today when the former President is facing summons and it

is not good enough.

CHAIRPERSON: Of course Covid 19 happened this year and the affidavits should have been filed or delivered sometime last year.

ADV PRETORIUS SC: Some last year, shortly after August of 2019, Chair.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: There is no reason why that document – not acceptable reason why that document could not have been presented. It does indicate that there is a reluctance to participate in the Commission other than by way of election not to respond in terms of Section 3.4 and the like.

CHAIRPERSON: Well, you see, and again this is something ...[intervenes]

ADV PRETORIUS SC: Regulation 3.4.

CHAIRPERSON: I mention more for Mr Sikhakhane than for you, one gets concerned if there is undertaking made to say we will file affidavits by whatever agreed date and then not only are the affidavits not filed but no attempt is made to show courtesy of an explanation to say we have some difficulties, these are our difficulties, can you accommodate us, or ask for an extension of time, one gets more concerned when one deals with that situation.

ADV PRETORIUS SC: Yes Chair, in paragraph 77 we go

on to say that Regulation 10[6] directives have been issued, not once, but twice at least, repeatedly issued, no response, no explanation or any failure to respond, and the answer to that conduct Chair may lie in the propositions put to you this morning, that in fact the former President is of the belief that this State Capture Commission is a political project, designed to somehow defeat or prejudiced in a significant way the former President.

That would explain the conduct to date and that cannot rest comfortably with the notion that full cooperation has been offered which it has not and is being offered and one would hope that perhaps after today full cooperation will be offered and that is not with respect to her being Ms Dudu Myeni approach Chair this Commission needs a full explanation of that approach that says that this is a political conspiracy designed to defeat the former President.

Chair I want to refer to, to two things which indicate that far from being objective the approach adopted by the former President is itself based on conjecture and bias. If one looks at the founding affidavit paragraph 41, I do not have the red numbers Chair immediately.

CHAIRPERSON: Did you say paragraph 41 of the founding affidavit?

ADV PRETORIUS SC: Yes, Chair.

CHAIRPERSON: I will find it, yes I have got it.

ADV PRETORIUS SC: For the record we at page 30. There Chair the statement is made as follows:

> "It is clear that the Chairperson took a view that I must simply answer the narrative that I dismissed Mr Nene for nefarious and corrupt objectives related to the so called nuclear project. Nene is portrayed as one who stood guard against my alleged unrealistic and corrupt ambitions who caused the irresponsible spending of public finances in pursuance of a nuclear deal."

Chair that complaint that the former President was called upon to answer on what he regarded as a ridiculous assertion just fails to understand the job that you have to perform. You have a proposition before you which gives an explanation as to why a particular Minister was dismissed.

You call upon the President to answer that, the President says that is ridiculous why call upon me to answer that. The proposition just needs to be stated for it to be understood as fallacious it is your duty once again Chair whatever you might think or whatever anybody else might think about that allegation to call for an answer and it is the duty of someone who seeks to cooperate in the affairs of the Commission to answer.

I am sure Chair it is perhaps ironic that an

important witness that is Mr Zuma himself who is potentially able to contradict, confirm, clarify evidence referred to by him in his founding affidavit has been repeatedly invited and now summons to give evidence but there appears to be and I hope it is only an apparent conclusion that might be drawn a reluctance to come and do that, Chair.

Chair I would like to deal with the question you raised earlier with my learned friend about the nature of the relief sought. We deal with that in paragraph 88. Then the notice of motion prayer one the prayer is the following:

> "Recusing the Chairperson from chairing the Commission of enquiry proceedings relating to the applicant's testimony and directing that that lawful steps be taken to find a replacement Chairperson to hear the testimony of the applicant."

Now that is unclear Chair. The second part is clear:

> "That what is required is that a replacement Chairperson come and sit here this week and hear the evidence of the applicant."

