

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

05 FEBRUARY 2021

DAY 338



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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 05 FEBRUARY 2021

CHAIRPERSON: Good morning Mr Freund, good morning everybody.

ADV FREUND SC: Good morning Chair.

CHAIRPERSON: I understand there have been some technical glitches but I am happy that we are finishing the week off – we are finishing this week without the kind of glitches – the technical glitches I thought we would have so on the whole it is has gone smoothly. Okay are we
10 going to complete Mr Selfe’s evidence today – this morning first?

ADV FREUND SC: That is correct Chair. Mr Selfe is here.

CHAIRPERSON: Okay.

ADV FREUND SC: And I presume he should be reminded that he is still under his former oath.

CHAIRPERSON: Yes. Yes. Mr Selfe good morning to you.

MR SELFE: Good morning Judge.

CHAIRPERSON: Thank you very much for availing yourself again this morning as arranged. The oath you
20 took the other day when you gave evidence will continue to apply today. You understand that?

MR SELFE: I understand that.

CHAIRPERSON: Thank you very much. You may then proceed Mr Freund but as I say so I am trying to remember whether you had said you had no further questions. I was

the one who wanted to ask further questions Mr Freund.

ADV FREUND SC: Well Chair what I was about to do if I can refer you to Bundle 2 at page 741. I was about to take...

CHAIRPERSON: What page?

ADV FREUND SC: Mr Selfe.

CHAIRPERSON: What page?

ADV FREUND SC: Comments there and I make a – to do so very briefly and you then Chair said well perhaps it
10 needs a little more time.

CHAIRPERSON: Yes okay what page did you refer to just now?

ADV FREUND SC: 741 in Bundle 2.

CHAIRPERSON: Oh – oh okay, okay. Okay. Yes okay thank you. So I think the ...

ADV FREUND SC: My suggest...

CHAIRPERSON: Yes. Go ahead.

ADV FREUND SC: My suggestion Chair is (no sound) Chair [?] through this and that as we go along if you wish
20 to pose whatever questions then of course you should do so.

CHAIRPERSON: Yes, no that is fine let us proceed on that basis.

ADV FREUND SC: Thank you Chair. Mr Selfe on the previous occasion when you testified you had really

completed what we might call a chronological narration of your experience on the 00:03:24 of allegations of corruption and the like relating to BOSASA and its related companies.

From that you then move on in your affidavit to – to deal more broadly with your observations and analysis of the role played by Portfolio Committees and you say in paragraph 2 that – paragraph 7.2 that you would argue that many of your colleagues on the committee at the time did
10 not obey, respect and uphold the constitution and did not perform their functions as MP's to the best of their abilities. Is that correct?

MR SELFE: That is correct yes.

ADV FREUND SC: And then you – you expand on that in paragraph 7.3 and then you say there are many reasons for this failure in you and you start to list those reasons. And the first of those that you refer to in paragraph 7.3.1 is the lack of independence of MP's generally and particularly in the ANC. Would you care to comment on that issue
20 please?

MR SELFE: Yes well the South African Electoral system is structured in a particular way at the moment whereby political parties provide closed lists of candidates for the National Assembly to the electorate. The electorate does not vote for any particular candidate it votes for a political

party and the political party gets a requisite number of seats depending on their proportion of the vote. But the lists themselves by notion be constructed by the branches and regions and provinces are in fact finalised by the headquarters of the political party. Very few voters know who is on those lists and in the end the person or the group of people who put that person – that candidate on the list can remove that candidate. It is very highly centralised and that does not lend itself to the
10 independence of the MP's.

ADV FREUND SC: While we are on that point...

CHAIRPERSON: Well – I am sorry Mr Freund.

ADV FREUND SC: If they can...

CHAIRPERSON: I am sorry. Mr Selfe I would like your full comment on the proposition that as long as members of Parliament in our current electoral system do not have adequate protection to be able to act in the best interest of South Africa or the people of South Africa where the interests of their party might be in conflict with what they
20 believe to be the interest of the country or of the people of South Africa. As long as we do not have in our system adequate protection for members of Parliament who want to act in accordance with the interest of the people as they see them or of the country when there is that conflict and as long as the parties are able to instruct them how to vote

or how to do – perform their overall oversight functions and the instruction is not one that makes sure they do their job properly. And as long as parties can take steps to prejudice somebody who may have decided to act in what they believe is the best interest of the people in that situation then it is going to be very difficult to have particularly the members of the majority party and we have the – an ANC majority party now but it could be members of whichever majority party there may be in the future to
10 put the interests of the people of South Africa first where they are in conflict with those of the party. So the proposition being unless the system provides adequate protection then maybe we may as well forget that we would have effective oversight and proper accountability on the part of members of the Executive in Parliament. What do you say to that proposition?

MR SELFE: The proposition is completely correct Judge Zondo because the – at the current moment as you can ask a number of people who have been expelled from
20 Parliament for – for not agreeing with the party line or simply did not get re-elected at the next election. There is a very chill wind that blows as a result of the way that the current electoral system is structured. So yes you do require protection for members of Parliament who are bona fide doing what they regard as being the work of the

electorate and in the interests of South Africa. But I would argue that it goes further than that but a member of Parliament needs an independent mandate not just a mandate from his or her party and that mandate should ideally come from a constituency system but I introduced to private members all in 2013 to provide for exactly that constituency system so that members of Parliament have an independent power base; an independent mandate. But that bill was rejected by every other political party in
10 Parliament. But it never saw the light of day.

CHAIRPERSON: Okay no thank you for that comment Mr Selfe. But maybe you could speak up a little bit so I can hear you but I would hear you better if you spoke up a little bit.

Now what you have just told me about the private members be I think that is what you said that you introduced but it did not receive enough support seems to reflect my understanding but you might be able to enlighten me more – better because you are in Parliament
20 and have been there for many years. You are a senior member of Parliament, you have experience about how things happen there.

My sense is that most – that the bosses of most of the political parties I am just – I am saying the bosses for just to indicate the leadership – most political parties do

not seem to have an appetite for a system where the party cannot instruct its members in Parliament how to vote .

They – I may be wrong but I have this impression that it looks like that might be one area where all these different parties seem to – to have no divergence of opinion. I may be completely wrong. What is your impression on this point?

MR SELFE: As somebody who up until very recently was in fact a party boss of my own party I can tell you that it is
10 very convenient if you are a party boss to have this sort of electoral system that we have at the moment because you can ensure discipline; you do not have to worry about corium's; you do not have to worry about people stepping out of line. But I would argue that that does not necessarily serve the interests of democracy and it does not serve the interest of accountability or oversight.

You ought to be in a position where a member of Parliament is able on bona fide grounds and following his or her conscience and good reason to take a view that is
20 different from that of the party leadership.

CHAIRPERSON: Excuse me. Now you – you may be able to – to say this you might not be able to say. Do you know whether for example your party the DA whether it shares this view that you have just expressed or whether its position is different?

MR SELFE: No Judge Zondo my party is committed to introduce a system of constituencies. They are members of Parliament are elected directly the voters of South Africa unaccountable to them. That was the basis of the private members bill that I introduced in 2013 but it saw no favour or it had no favour with any other party in Parliament.

CHAIRPERSON: What do you understand to be the main grounds of objection to the proposal of using the
10 constituency system? I ask this question because it seems to me that if the country used the constituency system to a very large extent we would be able to improve Parliamentary oversight by members of Parliament including those who may belong to the majority party. Because under that system I have to be elected – I have to be elected by the majority of voters in my constituency and those voters might not just be those who belong to my party. It might be other people who think I am doing a good job in the constituency. And if I believe when for
20 example there is a motion of no confidence in a President or in the President at a certain time in Parliament and I truly believe that being faithful to the Republic of South Africa in accordance with the oath of office that I took as a member of Parliament I should support that motion because the President has failed in his duties or is no

longer good to lead the country. And I know that the – my constituency will have no problem with that and maybe they actually want me to vote that way.

Then if my party wants to punish me or dismiss me because I did not follow an instruction to vote against maybe I may be dismissed and might be out of a job for a certain period of time but the next elections my constituency might vote me back and I go back to Parliament.

10 Or maybe even – maybe even if my party can dismiss me that would not result in my removal as a member of Parliament therefore I would know that going against my party on this issue on this motion of no confidence is not going to result in me having no job and not being able to put bread on the table for my family because I know my constituency appreciates my work. They think I am doing a good job and so on.

Therefore I can say well maybe they will not promote me and make me a chair of a certain committee;
20 maybe they will not make me Deputy Minister; maybe they will not make me Minister but I will – I will not be without a job. They will not be able to take food from my table.

So therefore I can speak to what I believe is best for the Republic. So those are the – the – that is the thinking that I have and that therefore in that way you can

enhance – we can enhance the prospects of even members of the majority party to perform proper oversight at least those who want to do the right thing. Those who take that job seriously.

Have you got any comments on that?

MR SELFE: Yes Mr Chair you are absolutely right. If one has a constituency system one is able to be much more independent; follow one's own conscience; follow one's reasoning and also truly represent the voters who voted for
10 you without fear or favour because as you correctly say the parties have their – have the ability to prevent you from being promoted but not to make you lose your job.

Now that is the basis of the independence of members of Parliament allows them to do their job. There is only one proviso of course and that is that the constitution enthrones us that the composition of the National Assembly shall in general be proportional to the votes cast.

There are various mechanisms where one can make
20 sure that that happens but involve principle you are correct.

CHAIRPERSON: And what is your understanding of what the main grounds of opposition are from other political parties to the idea of the country you know using the constituency system?

MR SELFE: Well I do not know about all the other political parties but at the time of the negotiation of the constitution it was felt that particularly in minorities would not be adequately represented if there was a constituency system and in addition to that it was felt that particularly women find it difficult to represent a constituency when they – when there is no degree of proportionality.

So I think it really has to do with the represent making sure that the National Assembly is representative
10 of everyone in the right sort of proportions rather than a constituency system which may result in clever domination by a particular party.