What is to happen to the contradictory evidence given by 33 or 34 witness we must judge that evidence. Who's going to make findings about credibility? What if the new Chair believes that this was a political conspiracy and this whole Commission is a political conspiracy and you find

the opposite. The situation on the narrow interpretation that you must recuse yourself for this week to hear this evidence it is unworkable. But if one goes on to the affidavit in paragraph 3 of the founding affidavit the applicant says:

> "The Chairperson is required to recuse himself from presiding so that those issues that pertain to Mr Zuma and his family."

He says myself and my family in the affidavit it is incorrectly recorded there in paragraph 88.3 I apologise Chair. But in the essence he is saying that you must recuse yourself from presiding over all those issues that pertain to Mr Zuma and his family that would include Mr Duduzani Zuma whose evidence you have already heard and would include anything related to your several terms of reference in relation to which Mr Zuma is expressly mentioned as being implicated by the terms of reference and all the evidence that has been given.

Who's going to draw that line between you and your replacement colleague as to what you can do and what someone else can do. In fact, the authorities are quite clear Chair that once you are recused you cannot make findings and it would mean that you cannot make findings central to the Commission. It would render your future participation in this Commission entirely nugatory and

would mean in fact the collapse of the Commission.

CHAIRPERSON: Can one ever in a Commission such as this recuse oneself from hearing the witness the evidence of a specific witness or certain specific witnesses but hearing, but hear the rest of the witnesses?

ADV PRETORIUS SC: Chair I suppose to think about that for a moment there may be a situation where there is an issue so separate and discreet from the main issues that the Commission has to deal with that it could be decided for example by a medical expert or by an accountant or by an engineer and then you would rely on that finding but ultimately the responsibility for the findings remains yours but not in this case Chair quite clearly.

CHAIRPERSON: I guess in that situation if it comes back to you, you still have to see somebody else making a finding and you are bound by it. It is different maybe if they make a recommendation and you can then make a finding in regard to such a matter.

ADV PRETORIUS SC: I am sorry Chair I was distracted for a moment would you mind repeating.

CHAIRPERSON: Ja, I am saying it is difficult to see a situation where somebody else you made an example of some medical expert making a finding and then you are bound by it as Chairperson. It is different if they make a recommendation which you can examine and if you are

persuaded it is right then you accept but there are all kinds of difficulties that might need to be looked at because in the end the findings in the context of this Commission must be the findings of the Judge selected by the Chief Justice.

If it is findings is made by somebody else that might be problematic because the remedial action said these issues must be investigated and decided upon by a Judge selected by the Chief Justice and not by the President.

ADV PRETORIUS SC: Chair the furthest one would go in the context of this Commission is that it would perhaps be permissible for you to rely on the opinion of an expert where you feel that you do not have the ability to make the necessary judgement but the decision is to whether to rely on it or not would remain yours.

CHAIRPERSON: Yes, ja.

ADV PRETORIUS SC: It does not appear to me that there is any wrong here for a second Chair to deal with all matters relating to Mr Zuma and his family. Drawing a line between those issues and the remaining issues of the Commission would be impossible.

CHAIRPERSON: Ja, okay.

ADV PRETORIUS SC: In fact the central issue in this Commission according to the terms of reference is the issue relating or are the issues relating to Mr Zuma and perhaps his family as well.

And then Chair between you and your replacement who would decide what issues relate to Mr Zuma and his family and what if there is a disagreement who wins as it were it is just simply unworkable one just needs to think through the implications of that proposition to understand that it really is unfortunately and I hesitate to say this because it is an extreme conclusion in many contexts.

It is an all or nothing position where there can be no compromise. Chair if I may deal with – I see I do have a little time left.

CHAIRPERSON: Yes, okay.

ADV PRETORIUS SC: With some of the extracts that were relied upon in the founding affidavit. Chair if I can take you to the numbering is somewhat problematic at one stage where paragraphs numbers are repeated but if I could take you to paragraph 53.2 on page 32.

CHAIRPERSON: Are you talking about the founding affidavit on 32 so what document are you talking about?