CHAIRPERSON: But I guess that there may be ways to address that. I do not know I seem to have heard or read somewhere that there could be a situation where it is a mix of the two systems constituency and the current one. Do you know anything about that idea?

MR SELFE: Yes that in fact was the basis of the bill that I introduced where 300 members of the 00:22:22 and 100 of
20 those members would be elected from a proportional list so as to ensure that the representation of the National Assembly was as close to the proportions who voted for particular parties as possible.

So indeed it is eminently possible to work around that problem.

CHAIRPERSON: Ja I think it is just going to be important for all of us as South Africans to consider a way of even some protection to members of Parliament who might want to do the right thing for the country where their party might not think that is the right thing and one has in mind here is a situation where quite clearly it is not the right thing you know. But the party says this is what we want our members to do.

Because I think in the current system of oversight I
10 mean the evidence that I have heard in this commission is as if there is no oversight in Parliament.

Of course there are certain committees that seemed to have really tried but by and large it seems that the performance of oversight functions comes mainly from the opposition parties and not from members of the majority party.

Whereas if everybody took that function seriously and wanted to do it effectively then there could be a lot of difference that could be made in how things are happening
20 in terms of corruption and just proper governance.

So if we – we leave this situation as is I do not see any chance that if we were to be faced as a country with allegations of state capture in the future and a huge rise in corruption I do not see that Parliament would be able to – to play any better role than they played over the past X

number of years.

Are you able to make – to give me any comments?

MR SELFE: I agree with that proposition Judge.

ADV FREUND SC: No thank you. Mr Freund you may continue.

ADV FREUND SC: Thank you Chair. Just – just for the sake of clarity Mr Selfe there is as I understand it but I am asking you to confirm if you happen to be able to do so. There is a provision in the constitution which makes clear
10 that if a member of parliament is expelled from the party on whose list that member came to Parliament that member then ceases to be a member of Parliament and so loss of your party membership automatically results in loss of your seat as a member of Parliament. Am I correct in that regard?

MR SELFE: Absolutely Chair.

ADV FREUND SC: And so the – that provision also has – has implications it seems to me I am putting it to you for your comment on the degree to which members of
20 Parliament are likely to follow their conscience in defiance of party instructions. Would you agree?

MR SELFE: I would agree because in the end it is the political party that orders the list and if one can be expelled for holding a different kind of view then it does cast – well cause a chill wind to blow on anybody who

might be inclined to do proper oversight.

ADV FREUND SC: And in your affidavit you just refer in passing to the position of Mr Andrew Feinstein. I appreciate that it traverses a little beyond the scope of the current commission but if you could just maybe in one paragraph summarise the Andrew Feinstein experience?

MR SELFE: Yes well as I remember Andrew Feinstein was one of the early whistle-blowers on the arms deal. He tried to as a member of the majority party tried to have
10 Parliament take these allegations seriously. He failed in that quest and he was gradually worked out of the – out of the ANC.

ADV FREUND SC: And he was not only a member of the majority party he was a – a sterling member of SCOPA before which committee the arms deals acquisition in question was being investigated, is that correct?

MR SELFE: That is correct yes.

ADV FREUND SC: Therefore due to his insistence or persistence in trying to ferret out the – the details of the
20 alleged irregularities in respect of the arms deals effectively you say he was worked out of Parliament.

MR SELFE: That is my understanding yes.

ADV FREUND SC: Now in paragraph 7.3.1.4 the foot of page 743 you deal with what you call the hierarchy call the nature of the African National Congress and you say that

this tends to mean a senior officer bearer such as Cabinet Ministers are treated with deference if not obsequiousness. Could you just tell us the basis on which you make that assertion?

MR SELFE: I make that assertion on the basis of my experience when members of the Executive appear before various committees and invariably they are treated with kid gloves. I do not think the hard questions are necessary be put to them and there are as I understand it from some of
10 my colleagues consequences for people who give members of the Executive or senior members of the organisation a torrid time when they come to committees.

ADV FREUND SC: Now can I take paragraph 7.3.1.5. In that sub-paragraph you are dealing with the issues of ANC Study Group meetings. In fact, you say that on one occasion, really, by error you found yourself attending an ANC Study Group meeting. Is that correct?

MR SELFE: That is correct. I chanced on a meeting that I thought I was part of but found out that I was not part of
20 it. It was an ANC Study Group.

ADV FREUND SC: And you then go on to deal with a particular instance which you say illustrates the impact of decisions taken in the Study Group in relation to the degree of oversight then carried out in the Portfolio Committee meeting that follows.

And you refer at 7.3.1.5 to an instance where you tried to raise the topic of the award of a fencing contract to SA Fence and Gate. Could you please just elaborate on that to illustrate your point?

MR SELFE: Yes, indeed. I had received information from a source and I tried to raise the topic at the Portfolio Committee on Correctional Services because obviously the subject of the award of the fencing contract was very controversial because of the controversy that had
10 surrounded the award as iZulu previously

ADV FREUND SC: Is iZulu a BOSASA related company?

MR SELFE: The source that I said that I talked to said that there were irregularities in the award of the contract to SA Fence and Gate. I tried to raise the topic at the committee. The committee members from the majority party simply would not entertain a discussion about this at all.

ADV FREUND SC: And why, if you do, do you link that to the Study Group issue?

20 **MR SELFE:** Well, in my experience and I am also relying on information that has been given to me by various other people. A committee meeting was preceded by the Study Group. Very frequently that Study Group is attended by the Minister and/or members of the Civil Service.

And a line is taken about certain topics, a

predetermined line and if the majority decide on that or if the instructions come from the majority party that that is the party line.

Where in my experience I find it very, very difficult to elicit any sort of sensible conversation on the committee on the topics that have been pre-discussed by the majority party.

ADV FREUND SC: I want to move on to your paragraph 7.3.2. It is a slightly more prosaic matter. But you deal
10 with what you the unsatisfactory modes operandi of the portfolio committees and you commence by dealing with the problems that flow from the manner in which the agenda of these committees are determined.

And I imagine that is tied in with a bigger problem of this sort of annual cycle of oversight or the annual cycle of functions of the committee.

So I would like you to talk to that briefly but in particular the implications of that cycle and the nature of that work for the capacity of portfolio committees when
20 appropriate.

When matters come into the public domain to actually exercise speedy and effective oversight on important matters that then arise and are not necessarily catered for in this cycle of meetings.

MR SELFE: Yes, you are absolutely correct. At the

beginning of the quarter the committee normally determines its agenda for the quarter where a number of steps that a committee has to take, it has to adapt with the department and with entities very frequently.

There are limited opportunities for meetings as a Portfolio Committee and limited time to do that.

And so when a topical subject arises, say a controversy around the awarded of a contract or unsatisfactory behaviour of a particular individual, it is
10 very, very difficult to get a committee arranged to deal with that matter bearing in mind the predetermined nature of the quarterly programmes.

It is – I have achieved that sometimes in the past but a lot depends on the chairperson and the chairperson is bound by, again, by I imagine, the mandate given to him or her by the study groups.

ADV FREUND SC: That leads directly into my next question. If I can refer you to paragraph 7.3.2.3? In the first sentence you make the following point:

20 “A lot depends on the latitude the chairperson gives to members in the manner in which questions are asked.”

Now before we come to the manner in which questions are asked. You are drawing attention to the importance of the identify, character and disposition of the

chairperson of a committee. Would you like to elaborate on that a little further?

MR SELFE: Yes, indeed. Ja, obviously, in my time in Parliament I have served on a number of committees for a number of chairpersons and there are chairpersons that encouraged debates and encouraged oversight and there are chairperson who are reluctant to do that.

And so I think but if you really want to have proper oversight, you need to look at something like the SCOPA
10 model where a chairperson of a committee is given to an opposition party and that chairperson has then an interest and...

Yes, an interest in making sure that all the facts come out and are presented to the committee rather than an interest in making sure that the matter is electively put to bed.

ADV FREUND SC: Now you deal in this particular paragraph that I was quoting from. With the modes operandi in relation to questions how MP's ask their
20 questions and how they are responded to. Would you just clarify as a matter of fact how that happens and then comment on its functionality?

MR SELFE: Yes. Well, what ordinarily happens is. A chairperson will then invite questions from MP's after the presentation or the testimony of whoever appears before

the committee is finished.

And the MP's ask those questions in turn. Some MP's ask three or four questions. The whole question time takes probably half an hour or three quarters of an hour.

And the department or the entity or the witness then responds but because they have maybe 25 or 30 questions to answer, they do not answer them necessarily with the vigorous specificity that is required.

Sometimes the questions are fudged. Sometimes
10 inaccurate information is given. And it is not always possible to follow up or to clarify on those replies.

ADV FREUND SC: Moving on to your paragraph 7.3.3. I think essentially you make the point that there is heavy burden on portfolio committees. And that might account by implication in part for example the way in which the BOSASA issue seems to have simply fallen off the agenda.

MR SELFE: Yes. The committees do have a heavy agenda but in my experience what skilful chairpersons are able to do is to distinguish between what is really
20 important when it comes to oversight and what is less important. And they then prioritise the more important aspects that need to be interrogated and they tend to let the other matters slide.

ADV FREUND SC: You raise in your affidavit, paragraph 7.3.3.2 the Nkandla saga. Now the matter has already

been before the Constitutional Court which has expressed itself firmly in the adequacy of parliamentary oversight. But just for the record and extremely briefly.

What are your comments about the manner in which the Parliament dealt with that issue and how that ties in with the points that you have been trying to make about portfolio committee oversight?

MR SELFE: Yes. I was a member of all three ad-hoc committees on Nkandla and in fact went on an oversight
10 tour of the Nkandla Homestead.

But I can tell you that any efforts or all the efforts that we made had key people report to the committee, to have documents produced, to have the then President himself come before the committee, were block by the majority party.

In the second ad-hoc committee, I constructed an alternative report which was put to the vote and simply voted down. So it was not a pleasant experience. It was very frustrating because one was not able to get through
20 the inbuilt majority in that ad-hoc committee.

ADV FREUND SC: A former witness has referred to the fact that the rules governing the National Assembly actually provide that minority reports are to be permitted and to be appended or to be submitted together with majority reports. Are you saying that that your attempt to

evoke that simply failed?