ADV PRETORIUS SC: The founding affidavit Chair page 32 of the founding affidavit.

CHAIRPERSON: At page 32 I have got paragraphs 46, 47 and 48 and you said paragraph fifty something.

ADV PRETORIUS SC: Yes Chair, I am not referring to the red numbers I am referring to the page numbers it is at page 26.

CHAIRPERSON: Let us stick to the red numbers.

ADV PRETORIUS SC: Okay Chair.

CHAIRPERSON: Yes, I have got that were you referring to paragraph 32? Were you referring to paragraph 32?

ADV PRETORIUS SC: No paragraph 53.2.

CHAIRPERSON: 53?

ADV PRETORIUS SC: Yes, Chair again the numbering is confusing because it was a repeat.

CHAIRPERSON: There is no paragraph 53 at page 26 and you said it is the red numbers.

ADV PRETORIUS SC: Sorry 26.

CHAIRPERSON: Page 26 red 26 only has paragraph ...[intervene]

ADV PRETORIUS SC: I hesitate to say I have been misled it is my responsibility. It is red number page 37.

CHAIRPERSON: Okay I have got it.

ADV PRETORIUS SC: Do you have it Chair?

CHAIRPERSON: Ja, paragraph 53.2.

ADV PRETORIUS SC: Yes, Chair below the extract is dealing with an exchange between yourself and Ms Hogan and in the second paragraph when dealing with her evidence about the former President you say and you put:

> "Is there room you can just answer this question to the best of your ability. Do you think there may be room for any suggestion that maybe your

personality and his personality, your respective ways of dealing with issues were such that the kinds of differences that came up maybe were lucky to come up or is that something that you had not thought about."

So in other words an issue is raised in your mind that maybe this is all down to a difference of an opinion that it does not bear the import that the witness Ms Hogan intends and you raise it as a concern that does not mean to say you believe that or that you trying to persuade the witness to say that on the contrary you were merely raising it.

And then the passage relied over the page relied upon by my learned friend the whole passage should be read because after the underlined portion there is another portion which says:

"But having said that I think that I must say that that should not necessarily mean that he the former President did not have a mind that the Board could do whatever it considered it had a right to do. In other words, if it decided that it would dismiss him – that is Mr Moroga, it may well be that he was not excluding that that what he said to you just seem to say look Mr Moroga will continue as CEO and then the Board must decide whether they accept that or

they decide to do whatever they decide."

A version that comes to your mind that you are exploring. You say well maybe the former President did not intend what you told me he intended maybe he intended nevertheless to defer to the Board, you put that version. In the very same paragraph of which, of the applicant complained. Then paragraph, the second the penultimate paragraph on that page also relied upon:

"Did you get an impression that there might have been private meetings between the President and Mr Moroga?"

Again an issue that strikes you as an issue of concern you asked the question. You do not find that there are, that there is evidence of private meetings you ask the question. Now the question is Chair not whether you asked that or what a person might think you were getting at because he believes that this Commission is part of a conspiracy and Ms Hogan is a proponent of that conspiracy. The test is at the end of the day will you be able to assess this evidence impartially with all the propositions for and all the propositions against that you have put.

Complaints is made Chair about what you say to witnesses including Ms Hogan an Mr Gordhan thanking them for coming to give evidence and alike. Chair your approach consistently throughout this Commission from

beginning to an end is to thank witnesses for coming forward for giving their versions and in the same breath to encourage other witnesses to come forward that that somehow is an expression of biased is simply untenable reasonable apprehension of biased.

Then it is also complained that at paragraph 53.6 in dealing with Minister Gordhan you say at the bottom of page 36:

> "Okay that paragraph appears to me and you must tell me if you understand it different appears to be an acknowledgment by the ruling party that the leadership structures that it had up to that stage were failing to arrest corruption and that these other practices that are mentioned there is that your understanding of the paragraph as well."

In other words, the statement of the witness's implications you point out those implications and you ask the witness for those implications. In no manner can it be said that that is your view in relation to the ruling party not the former President the ruling party that can never be changed. That is not alleged and it is not proved. All that is said is that the applicant reads that and he is worried by that statement that is not the test Chair. Then Chair the bottom of page 37 that same paragraph you say to Mr Gordhan:

> "I take it that the former President did not articulate his views in regard to the suggestion you made about what process you were thinking should be followed."

In other words, what the President did not say is indicative of a conclusion that might be drawn that he did not confirm that what you said about him is correct. It goes the other way or it could go the other way it does not matter Chair you were exploring. Over the page:

> "President Zuma I think it is President Zuma that he may want to put his preferred candidate through the usual process. What I am saying is that I take it that he did not articulate to you any views about your suggestion at that time."

We know that later on he did not follow that process or you cannot and then there was an intervention and Mr Gordhan then admits not in an explicit way. In other words, he has no confirmation there that President Zuma wanted to follow course A or course B. Then at the bottom of the page you ask a question:

> "Would the involvement of the Presidency in the appointment or re-appointment of members of Boards of SEO's had been a normal thing, is that a normal thing or not?"

A witness gives evidence to that and then you enquire as

to its import. I do not see that that shows that you can never bring an objective mind to bear on that evidence and then over the page again with Mr Gordhan you say to Mr Gordhan:

> "Am I missing anything that one could really say did happen that could be said to reflect a breakdown in the relationship between the two of you other than maybe just differences of opinion on certain issues relating to work?"

You have raised that issue before in evidence Chair where you say look is this not explicable or explainable by differences of opinion that you just did not get on that you could not work together and that explains the conflicts that you have spoken about in your evidence. Again not a decision that is so but merely exploring whether it is so.

Chair if I may one could go on Chair but I think that the pattern is clear that there is no evidence here in any of these extracts that you come close to saying I have made up my mind and I am not going to change my mind. All you exhibit exactly the opposite if I may say with respect.

The propositions you put are generally qualified so on page 41 you say:

> "My other question is this if at the end of this process I come to the conclusion that definitely there was in State Capture there are certain

consequences that follow and certain questions you must ask as a result of that."

There is no finding that State Capture is a reality in your mind Chair and so one can go on but I would like to just take one step further the proposition that in fact the propositions that have been put to you in the papers on behalf of the applicant and in argument by the applicant themselves rest on a preconceived notion and set of ideas and are coloured by that approach.

So it is based in the fact this Commission is a political conspiracy designed to undermine the former President as part of a factional struggle that informed the views then that interpret the passages that have been put before you and I may just take you to one glaring example.

Page 46, well let us start at page 45 paragraph 53.9 I am referring to the pages at the bottom again Chair. If you want the other page for the record I can give it you.

CHAIRPERSON: It is better if we are consistent and use the red ones, the red page numbers of course you can say mention both, I think you said Mr Zuma's legal team might not have the red pagination.

ADV PRETORIUS SC: Yes I will mention both it is red number 50 paginated or typed number 45 that is the answering affidavit numbers paragraph 53.9.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: Now if there is any preconceived ideas it is expressed in this paragraph and it is a preconceived notion about your role Chair and your vision of matters. 53.9 the deponent to this affidavit says:

> "On 12 August 2020 the Chairperson made an attempt at seeming impatient with Gordhan."

In other words, the accusation is when you were visibly upset with Mr Gordhan on the 12th of August that you said so in no uncertain terms it is then interpreted as you producing a sham.

In other words, lying to the Commission and to the public that you were only pretending because you were so fond of Mr Gordhan and his political position that you were not impatient or upset with his attitude of not coming to the Commission which we dealt with at length but you made an attempt at seeming impatient.

Now that is preposterous Chair quite frankly to accuse you of that indicates and apart from saying so what it does indicate coldly looked at is that your conduct is being seen through a biased and the misapplication and it is not an objective reasonable assessment of the facts and that is a prime example of that Chair.