MR SELFE: No, I – it was appended as a minority report but it was most certainly not accepted. And in that respect, of course, the fact that we find it difficult to bunch a majority has led to a great deal of litigation to various courts to enforce what we regard as our democratic rights.

ADV FREUND SC: Alright. And then you make a point near the end of your affidavit which is based on earlier parts of your affidavit but also based on the detailed
10 material that we have not traversed in the PMG’s report on BOSASA about the implications of political and administrative role-player turnover.

If you can just talk about that issue very briefly. And it seems to me that this not confined to your committee. It seems to be something you see in a host of committees that would be the subject of this Commission’s investigations.

MR SELFE: Yes, indeed. There has been a very high turnover in my period on that committee of – as political
20 office bearers and administrative heads of department one can say.

And while one can sometimes get away with having a new Minister every couple of months, it is very much more difficult if one has a change of the National Commission because the National Commissioner is the

Accounting Officer.

The National Commissioner order and manage the department and if he or she only has a couple of months in office, it becomes very difficult to provide administrative accountability.

ADV FREUND SC: And Mr Selfe, subject to one qualification. That is all I wanted to ask you. The qualification is this. You are aware of what is contained in your affidavit. Is there anything in particular that you feel
10 needs stressing that I have not given you the opportunity to raise?

MR SELFE: I do not think so.

ADV FREUND SC: Thank you. Then I have no further questions.

CHAIRPERSON: Thank you very much Mr Self for availing yourself to help the Commission. We appreciate it very much. You are now excused.

MR SELFE: Thank you Mr Chair.

CHAIRPERSON: Mr Freund, your next witness.

20 **ADV FREUND SC:** Yes, I just want to check that the next witness is in fact connected. Let me just check that. Yes, the next witness will be Mr Matt Johnston, who I believe is connected to this video call. Perhaps he should come on screen and unmute.

MR JOHNSTON: Yes, I am here. Good morning.

CHAIRPERSON: Good morning. Mr Freund, is his affidavit in this bundle or a different bundle?

ADV FREUND SC: Chair, it is Exhibit ZZ-3, Bundle 1, page 217 and following. Quite an extensive affidavit and annexures. It is the first page of the affidavit beginning at page 217 in Bundle 1.

CHAIRPERSON: Okay I have got it Mr Freund. Thank you.

ADV FREUND SC: Thank you. Mr Johnston, do you have
10 a hard copy of your own affidavit and annexures paginating in accordance with the pagination system adopted by the prescripts?

MR JOHNSTON: Yes, I do.

ADV FREUND SC: And if you look at page 217, is that the beginning of your affidavit?

MR JOHNSTON: Yes.

ADV FREUND SC: And if you go to page 325, is that your signature?

MR JOHNSTON: Yes, it is.

20 **ADV FREUND SC:** In fact, you had an opportunity to read and ...[intervenes]

CHAIRPERSON: I am sorry. I am sorry Mr Freund. That we need to have the oath administered if you do not mind. And I was – let us do that first. Registrar, will you administer the oath or affirmation?

MR JOHNSTON: I prefer the affirmation.

CHAIRPERSON: Yes, she will administer the affirmation.

REGISTRAR: Please state your full names for the record.

WITNESS: It is Matt Paul Johnston.

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

WITNESS: No, I do not.

REGISTRAR: Do you affirm that the evidence you are about to give, will be the truth, the whole truth and nothing
10 else but the whole truth? If so, please raise up your right hand and say, I truly affirm.

WITNESS: I truly affirm.

MATT PAUL JOHNSTON: (affirmed)

CHAIRPERSON: Thank you Mr Johnston. Mr Freund, you may then start afresh.

EXAMINATION BY ADVOCATE FREUND SC: Thank you Chair. And I apologise for the oversight. Mr Johnston, we have just referred to page 217, will you confirm again for the record is the beginning of your affidavit?

20 **MR JOHNSTON:** Yes, I can confirm.

ADV FREUND SC: And that the signature at page 325
...[indistinct] [00:18:35] [*distortion in transmission present*
– *speaker unclear*]

MR JOHNSTON: Yes, that is correct.

CHAIRPERSON: Mr Freund, I do not know what is

happening. You – the last two questions, you have made – you were not very audible. I do not know what is wrong with the – whether it is the technology or you are speaking softly. Do you want to try again, starting from the first question?

ADV FREUND SC: I will try again Chair. I am concerned. I have a bandwidth problem.

CHAIRPERSON: Yes, I can hear you well now.

ADV FREUND SC: Mr Johnston, I think now for the third –
10 I just want you to confirm in your affidavit from page 217 to page 325, it is your affidavit and at 325 we find your signature. Is that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: And have you had an opportunity to then read your affidavit and are you comfortable that this is correct?

MR JOHNSTON: Yes, I have and yes I am.

ADV FREUND SC: Now you say in paragraph 1 that you are authorised deposed to this affidavit and is not
20 ...[intervenes]

CHAIRPERSON: Sorry Mr Freund. You request that I admit the affidavit with its annexures as an exhibit?

ADV FREUND SC: You can most certainly do Chair.

CHAIRPERSON: [laughs]

ADV FREUND SC: Exhibit ...[indistinct] [00:20:11]

[distortion in transmission present – speaker unclear]

CHAIRPERSON: It will be exhibit what?

ADV FREUND SC: ZZ-3.

CHAIRPERSON: Okay. The affidavit of Mr Matt Paul Johnston which starts at page 217 together with its annexures, will be admitted and will be marked Exhibit ZZ-3.

AFFIDAVIT AND ANNEXURES OF MATT PAUL JOHNSTON IS ADMITTED AND MARKED AS EXHIBIT ZZ-3

10 **CHAIRPERSON:** Okay. You may proceed.

ADV FREUND SC: Thank you Chair. Mr Johnston, you say in paragraph 9 of your affidavit that you are the Parliamentary Engagement ...[indistinct] [00:20:57] *[distortion in transmission present – speaker unclear]* at the Organisation Undoing Tax Abuse known by the acronym OUTA. Is that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: And that you are now duly authorised by OUTA to depose to this affidavit on behalf of that
20 organisation.

MR JOHNSTON: Yes.

ADV FREUND SC: And you make clear in paragraph 2.2 that as from September 2017 OUTA and presumable and primarily you personally were engaged or attended the meetings of the Portfolio Committee with which you deal

with in this affidavit. Is that correct?

MR JOHNSTON: That is correct.

ADV FREUND SC: But you have been clear that you also deal in this affidavit the proceedings prior to that date. You did not personally attend but where your information is derived from the records primarily of the Parliamentary Monitoring Group. Is that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: And you deal in paragraph 2.1 with
10 your assessment of the **...[indistinct] [00:22:18]** or otherwise of the Parliamentary Monitoring Group's records of the portfolio meetings. Can you just comment on that briefly?

MR JOHNSTON: Yes. As I indicated in there, it is the best record that I am aware. We have looked at internal parliamentary meeting minutes and we found that those were quite inadequate. They are frequently incomplete and sometimes inaccurate or just conveniently omit information that some people would rather not publish. So we use
20 PMG as what we see as the best record.

ADV FREUND SC: And when you have regard to meetings that you personally attended in your regard to which they are recorded by the PMG. What is your comment on the accuracy **...[indistinct] [00:23:17]** of the PMG.

MR JOHNSTON: I would say they are almost a hundred

percent accurate. Frequently there is something that is omitted and I do indicate that because it is individual people attending those meetings with a digital recorder.

And they would then subsequently transcribe those recordings but there is never content that was not in truth in that meeting. But sometimes there are small omissions but by enlarge I would say they are accurate and complete.

ADV FREUND SC: Now I would like to take you to paragraph 3.3(?) of your affidavit. You give an indication
10 of what your objective was in compiling this affidavit. Perhaps you could just take us through that paragraph?

MR JOHNSTON: So the purpose was just to provide a chronological series of meetings that we are aware of that dealt with the topic of state capture. We used particular keywords to search for those meetings, for example the Gupta family. I am just using this as an example.

But in particular in the main we focused on a handful of Portfolio Committees that ostensible held inquiries or actually held inquiries and we deal with those
20 minutes and how they dealt with the topic of the concept of state capture.

ADV FREUND SC: You say in that paragraph:

“The aim is to describe shortcomings in parliamentary oversight practices that we have identified over the course of several years of

professional monitoring and evaluation in Parliament.”

Is that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: And in fact, perhaps it would be helpful if you just describe what is the very purpose of the minute within OUTA that you are engaged in parliamentary – and what are the duties, the functions of a Parliamentary Engagement Manager at OUTA?

10 **MR JOHNSTON:** So what we have been doing as an organisation and from 2016 and earlier on, we have been laying several criminal charges and pursuing issues of tax abuse which is basically similar to the abuse of authority in government. And many of these issues that we dealt with would end up at law enforcement agencies.

And I think what my superiors in the organisation realised is, is that those issues do not reach any sort of consequence.

And we decided to really start some operation in
20 Parliament to not only come to grips with what they are doing in terms of the oversight of the Executive and how they spend taxpayers’ money.

But to really put some of the issues that we have been dealing with and that were fruitless at the law enforcement agencies to put to parliamentary committees

and to try and get some justice there.

So in the beginning we monitored what particular committees were doing that were relevant to our mandate, to our projects for example in the transport, energy, water sectors and also in justice and constitutional developments.

We monitored those committees to understand how they actually exercising oversight whether they are. Because frankly, the position was that surely they are not
10 carrying out oversight because we are seeing the effects of impunity.

So the purpose was to initially to come to grips with how they were doing things but then really to try and improve the way they carried out oversight.

ADV FREUND SC: And in paragraph 3.5 you summarise your conclusion and what then follows over hundreds of pages is detailed but you say:

20 “To our profound disappointed we have repeatedly experienced in several Portfolio Committees of the National Assembly in Parliament the brazen flouting of genuine and non-partisan oversight of Executive conduct.”

Is that a fair summary of your conclusion?