And if you go over the page you will see there that you were quite clear Chair that you were not happy with Mr Gordhan's conduct in just deciding not to come to the

Commission and the reasons are well founded because the Commission is frustrated that it cannot ensure that people come when they required to come and it upsets the calendar and the limited time that we have is put to the test.

One more Chair paragraph 54, page 54 Chair to 55 in relation to the evidence given more recently by Mr Tsotsi and whether the former President arranged a meeting or whether the meeting was arranged by Ms Myeni. You put it quite clearly there that perhaps the former President was not involved in the arrangement of that meeting because he came to that meeting and immediately asked what is this meeting about and you looked at the probabilities involved in that and you said:

> "This probability points in the direction of the former President not being involved."

As I understand the evidence, there's a host of different examples in these extracts, let alone, Chair, the other three hundred thousand odd pages that constitute the record. Chair, if you would bear with me a moment?

CHAIRPERSON: Okay.

ADV PRETORIUS SC: Chair, there's another example that's been brought to my attention by a member of the legal team. When you said, in relation to the evidence that was led in the Transnet stream, where you said on day 285

at page 209 of the record,

> "I'm sorry Mr Myburgh please don't forget your point that you want to ask, I just want to mention one thing arising from what I said to Mr Mkwanazi. You see Mr Mkwanazi is going back to what I said last time, I said Mr Zuma has denied Ms Hoggin's version and that he said his only choice for the position of Group CEO is Mr Gama. I don't know what finding I will make in the end but if Ms Hoggin's version is true, then it seems that there may be room for someone to say Mr Zuma would have been quite disappointed in the fact that Mr Gama was dismissed and had been dismissed because that ruled him out of the running for the position of Group CEO and it may well be that a new Minister had a discussion with him and that he might have mentioned that there was this issue of Mr Gama and he needs to look at it. He might not have said, he should be reinstated but he might have said, he should look into it, and maybe that is why he instructed you to review it",

An innocent version, again, it strikes you during the course of the evidence that there may another explanation other than that, that the witness is contending for. It doesn't have to be your view, you raise it, and you

ask questions about it as you must, with respect, Chair, as an inquisitor. Then Chair, finally if I may say something about Commissions and the role of a Commission of Inquiry.

Chair this Commission doesn't give a judgement which will be a final judgement for or against any person, including the former President. Judges sitting in Commissions are instruments of the Executive branch of Government, they must establish a factual matrix on a particular topic, and they must make recommendations on the basis of facts so found. Neither the findings of fact nor the recommendations bind anybody, least of all the applicant for recusal whose better remedy, it is suggested, Chair, is a review of the findings made against him. Chair, there is nothing in the papers and there's nothing with respect to my learned friend in his argument, other than a plea to reconstitute or reorganise the manner in which the former President testifies before the Commission. It's a plea at *misericordia* that passes the legal test for recusal and Chair, in that circumstance, you have no discretion even if you wished to out of deference for the former President you must – you cannot recuse yourself, thank you.

CHAIRPERSON: Thank you Mr Pretorius, Mr Sikhakhane? Maybe, I see it's four o'clock maybe we

should take a short break, ten minutes, ja let's – well earlier on we took a tea break and maybe, because of the numbers of people it's difficult for everybody to come back on time, should I make it twenty minutes or, what do you think, Mr Pretorius and Mr Sikhakhane, guide me?

ADV PRETORIUS SC: I think the numbers are on Mr Sikhakhane's side.

CHAIRPERSON: [Laughter].

ADV SIKHAKHANE: Chair, I'm going to be very brief, maybe you want to take hours of a break, so I'll give you five minutes reply and you go home.

CHAIRPERSON: Okay, then maybe – I thought you might...[intervenes].

ADV SIKHAKHANE: You can take a break for 24 hours.

CHAIRPERSON: Yes, okay, alright then maybe let me hear Mr Sikhakhane because I thought it might take long.

ADV SIKHAKHANE: I won't.

CHAIRPERSON: Okay.

ADV SIKHAKHANE: Chair, I have very, very few submissions to make. One is to start by accepting, Chair, as you know in the affidavit when we have no, we have no way to know that the person has authority as you know there's counter questioning of bone fides here, we accept your bone fides that there's that authority we have no reason not to and then, Chair, we were doing very well,

you and me argued for ten – for three hours, none of us patronised each other, none of us assumed one of us doesn't know much about something and I take serious exception to being patronised by Mr Pretorius, I don't know how many times he said, we failed to understand something, it's not true, I know no less law than he does. It's not failure to understand anything, we agree on the test and I have a view about the test, and he has his view and so to say the following things. He says, for instance, nowhere do we say – and I'm not re-arguing this point, Chair, he says, nowhere they say you won't bring an impartial mind. Chair we say that in paragraph six of the affidavit, I'm not re-arguing the point, I'm just saying, for a man accusing me of making false submissions, that's false.

CHAIRPERSON: What paragraph?

ADV SIKHAKHANE: Paragraph six of the affidavit, we make that point. He says, nowhere and I think it's him whose making false allegations and then he says we're peddling conspiracies, it's not true. I have put to you, what is in the mind of my client and what concerns him I have not questioned the legal team about their knowledge, I've not questioned them about anything. I'm putting to you what my client apprehends, and he may differ with me, it's not because I don't understand anything.

So, that prejudice offends me and then he says, he

says that I have quoted selectively. Chair that is an accusation of dishonesty on my part, it's not true, Chair, I could not come here with a whole record. We say, right at the beginning of the affidavit, that we called for you some of the exchanges, I could not burden you with all the exchanges you've heard, so I take serious offence to being patronised in this way because I was quoting to you, I could go on and on and we could differ about which ones are good and which ones are not. So, my quoting particular ones, was to demonstrate to the Chair in our discussion about what I'd said, were issues of, perhaps lack of sensitivity on the part of the Chair and I could go on and on so I was not quoting them selectively at all there was no dishonesty on my part and Chair, lastly, perhaps this is how Mr Pretorius exposes what sits in his head.

He says – and Chair this is not you, you've not said this I accept all the arguments you made against me. He says, sarcastically,

> "Maybe Zuma has reasonable apprehension that there may be findings against him",

Chair, that is just an insult and unfair because it questions Mr Zuma's *bone fides* for no reason, that's not what he fears, he fears no finding and so this conspiracy itself is a problem. He has told you, Chair, his fears and he has told you that he does not fear any finding, but he is

told by the evidence leader that, that is what he fears. So, I want to say, Chair, I've stated to you – and there's no point that I make that I'm going to pull back on, those arguments are what they are, I understand the test that he thinks I don't understand, and Chair, you have the responsibility to assess it, find against us if you must, I can see he wants to take the Stalingrad approach, he does, and let him do it, we'll see who wins but we must be constructive about this and it's that attitude, Chair, that I think has made difficult for your Commission, it's not you mostly, it's the attitude that, I think, has a particular slant against Mr Zuma and doubting us and I don't even know what the prejudice is of doubting our *bone fides* and knowledge, it just offends me, thank you Chair.

CHAIRPERSON: Okay thank you Mr Sikhakhane. We are going to adjourn for the day, and we'll resume tomorrow morning at ten. I'm going to use the evening and the night to consider all these submissions that have been made by both sides. The idea will be to try and arrive at a decision as soon as possible but we will see when I arrive tomorrow, what the position is. So, I would like to be able to give my decision tomorrow at ten but if by that time, it's not ready I'll be here and then, indicate what the position is but I'll use the – I will consider, overnight all these submissions. Don't forget, Mr Sikhakhane to let me have

your written submissions but I would like to see counsel once I've adjourned, ja both sides.

ADV SIKHAKHANE: Chair, thank you so much, thank you for listening to this difficult application.

CHAIRPERSON: Thank you. Alright, we are going to adjourn then, and we'll resume tomorrow morning at ten. We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 17 NOVEMBER 2020

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