MR JOHNSTON: Yes, it is.

ADV FREUND SC: Now... Just bear with me, please.

MR JOHNSTON: [No audible reply]

ADV FREUND SC: I would like to take you to paragraph 5.1 of your affidavit. And again, I only want to deal with this extremely crisply and briefly because the issue of the Waterkloof landing incident has been the subject of ...[indistinct] [00:28:23] [distortion in transmission present – speaker unclear] before the Commission already. And that is at paragraph 5.1.4 that:

10 “Inappropriate ...[indistinct] [00:28:37]
realisation(?) of state asset by a private
family, the Gupta family, well-connected to
high-ranking politicians was answered by a
member of Cabinet as something the
parliamentarians need not to concern
themselves with.”

You say:

“Members of the ruling party did not object to
this explanation.”

20 Firstly, who was the Cabinet Minister to whom you
are referring?

MR JOHNSTON: It was the then Minister of Justice and
Constitutional Development, Mr Jeff Radebe.

ADV FREUND SC: And could you just elaborate on why
you say members of the ruling party did not object to this
explanation?

MR JOHNSTON: Well, the Hansard record is there. There were some objections from members of the opposition party and I would have wished to be a little more privy to how debates on matters of public interest go but I have never been fortunate enough to attend such.

In this instance in 2013 was the first debate in the National Assembly on an issue of public importance as far as I am aware since the year 2000. So those are very uncommon but there were objections.

10 **ADV FREUND SC:** Sorry to interrupt you but you are referring to a particular technical device which is provided for, and if you could just ...[intervenes]

MR JOHNSTON: Yes, the parliamentary debate on a matter public importance is something that can be requested by any member of parliament requested from the Speaker and in this instance she acquiesced and accepted that request and that is why this debate actually happened and this is something that does not happen very often, is my point, it happens very seldom and that is just a
20 testament, one of the many testaments, in my view, of the fact that there are not many relevant debates in parliament on issues that are of importance today. That is the point I was trying to make.

ADV FREUND SC: When you talk debates in parliament are you referring to the debates on the floor of the National

Assembly?

MR JOHNSTON: Amongst others, yes.

ADV FREUND SC: And did you have regard to Hansard or what was the source for comment that the members of the ruling party did not object to this explanation?

MR JOHNSTON: Yes, precisely.

ADV FREUND SC: And you make the point ...[intervenes]

CHAIRPERSON: I am sorry, Mr Freund, I want to make sure that I am following. The explanation you talk about is
10 it the one that is dealt with at paragraph 5.1.3 that is said to have been provided by Minister Radebe? Mr Freund?

ADV FREUND SC: Yes, here you, Chair, I assumed that the question was directed to Mr Johnston.

CHAIRPERSON: Oh, no, no, to you.

ADV FREUND SC: Maybe shall I cover the material again?

CHAIRPERSON: No, no, I just want to make that I understand.

ADV FREUND SC: Alright. Well, let me ...

CHAIRPERSON: That the explanation you are referring to
20 ...[intervenes]

ADV FREUND SC: Yes. No, let me...

CHAIRPERSON: Okay, you go.

ADV FREUND SC: Chair, after paragraph 5.1.3 there is in the first sentence of paragraph 5.1.4 the allegation by Mr Johnston that says that – and he explained now, that

Minister Radebe said that the alleged inappropriate utilisation of state assets by a private family, the Gupta family, was something that parliamentarians need not concern themselves with. That is what Mr Johnston said.

CHAIRPERSON: Oh ja, I see that. Yes.

ADV FREUND SC: And what you say, Mr Johnston, is that once Mr Radebe had , is that once Mr Radebe had expressed that view, you say members of the ruling party did not object to that explanation, as I understand your
10 evidence, is that correct?

MR JOHNSTON: Yes and I should just qualify that saying he also referred to it being dealt with by the Public Protector's office and this is a point that I make further on, is that very often issues of parliamentary oversight are silenced on the basis that they are being dealt with either in the judiciary by some court or in a Chapter 9 institution.

CHAIRPERSON: But the statement, if you have got the statement right, that Minister Radebe said the utilisation of Waterkloof, effectively that the Guptas landed their plane
20 on Waterkloof was effectively none of the business of members of parliament, that is extraordinary. Are you quite clear that you have reflected correctly what he said? I am not saying – I am not meaning you recall word for word but that is the point he made. Are you quite clear that that correctly reflects what he said?

MR JOHNSTON: Yes, Chairperson, so this is reflected in the Hansard.

CHAIRPERSON: Yes.

MR JOHNSTON: And more specifically, if I just may elaborate on that, it is - you know, it is difficult to reflect the precise tone of a minister speaking in the National Assembly but it was a tone of dismissal, in that the issue was being dealt with elsewhere and therefore the member of parliament did not need to concern themselves with that
10 issue.

CHAIRPERSON: But what is this story that a matter is being dealt with by the Public Protector therefore parliament should not or cannot carry out its oversight function? I seem to have some difficulty with that. So, in order to make sure parliament will not be seized with a matter you must just refer it to the Public Protector or take it to court.

MR JOHNSTON: Yes.

CHAIRPERSON: Then parliament will never exercise its
20 parliamentary oversight responsibilities in regard to that matter.

MR JOHNSTON: Yes, Chair, that is the tone that came across in my view.

CHAIRPERSON: If it is taken to the Public Protector, the Public Protector investigates, sometimes it might be for a

year or two years or whatever the period, she issues her report. If her report is taken on review in the High Court could be five years before there is – we see an end to the litigation. By that time how does it help for it to go back to parliament? So it seems to me that if you say if a matter is before the Public Protector or if a matter is before the courts, parliament cannot debate it, cannot perform – I mean cannot debate it and cannot demand answers or explanations from the executive. It means that in that way

10 you are depriving parliament of the opportunity to perform one of its very important functions over the executive. What is your comment on that or am I missing something? Mr Johnston, do you have any comment to...?

MR JOHNSTON: I completely agree with you, Chairperson.

CHAIRPERSON: Yes but you say that after ...[intervenes]

MR JOHNSTON: Yes, I can go further and say...

CHAIRPERSON: Yes, go ahead?

20 **MR JOHNSTON:** Sorry, I think there is a lag. Yes, I think that is exactly the point and later on in the affidavit I emphasise this, that it is actually precisely four or five years later that the issue of this family and how they relate to important decision-makers in government was actually picked up substantively only by some. So that is

the period of time that passed and in that time it was our view that that was the zenith of state capture. But consistently, when this issue was brought up, it would always be downplayed, it would be purposefully ignored or some external authority would be referenced to justify dropping the issue.

CHAIRPERSON: Yes, Mr Freund, continue?

ADV FREUND SC: Thank you, Chair. Now on the question of delay, in your paragraph 5.3, which has many
10 subparagraphs, you deal with the manner in which parliament has or has not dealt with, allegations pertaining to Mr Bongani Bongo, a complaint that was lodged and the lack of progress to this date that you are aware of in respect of parliament's response. Could you just briefly summarise the story there please?

MR JOHNSTON: Yes, my understanding of the complaint itself and the substance of a complaint is that Advocate Vanara, who used to be the registrar of the joint committee on ethics and members' interests as well as the evidence
20 leader of the portfolio committee on Public Enterprises inquiry into Eskom, that he was bribed in parliament by Mr Bongo to tone down the heat, if I can put it that way, and what transpired subsequently is to me an illustration of a problem of parliament's culture and that problem is that Mr Bongo went to the High Court, if I remember correctly, and

basically made the case that it is unfair that the process of the ethics committee's inquiry into said complaint is taking so long and what the judge found, in essence, was that it is a result of his case in court that the process was further delayed.

And the point I wanted to illustrate with that, and that issue still has not been resolved, according to my knowledge, but the issue that I am trying to portray is that members themselves, members of parliament, do not
10 respect the processes and the internal accountability mechanisms that are there. For example, the ethics committee's proceedings. These are not respectful and I think there is an understanding, especially the ruling party, who effectively controls each and every disciplinary and ordinary committee in parliament, that any complaint that is levelled against a member of the ruling party, if you are on the right side of things, will lead to nothing and this is an illustration to me of that problem.

ADV FREUND SC: So if I can just refer you more
20 specifically to paragraph 5.3.7? There the honourable justice hearing that case records that Mr Bongo's own complaint is inexcusably slow progress. That, of course, was quite some time ago from today, well over a year, I think, am I correct?

MR JOHNSTON: Yes, I think so.

ADV FREUND SC: You say, if I understand correctly, in paragraph 5.3.10 is that as yet no steps have been taken, no outcome has been communicated in respect of that extremely serious complaint which, if the complaint is valid, would be the most egregious violation of the duties of an MP and of a minister.

MR JOHNSTON: Yes, precisely. And I do not want to preempt where we are going but this is a small example and one that we are less directly involved with, as an
10 organisation. As an organisation we submitted two very (indistinct – recording distorted) substantive complaints, that this we received any substantive feedback. We have no indication of anything that has happened to those complaints to date.

ADV FREUND SC: I want to just interrupt you just to refer you to the parts of your affidavit that deal with that. Would you go to paragraph 5.7, I think point 19. Let me check that?

CHAIRPERSON: Just one second, Mr Freund? Just one
20 second. Can I find out from the stenographers whether they hear what Mr Freund and Mr Johnston say quite clearly because there are quite a few times when it looks like there are glitches. Mr Johnston was making a comment a minute ago and half of what he was saying I think could not come out clearly. They can hear? Okay,

alright. Given these technical glitches I think from your side, Mr Freund, I can hear you quite clearly now. Mr Johnston, being aware of these technical glitches, do your best to speak up and do so clearly. Thank you, you may proceed, Mr Freund.

ADV FREUND SC: Thank you, Chair. Mr Johnston, would you please turn in your affidavit at page 258 to paragraph 5.7.19?

MR JOHNSTON: I am there.

10 **ADV FREUND SC:** And does that paragraph deal with the evidence you were just giving about two complaints that were furnished by OUTA and is it correct that they were complaints against the former Minister of Communications, Faith Muthambi and the former Minister of Mineral Resources, Mosebenzi Zwane. Is that all correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: Now can I ask you to move further into your affidavit to paragraph 5.8.104? You will find that at page 298.

20 **MR JOHNSTON:** Yes, I am there.

ADV FREUND SC: And you say there that those two complaints were lodged with parliament's joint committee on ethics and members' interests on the 16 and the 25 October 2017 and you actually annex them, is that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: And then you say as of the date of opposing to this affidavit which was in November of 2020, no tangible disciplinary action have been taken against either of the former ministers, they have since been appointed as the Chairpersons of the Portfolio Committee on cooperative Governance and Traditional Affairs and the Portfolio Committee on Transport in the National Assembly of parliament respectively, is that correct?

MR JOHNSTON: Yes, that is correct.

10 **ADV FREUND SC:** And as of today, to the best of your knowledge, have you been advised of any outcome of either of the complaints that you lodged in October of 2017?

MR JOHNSTON: No, we have not.

ADV FREUND SC: Let me take you back now to paragraph 5.5.16. You deal – and that is at page 237 of volume 1 – you deal at some length over the next four pages with a presentation by Eskom, the Portfolio Committee on Public Enterprises on the 31 August 2016, is
20 that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: Now we do not have time to go through all the detail of what you set out there, but it seemed to me in fairness to Ms Rantho who testified earlier, that we should point out that you make the point that at this

meeting when opposition party members were endeavouring to raise difficult questions pertaining to alleged corruption or state capture at Eskom, Ms Rantho was the Acting Chair and that she did allow those questions, is that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: And I think see that in paragraph – that is at paragraph 5.5.20. At paragraph 5.5.23 you deal with the stance adopted by Dr Ngubane who I think was
10 then the Chair of Eskom, is that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: And you say that his attitude was the following:

“He said that the members of the committee should trust Eskom and the portrayal of Eskom as being captured was unfair and total nonsense and that he introduced a counter-narrative by saying that the state had been captured in 1948 when the National Party came to power.”

20 Is that broadly reflective of his stance?

MR JOHNSTON: Yes, it is.

ADV FREUND SC: And did you get a sense that that stance was rejected by the committee?

MR JOHNSTON: No, I did not, not by the majority of its members.

ADV FREUND SC: Now you make a point in paragraph 5.5.32 that there is a structural problem here. You say in the second sentence of paragraph 5.5.32 first that:

“There is serious flaw in the procedural setup of parliamentary oversight in that oral testimony serve as the primary source of information for members to pass judgment on the adequacy of executive conduct in regard to state owned entities.”

And you say further:

10 “The tone of responses from high-ranking employees of major SOEs illustrates that they do not consider themselves to be accountable to parliament.”

Would you just like to elaborate on that a little please?

MR JOHNSTON: Yes, very much. This is an important point I make throughout the affidavit and basically the primary source of information that members rely on is verbal accounts of what is happening from the very people who are supposed to be held to account, so obviously
20 there is a conflict of interest but this is not something that cannot be solved. There are various organisations that are nonpartisan, apolitical, like ourselves, who have substantive information on issues at state owned entities like this, but parliament does not routinely request such information, it does not entertain external sources of

information and I will get to this point later on, so I do not want to elaborate too much but there is a very obvious problem in that people who are in managerial or executive positions of state owned companies are obviously more knowledgeable about the operations of that entity and so members of parliament, even if they have the intention to actually oversee what is happening there, they would have a difficult time comparing their knowledge of the subject matter with the knowledge of those who are actually in
10 those positions and this is also, in my view, a political problem since the deployment of members of parliament to particular committees is not always a function of their expertise, it is more often a function of their political inclination and that I see as a fundamental problem.

ADV FREUND SC: I would like to take you now to page 243 to paragraph 5.5.35 and following. You deal here with a meeting of the Portfolio Committee on Public Enterprises with Denel in respect of the VR Laser issue, is that correct?

20 **MR JOHNSTON:** Yes, that is correct.

ADV FREUND SC: And you do furnish to the Commission the PMG minutes, you say see annexure 3.5, you say that in the third line of that subparagraph and, Chair, that annexure is to be found in volume 1 at page 375 to 381.

CHAIRPERSON: Yes, thank you.

ADV FREUND SC: I am not going to take you there immediately. But what narrative then describes is that this meeting had been prearranged in order to get to the bottom of the VR Laser/Denel controversy. It had been preceded by an earlier meeting and fingers were pointing in different directions, the Department of Public Enterprises, the Treasury, ministers of those two departments, the old board, the new board, so this was a specially arranged meeting to bring all the parties
10 together so that the committee would have an opportunity to probe and get to the bottom of the matter. Is that a fair summary?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: Now this you indicate in the fourth line, paragraph 5.5.35, was chaired by the then chair of Public Enterprises Portfolio Committee, Ms Letsatsi-Dube, but she was also accompanied by the Chairperson of the select committee on Public Enterprises and Communications Ms Prins, that select committee being a
20 structure of the NCOP, is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: So must have been an important joint meeting and what emerged, at a very early stage at the meeting, is that the chairperson informed the committee that the Minister of Public Enterprises Ms Lynne Brown

and the Minister of Finance, Mr Pravin Gordhan, had forwarded their apologies for not attending the meeting and I might indicate, Chair, that if one looks at page 378, which is in the annexure, one sees that the notification from the Finance Minister, according to the Chair, was on the 2 September, in other words some days before this meeting.

And you also reflect that the committee had been unable to get the previous board members of Denel to attend this very meeting, is that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: And so the fact that the two ministers were not there and the former board was not there, notwithstanding that this is an arrangement that had been made by agreement from months earlier, to finally try to get to grips with the Denel VR Laser, that at least of the members present were extremely disappointed, Ms Motsane, for one, is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: And so you describe in your affidavit how Ms Motsane and other members of the opposition objected in strong terms to the nonattendance of required participants and the fact that no alternative arrangements had been made notwithstanding prior notifications to the chair that certain person would not be able to come and

an argument developed and eventually the opposition MPs all walked out of the meeting, is that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: Must (indistinct – recording distorted) to them walking out of the meeting. The Denel leadership were then invited to make a submission which, as it were, reflected their side of the story, is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: And I want to take you to paragraph
10 5.5.42 because this reflects, according to your evidence, the conclusion that was expressed. Now here at this stage could I ask you please to go to the actual source document, the annexure, which is in bundle 1 at page 381. Perhaps in fairness, just for us to get our bearings, perhaps we should start at page 376, which is the beginning of the document.

(Break in recording)

CHAIRPERSON: Yes, Mr Freund? Oh, okay. How much
20 time will be needed? Okay, alright. Well, I think ...[intervenes]

ADV FREUND SC: ...was that essentially the conclusion reached at this meeting?

MR JOHNSTON: Yes, exactly.

CHAIRPERSON: Mr Freund? Mr Freund? I think he cannot hear me. Mr Johnston, can you hear me? I think Mr Johnston

cannot hear me either. You cannot hear me?

MR JOHNSTON: I can hear you, Chair.

CHAIRPERSON: You can hear me? You can hear me, Mr Johnston?

MR JOHNSTON: Yes, I can, Chair.

CHAIRPERSON: I think Mr Freund cannot hear me.

ADV FREUND SC: I can hear now, Chair, there was a brief moment when I could not, but I now hear you clearly.

CHAIRPERSON: Yes well you both disappeared from the
10 screen for maybe a minutes or two or a minute or so and I
think from your side you may have been continuing with your
questions and Mr Johnston giving you answers but I could not
hear. So I think we will need to take the tea adjournment now
because it is the right time but give the chance to the
technicians to attend to the technical problems. Maybe I
should not have said in the morning that we have been doing
quite well in terms of technical problems, maybe I invited the
technical problems. Okay, let us take the tea adjournment and
we will resume at half past eleven. We adjourn.

20 **INQUIRY ADJOURNS**

INQUIRY RESUMES

CHAIRPERSON: I have Mr Freund on the other screen
and not on this one, is that going to change or what has
happened, it is blank on this one, I prefer to see them on
the one that is near and not the ones on the wall. I can

see Mr Johnston; can you hear me Mr Johnston?

MR JOHNSTON: Yes Chair.

CHAIRPERSON: Thank you. Mr Freund can you hear me?

ADV FREUND SC: Loud and clear Judge.

CHAIRPERSON: Yes, okay alright, let us proceed.

ADV FREUND SC: Thank you Chair. Chair when we broke you indicated to me that you believed, I am sure correctly, that I had asked some questions of Mr Johnston
10 that may not have been transmitted. Can I enquire from you Chair whether you heard me refer the witness to the document in the bundle that starts at Bundle 1, page 376, the minutes of the Denel Asia meeting with the PCPE?

CHAIRPERSON: Yes, I did hear, that is where I am.

ADV FREUND SC: Alright, then I will pick it up from that point if I may.

CHAIRPERSON: Okay, alright.

ADV FREUND SC: Thank you. Mr Johnston the document that starts at page 376 is the PMG minute of the
20 presentation on the Denel Asia issue, which was intended to be attended by the Denel Board by the National Treasury and the Department of Public Enterprises. Is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: And this meeting of the 7th of

September 2016 had two Chairs, Ms Letsatsi-Dube, who was the Chair of the Portfolio Committee on Public enterprises, and also Ms E Prince who chaired the Corresponding Select Committee of the NCOP. Is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: And I think that before the interruption, you had confirmed that essentially what happened was that certain expected role players were not there, that this led
10 ultimately to a walkout by the opposition members, and that the ANC members stayed on in the meeting and that there was then a presentation by the representatives of Denel, is that correct?

MR JOHNSTON: Yes, that is correct.

ADV FREUND SC: I think we were really at that point, when communication lines were apparently dropped. I would like to take you to the end of that document, to page 381. And I just want to read into the record and invite your comment. The record says:

20 “Ms Prince, the Co-chair of the meeting, said it was quite clear that there was nothing close to a scandal in the Denel Asia deal.”

Is that the basis on which the meeting concluded?

MR JOHNSTON: Yes, it is and I would just like to comment a little bit further on that. The persons who

represented Denel were Mr Richard Seleke and Mr Daniel Mantsha. Now we have laid criminal charges against Mr Seleke as well and I would just like to extract the core narrative of that meeting, and that was one where this deal between the Denel and VR Laser Asia was being pushed very strongly by Mr Seleke in particular.

And he went so far as to acknowledge well, firstly we negated comments or allegations that the Gupta family were major shareholders in that Asian company. But he did
10 not deny that Mr Salim Essa was the majority shareholder of that company, Mr Salim Essa we have also laid criminal charges against and he is a very close associate of the Gupta family.

And clearly in my view, Ms Prince in particular was on Mr Seleke's side and very much agreed with his sentiment, despite the fact that it was on record there that the National Treasury did not approve of this deal and they said that it was in transgression or not in alignment with the Public Finance Management Act.

20 **ADV FREUND SC:** In fact, it went further, did it not. It was acknowledged at that meeting on behalf of Denel that by statutory law, it was imperative if that was to proceed for the approval to be obtained of the National Treasury and it was acknowledged that it had not been that that approval had not been received, am I correct?

MR JOHNSTON: Yes, that is correct and further Mr Seleke bemoaned the fact that they are already operating in a very restrictive legislative environment. And what he is saying in essence is that he is irritated by the rule of law, and that he would prefer that these restrictions would not be there and clearly he had a very strong intention to have this partnership happen, despite the fact that it was in contravention of the laws that really govern how public officials spend taxpayer's money.

10 **ADV FREUND SC:** And all of this was apparent needs the transcript, the PMG transcript, and it precedes the conclusion by the Co-chair Ms Prince, that it was quite clear that there was nothing close to the scandal in the Denel Asia deal. Is that correct?

MR JOHNSTON: Yes, and I think it makes it quite clear that there was a preconceived or premeditated conclusion to this meeting, and whether or not the opposition members were there and whether or not they objected, and whether or not they decided to leave, that would have been the
20 conclusion.

And this is one of the problems that I have observed in Parliament very frequently, is that actual decisions are not taken on the record when these deliberations are happening, these decisions are taken beforehand, and then they will act it out when the meeting

actually occurs.

ADV FREUND SC: Thank you, I want to move on to a different issue, if you would turn please to page 259.

MR JOHNSTON: I am there.

ADV FREUND SC: I mean you will see in paragraph 5.7.20 and following that you start to deal there with what I will refer to as the Frolick letters, a set of letters from Mr Cedric Frolick who then the House Chairperson of committees, to the Chairs of various Portfolio Committees,
10 requesting that...[intervene]

CHAIRPERSON: Sorry Mr Freund, I thought you said - what did you say 259?

ADV FREUND SC: Page 259 in Bundle 1.

CHAIRPERSON: Okay, no, I did hear you correctly, but I went to 359 instead of 259. That was not your fault. Okay, what paragraph did you say, did you refer us to?

ADV FREUND SC: Five, sorry 5.7.20.

CHAIRPERSON: Okay, thank you I have got it.

ADV FREUND SC: And in that paragraph, Mr Johnston,
20 you deal with a topic that has already been canvassed with certain earlier witnesses, which is to say a set of letters issued in mid-June or thereabouts to the Chairpersons of the Portfolio Committees in which they were requested in their committees to investigate what we can broadly refer to as allegations of State Capture or the like, insofar as it

related to the areas of jurisdiction of those four committees. Is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: Now, you do annex those letters I am not going to necessarily need to take you to that. But what I would like to take you to is to paragraph 5.7.23 because this particular piece of information is not canvassed in the evidence of any of the other witnesses, and this relates to a press statement which you actually annexed to your
10 affidavit.

You annexed it as Annexure 4.2A, I am not going to take you there because you quote, the relevant part in your affidavit. And what this says and perhaps I should read it into the record:

“In the light of the recent accusations of State Capture linked to alleged emails, involving a number of Ministers, Parliamentary Committees have been directed to urgently probe the allegations and report back to the National Assembly.”

20 And it then goes on to explain how this is in accordance with the rules and it says in the penultimate paragraph:

“While no specific deadline has been set for the submission of the outcome of these investigations, the committees have been urged to begin with the work and report the recommendations to the House

urgently.”

And then it continues:

“Parliament as a representative body of the people of South Africa shoulders, the constitutional responsibility of ensuring that matters of public interest are dealt with as expected by the people.”

So you can confirm can you not that that is the media statement that was issued in which is annexed to your affidavit?

10 **MR JOHNSTON**: Yes, I can confirm.

ADV FREUND SC: Now, a great deal of your affidavit from that point onwards, consists of monitoring the progress in those four committees and certain other Portfolio Committees. Am I correct?

MR JOHNSTON: Yes.

ADV FREUND SC: I, for reasons of time I am not going to take you through all of that, I am going to be selective. But I do wish to refer you to your reference to the secret ballot judgments which we see in paragraph 5.8. 4 of your
20 affidavit that is at page 263. And you quote, a little more extensively than a previous witness a pertinent extract from the Constitutional Court's judgment.

And you then go on thereafter to make a judgment. This is in paragraph 5.8.5, perhaps you might read into the record the first two or three sentences of that paragraph

and then speak to that point.

MR JOHNSTON: So I set out to contend:

“That this conflict between upholding constitutional values and party loyalty occurs in Parliamentary Committees daily. We argue that this imperative that says party political representatives must as their absolute and unfaltering priority, enable the people together through them is not being realised.”

Would you like me to go further?

10 **ADV FREUND SC:** Yes, please.

MR JOHNSTON: “How members of the parliamentary office

have witnessed countless instances of party political decision making, both within and outside of formal parliamentary fora that are in no shape, or form, taking the public interest into account. On the contrary, we have witnessed decision making that knowingly contradicts the explicit best interests of the public at large, but serves party political purposes over the short, medium and especially the long term.”

20

ADV FREUND SC: In fact you can also deal with the next sentence.

MR JOHNSTON:

“This cannot be considered separately from the

Qaeda deployment and electoral system at play.”

And then I referred to the recent case of independent candidates having to be allowed to be elected to the National Assembly. Would you like me to...[intervene]

ADV FREUND SC: No, that would be fine. Now, when you met with that, with respect damning criticism, do you feel it is a fair criticism and do you feel that you can substantiate that from your personal experience and the observations made by your organisation not only relying on what you
10 have seen written in PMG reports, but in sessions that you have personally attended?

MR JOHNSTON: Yes, I can I mean I can give a very concrete and immediate example of that and that is not covered in much depth in this affidavit. But I think I do cover it somewhere, and for instance there was a planned inquiry into the Department of Water and Sanitation, the former department, this was something...[intervene]

ADV FREUND SC: Let me just stop you there. I will refer you to paragraph 5.9.4 of your affidavit. And really, from
20 5.9.4 all the way through to 5.9. 13 I think this is the portion of the affidavit in which you address this issue. So let us deal with this issue now.

MR JOHNSTON: Okay. I can summarise it. There was a very explicit intention to hold this inquiry and we were very welcoming of it, as well were other stakeholders and there

was an entire procedure. There were several meetings that I personally attended in planning this inquiry.

What was the intended scope of inquiry?

MR JOHNSTON: It was the financial governance of the Department of Water and Sanitation, I think, particularly under the custodianship of the former Minister Mokonyane and this was something that was going to be conducted by both SCOPA and the then Portfolio Committee on water and sanitation, that was Mr Themba Godi and Mr Lulu Johnson.

10 Now, Mr Lulu Johnson was the main man if I can put it that way in this in this planning process and Mr Godi and his committee SCOPA would be supportive. And we in preparation for this compiled very substantial submissions for these committees to consider and there was a draft schedule, and everything was really in place. And I think there was some representations from the SIU as well, that was in camera. So I am not sure what transpired there. But that happened and ultimately it was cancelled and there was no notification as to why this, this is happening.

20 So in the meeting that I attended, I urged a journalist sitting next to me to approach the Chairperson and ask him why this is no longer happening. I figured that he might not want to tell me, and he told her that it was because the elections were coming up. I think this was, yes this was in March and I think the elections were in

May, it was sometime soon. And Mr Johnson acknowledged to her off the record that That is why the committee will no longer proceed with their investigation or with the inquiry. And we tried subsequently to re-establish this and we were still in the process of trying to revive this, but it has not yet come to pass.

ADV FREUND SC: Now I want to take you back to where we were in your affidavit back to page 264 and in paragraph 5.8.6 you deal with the question of current
10 electoral system and the impacts on accountability to Parliament. You may have heard this morning that that issue was debated with a previous witness. I do not want to deal with that at length. But in crisp summary, what is your stance on this issue?

MR JOHNSTON: So I think I should get to this toward the end. But in short for now I can say I do not think that electoral reform, whilst I think it is an essential thing that needs to happen. I do not think it is a panacea for this issue but what I put here is that the obsessive
20 prioritisation of equality in political voice that has precipitated in the system of proportional representation through political parties has nullified any possibility of real accountability in Parliament.

And that is my view, it is in almost every instance – I am also going to refer to this later on. But when we come

to the code of conduct and the rules of the National Assembly and the NCOP, you can see quite clearly that in every process including disciplinary processes, there is a rule of majority that can override any finding. This is the case when it comes to findings of the Ethics Committee and it is the case in virtually every, every inquiry that has been held. And my view is that because there is a majority that consists of a single political unit being the ruling party, in this case having very large majority it means that
10 they have absolute power.

That means that, regardless of any information put before them, any allegation, they can simply decide not to do anything about it and that is what we have seen in practice and I have observed this myself personally. This is not based on what I have read in PMG at all, I have seen this, there have been bills that come to Parliament from the various departments and there is a unilateral decision of what that bill is going to do, where it is going to go.

And in many instances there seems to be a
20 meaningful debate on a certain issue, whether it be an issue of oversight or an issue of policymaking and there would be a pause when there is some confusion, members of the ruling party would step outside and make a decision amongst themselves by consulting probably a political directors, come back into the room and announce a

different decision or a particular decision.

And that is in my view what really limits Accountability because in the executive, where I say that State Capture has transpired when money really flows, that is the same case. So I think it is a system that is being exploited, where comrades are expected to hold one another accountable and that simply does not work.

ADV FREUND SC: Alright, thank you. I want to move on to paragraph 5.8.7 of your affidavit, page 265 and you refer
10 there to a 175-page report that OUTA published and submitted to the Speaker of the National Assembly on the 28th of June 2017, which was entitled no room to hide and sought to substantiate allegations of State Capture. You made such a submission, I take it?

MR JOHNSTON: Yes, we did.

ADV FREUND SC: Now you deal then in paragraph 5.8.9 following with a meeting of the Portfolio Committee on Public Enterprises. This of course was fairly shortly after the date on which that committee according to the
20 evidence we have heard of Ms Mazzone and of Ms Rantho had decided to start a process of inquiry into allegations of State Capture. And did you attend this meeting on the 25th of July?

MR JOHNSTON: Yes, I think I did.

ADV FREUND SC: And you say in paragraph 5.8.10. But

both of them know, when to report to the committee presented a summary of its contents for consideration. And you then go on to explain, as it were the nub of the various allegations in your lengthy report. And that was considered, as I understand it, and taken into account by the Portfolio Committee on Public Enterprises on that occasion and presumably it informed some of their subsequent work.

MR JOHNSTON: Yes, I believe so.

10 **ADV FREUND SC:** Now, let us turn to the Portfolio Committee on mineral resources and I want to take you to page 267 and starting at paragraph 5.8.18 and I think it is necessary for me to make clear both to you and to the Chair that on this issue it is not currently anticipated that politicians who were directly involved will be called to testify about the events of this particular committee.

And so for present purposes, we rely quite heavily in relation to this committee on the content of your affidavit and that is why I am going to focus on that in some detail
20 in your evidence that now follows. Now, if we can look at paragraph 5.8.18, you refer in the fourth line to Annexure 4.7A and that is the letter from Mr Frolick I think we will find that at page 531, let me just check that please.

CHAIRPERSON: And that is 500 and?

ADV FREUND SC: 531 but perhaps I should take you to

530 just to set the context. Now, this is the PMG minute or summary of the meeting of the Portfolio Committee on mineral resources and energy on the 16th of August 2017 Chaired by Mr S Nosipho, is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: If you then go to page 531 through to 532. We find that there was some discussion on that occasion about a letter. If you go to the middle of page 531, under the heading letter from House Chairperson,
10 State Capture allegations. Do you see that?

MR JOHNSTON: Yes, I do.

ADV FREUND SC: And it says the following:

“The Chairperson read a letter from Mr Cedric Frolick the House Chairperson, which had been sent to the committee on 20 June 2017. The letter was not circulated to the general public attending the meeting. In essence, the letter was a request for the committee to investigate the various allegations in the media on the State Capture of organs of the
20 State, some implicating the Minister of Mineral Resources. He wanted the committee to report back to the National Assembly at the soonest opportunity once the investigation was done.”

Now let me just pause there and say this, there does not seem to be any controversy from anybody that such a letter

was sent to the Chair of this particular committee, as we see reflected here. But for reasons unclear to me, we have been unable to come up with the copy of that very letter but it seems clear, does it not that the letter was sent and drawn to the attention of this particular Portfolio Committee?

MR JOHNSTON: Yes.

ADV FREUND SC: And what do you then deal with in your affidavit from paragraph 5.8.19 is that Mr Nosipho reports
10 to the committee and you are really here summarising what we find in more detail in the PMG report. Mr Nosipho reported that he had responded to the House Chairperson by asking for terms of reference to guide the committee in its investigations and that is what you discern from the PMG reports. Is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: Now I take it Mr Johnston, that although you attended many meetings, you are not certain that you attended this meeting.

20 **MR JOHNSTON:** I am not quite sure because I was trying to spread myself between all these inquiry meetings.

ADV FREUND SC: So you were able to rest here largely on the PMG report?

MR JOHNSTON: Yes, I would say so.

ADV FREUND SC: And then you say in paragraph 5.8.20

shows that several ANC MP's present advanced arguments against conducting the requested investigation. You say Mr. Mandela, a member of that committee said that the committee should wait until more terms of reference were in place and also said that he was not sure what emails were being referred to and what media was being referred to and one sees if one, if one goes to page 531...[intervene]

CHAIRPERSON: Sorry Mr Freund, Mr Freund.

10 **ADV FREUND SC:** Yes, Chair.

CHAIRPERSON: I think when you were reading, I do not know whether it was deliberate but it does not seem to be very clear you skipped a line where you said, he was not quite sure what I think the next line is what the House Chairperson wanted the committee to do. You went to the next line, what media was being referred to, I got.

ADV FREUND SC: Yes, yes I stopped...[intervene]

CHAIRPERSON: Was it deliberate?

20 **ADV FREUND SC:** ...at a particular, but you are correct it does continue and it...[intervene]

CHAIRPERSON: I thought it was not deliberate, if it was deliberate, that is fine.

ADV FREUND SC: No, it was deliberate because at that point Chair I wanted to take you to the source document for that particular point.

CHAIRPERSON: Oh, okay.

ADV FREUND SC: This document page 531.

CHAIRPERSON: Five four one?

ADV FREUND SC: Five three one, 531 in Bundle
...[intervenes]

CHAIRPERSON: Oh that is where I am.

ADV FREUND SC: And in the fourth last paragraph on that
page you will see that that is the source of what Mr Johnston
is setting out in his affidavit and that Mr Mandela says that
10 he referred to the rural village Nveso in his constituency
where newspapers and other forms of media were not readily
available. He was adamant that the committee should not be
seen to be chasing rumours and had to rely on facts which
as I understand it was put up as a reason not to exceed to
Mr Frolick's request that this committee at this time should
pursue this inquiry. Is that how you understand it Mr
Johnston?

MR JOHNSTON: Yes it is and I think – I will get into more
detail but this is the beginning of an extremely extensive
20 series of excuses that were put forward not to hold an
inquiry or not to do – not to implement substantive oversight
but what one could interpret from what Mr Mandela is saying
here if he does not know what it means to carry out oversight
of this issue and I will get to that point later on but perhaps
that is a valid point.

ADV FREUND SC: Alright let us – let us lay a foundation for that. Let us go to the next paragraph in your affidavit at page 268 and that is the paragraph 5.8.21.

MR JOHNSTON: I am there.

ADV FREUND SC: And there you refer to the fact this PMG report that we have shows that Mr Lorimer of the DA then handed out sealed envelopes marked Gupta emails to committee members and that this provoked an angry reaction from amongst others the Chairperson of the Committee and
10 Mr Mandela as being so they said in breach of Parliamentary and Committee protocols. Is that correct?

MR JOHNSTON: Yes that is the argument that was put forward.

ADV FREUND SC: And then the Chairperson says something interesting that you deal with in paragraph 5.8.22 because he is quoted in this report as saying:

“That asking for Terms of Reference and further clarity should not be seen as stalling or evasive.”

20 And he said that and I quote from the minutes:

“There was already broad agreement within the government that there had to be an investigation. All that was needed from the Committee’s perspective would be how to go about investigating the issue and he closed

the discussion by proposing that a letter be drafted to the House Chairperson for guidance.”

In other words the Chairperson was not disputing in fact was proclaiming that what he called the government was in broad agreement that there had to be an investigation. You agree?

MR JOHNSTON: Yes.

ADV FREUND SC: Now in paragraph 5.8.23 you refer to a subsequent letter from Mr Frolick to Mr Lizipo [?] dated the
10 23rd August 2017. You refer to that as Annexure 4.7B and could I refer you to page 535 please in the Bundle? I am going to read this letter into the record.

“Dear Honorary Chairperson. Your letter dated 18 August 2017 as at hand and refers. I confirm that we have met and discussed the contents thereof in a meeting earlier this afternoon. We also agreed to an approach in dealing with the matter at hand. Over the
20 last two months serious allegations has been made in the public domain about state capture and the alleged role of certain members of the Executive. The sources of authority of the National Assembly is contained in Rule 2 and is primarily derived from the Constitution of the Republic.

Parliament is amongst other legally bound and empowered to exercise oversight over the Executive and to keep it accountable for executive action. Allegations against any member of the Executive warrants the attention of the relevant committee to clarify issues under contestation. A relevant member of the Executive must be to provide with – must be provided - my mistake – must
10 be provided with a fair opportunity and platform to respond and where possible clarify allegations in the public domain. This should be the point of departure before the committee determines its next course of action. Furthermore the committee must perform its functions in terms of Rule 167 the Rules of the National Assembly. Finally the committee must determine the resources required and communicate the needs to my
20 office.”

Now the existence of that letter and what was conveyed in that letter was then drawn to the attention of the committee itself as you deal with – with this way – there does not seem to be any controversy that that letter was drawn to the attention of the committee in due course. Now what I want

to know if you want to is the next meeting which you deal with at page 269 paragraph 5.8.24 and following and there we see that that letter that you have just been referred to was discussed and that it was clear on the need that the letter, Mr Frolick's second letter was clear on the need to first call the Minister to account and that the committee should then seek legal advice on the way forward. There is then some discussion and you indicate towards the foot of the page that the ruling party majority voted to allow the
10 Minister to come to the meeting and account. And what they really wanted was the Minister which is Minister Zwane to come there and then to that very meeting and be called to that meeting. Is that correct?

MR JOHNSTON: Yes I can comment further if you would like?

ADV FREUND SC: Yes I – that is exactly what I would like you to do please.

MR JOHNSTON: Okay. So my view is that there had been a strategic decision to get the Minister to come as soon as
20 possible and this was obviously was not standard procedure. As you can see virtually every other committee that either intended to or actually held an inquiry there would first be a plan of how the inquiry would go and what exactly they would talk about and what they intended outcomes would be obviously.

In this instance from this moment on onward and this is very early in the process there was a decision taken that the Minister must come immediately or as soon as possible.

Now my view as to why they did that and why it work in the favour of the Minister and organisation he represents is Section 58(1) of the Constitution which really makes members of Parliament and Cabinet members immune to any civil or criminal proceedings resulting from anything they say in Parliament.

10 So when we get there I will refer to this again but some of the utterances made by the Minister when he ultimately came – he came one time and he ...

ADV FREUND SC: Please let us wait until we get there. Let us just deal with where we are for the moment. If I can take you back to paragraph 5.8.25 you say we see this from the fourth line of that paragraph that Mr J Lorimer and Advocate H Smit of the opposition argued that the Minister should not be summoned until the proper processes had been put in place and the committee had received advice from the
20 Parliamentary legal advisor.

So there was some debate and argument about whether it is appropriate just to call the Minister immediately or that there should be certain processes put in place but the decision by the majority is we call the Minister immediately to this meeting now.

Is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: As it happens the Minister was unable to come immediately to that meeting and so he did not come to that meeting as the majority had been 00:09:22 is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: Now you resume dealing with this issue at page 271 of your – of the Bundle paragraph 5.8.33 where
10 you deal with the meeting of the Portfolio Committee on Mineral Resources on the 18th October 2017.

And you refer to the annexure – Chair just for your convenience if it is already in your papers the Annexure 5.1 is in Bundle – in this bundle at page 545. I am not going to go there at the moment.

But what is reflected in that minute and recorded by you is that at the outset of this meeting – I am reading from the fourth line of this paragraph.

20 “At the outset of this meeting the Committee Chairperson stated that there had been a command – that is what he says from the House Chairperson to have a meeting with the Minister convened and for him to respond to the allegations of state capture. And in the light of this directive says the

Chairperson the primary task was to ask questions related to accountability of the Executive.”

That is a fair summary I give is it?

MR JOHNSTON: Yes.

ADV FREUND SC: And what then happens is that the Minister does present himself and is questioned on a diversity of issues where there were allegations in the public domain that had some bearing on his Portfolio or his personal experience. And you deal with that at quite some length in this affidavit. Is that correct?

MR JOHNSTON: Yes I do.

ADV FREUND SC: Now one of the points that the Minister made and you deal with this in paragraph 5.8.36 and when I refer to the Minister here we are referring to Minister Zwane. The Minister made was that he asked whether he was being put on trial publicly without allowing the legitimate structures like the courts to do their work.

And he – on that occasion and other similar comments were made he was really suggesting as I read the report that whilst he was not disputing that this committee could call him and ask him questions he was really asserting that it was not their proper role. That the proper – the proper structures to deal with these issues were the courts, the Hawks and other entities rather than the Portfolio

Committee. Is that a fair summary?

MR JOHNSTON: Absolutely and similar to what was said in 2013 by Minister Jeff Radebe. He also gave the impression that this is not an issue that is relevant and that this is not something that really affects South Africans and therefore Parliamentarians need not concerning themselves with this issue.

ADV FREUND SC: I need to jump forward through to paragraph 5.8.41. The Minister had been asked a number of
10 questions which you deal with in your affidavit and he responded so you say that he had answered these questions more than ten times on different platforms and he said he wished members would take notes so they do not bring them up again. And he then went on to deal with those questions that have been put to him and one of those questions related to the Glencore Tegeta Transaction, am I right?

MR JOHNSTON: Yes.

ADV FREUND SC: And in the middle of page 275 his
20 assertion was that the owners of the company had been Glencore that he Mr Zwane was looking for an interested buyer and he was told that only one company called Tegeta showed interest so he took it upon himself to bring the two companies together to try to resolve the matter and this is when the trip to Switzerland occurred because he was told that the owners of Oakbay resided there. Correct?

MR JOHNSTON: Yes he said so.

ADV FREUND SC: And then he was asked about the Vrede Dairy issue and he – he was asked we see in paragraph 5.80 – 5.8.44 which is on page 277 he was asked about the Waterkloof Airbase issue. We see in paragraph 5.8.45 that he really thought that this was not an issue that should be canvassed with him on this occasion. And I – I want to take you now to paragraph 5.8.46. Because there has been as the minute shows and as your affidavit reflects there has
10 been an extensive period of questioning of Minister Zwane at this meeting.

But in paragraph 5.8.46 towards the middle of the paragraph the committee has now beginning to reflect on well where do we stand and where will we go. And you say that the Chairperson reiterated questions that the Minister did not answer. He noted that after the process had been completed the Committee will have to assess the answers provided by the Minister and then in the beginning of paragraph 5.8.47 you report that members of the opposition
20 parties were dissatisfied by the Minister's answers in particular about the role he and or his advisors played to assist the Gupta family in the acquisition of Optimum Coal Holdings and the facilitation of the pre-payment from Eskom for coal supply from OCH. So that is what the minute show was then discussed once the questioning of the Minister was

completed. Is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: And if we move on to paragraph 5.8.49 it seems that that conversation we have just referred to took place while the Minister was still present. In fact if we go to 5.8.48 we see as we often do the Minister or the person concerned invoking the sub judice rule is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: Certain question he did not want to have
10 to answer because of the sub judice rule and then it seems that what came to the fore what is referred to a certain set of emails it seems if one reads this with some other knowledge this must be a reference to what had come to be known as the Gupta Leaks that as for the emails that were referenced the Minister said that he had not had an opportunity to respond to them and he questioned by whom these emails were validated. Perhaps he added these emails should be tested before he can be probed about the content contained
20 in them. He asked if they had been tested sufficiently to declare that they are admissible in court. And he was reluctant to be drawn into an engagement as to what the emails purported to show. Is that correct?

MR JOHNSTON: Yes I would just like to highlight that he was dictating this conversation and there was no objection that he should very much be able to comment on the veracity

of those emails if he were presented with any of those contents. He simply said that that is not something that he is willing to discuss because there is not necessarily a legitimate sort of evidence.

ADV FREUND SC: And then if I take you to paragraph 5.8.51 the person you say said that the committee would write to the Minister officially to engage further but noted – oh well I will leave it at that.

So there was to be a further communication to the
10 Minister. And I want now to move onto the events of the 25th
October 2017 which you then deal with at page 280. And
what you report there is that the Chairperson of the
Committee informed the members of the Committee that a
further engagement date had been requested with Minister
Zwane to discuss allegations of state capture and the
Chairperson's hope was that this would be on the 1st
November 2017. Is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: If I can then take you to the next page
20 the meeting of the 1st November 2017. And what you then
deal with in some details is that it had been expected that on
this occasion Minister Zwane would face further questions as
had been agreed at a previous meeting. But that he had
written on the previous day the 31st October to say he was
unable to attend the meeting citing a Cabinet meeting and

other business issues and that arising from that the Committee agreed that a new date had to be agreed with the Minister urgently and an agreement was reached within the Committee that it first had to con – it had first to conclude its questions to the Minister before it could decide on an appropriate course of action based on its findings. Is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: And in paragraph 5.8.58 you make the
10 point that the Chairperson recorded that the members had not finished questioning the Minister so this had to continue to enable the Committee to conclude phase 1 of its investigations and move on to phase 2.

So the intention was get the Minister's position on record, understand the Minister's position and thereafter embark on what might be called a more intensive inquiry into the issues. Is that correct?

MR JOHNSTON: Yes that is the way it came across.

ADV FREUND SC: Now there was then a further meeting on
20 the 8th November which you deal with later at page 282 and it is recorded in paragraph 5.8.60 that the Director General had written to the Committee confirming that the Minister was available on the 28th and 29th of November for this resumed questioning of the Minister. And there was consensus that it was it was regrettable that the 30th – that

this was so far away into the future because the 30th November was the last day before leave but nonetheless those – the Committee members present all agreed that since the Minister had proposed the 28th and the 29th those were the dates on which the Minister would be expected to come and to continue to face further questioning. Is that correct?

MR JOHNSTON: Yes they were already trying to bend over backward in order to get him to come and account.

10 **ADV FREUND SC:** So he was supposed to be there on the 28th. Now you make no entry in your narration about the 28th but you deal with the 29th. And you say in paragraph 5.8.63 that on the 29th November the Committee held a further meeting. During its meeting the Chairperson said that the Committee had been supposed to deal on the previous day ie the 28th to which we have just referred with questions to the Minister so that it could finalise matters and deal with the way forward.

20 But the Minister had declared his unavailability with reasons and the meeting had therefore been shifted to the 29th and then in paragraph 5.64 the Chairperson asked the secretary to read out the reason for the unavailability of the Minister at that day's meeting which is to say the 29th the second of the two days scheduled and the secretary said that the correspondence from the Minister's office stated that

the Minister was still recovering from illness. That is what the records reflect. Am I correct?

MR JOHNSTON: Yes.

ADV FREUND SC: So if I take you to paragraph 5.8.69 after much discussion the Chairperson suggested that the Minister be given the date of the 24th January. If he did not appear the Minister would be expected – would be asked to suggest an alternative date and if he did not appear on the alternative date then the Committee would decide what
10 action to take and the Minister agreed to that proposal. That is how this meeting ended off. Is that correct?

MR JOHNSTON: Yes and I should note only at this point there was disagreement from opposition parties that this should be accepted and that these apologies are legitimate but members of the ruling party insisted that it should be accepted. And the resolution that was there in every instance of this attempt to get the Minister to come and account was that we will deal with it later.

ADV FREUND SC: Alright. Now I am going to be taking you
20 in a moment to paragraph 5.8.70 but before I do that can I take you please to Bundle 1 page 574?

MR JOHNSTON: I am there.

ADV FREUND SC: That is the media report to which you are referring is it not at paragraph 5.8.70?

MR JOHNSTON: Yes it is.

ADV FREUND SC: And that is the media report on the very date the 28th that the Minister was supposed to have been the first of his attendance where the reporter – two reporters say this:

“A jovial and joking Mosebenzi Zwane on Tuesday evening that is that evening became an ill Minister of Mineral Resources on Wednesday morning. Mr Zwane was at a surprise ANC Free State Provincial General
10 Council on Tuesday evening when News 24 saw him joking with ANC comrades.”

And you draw attention to this as a factor suggesting that there be suspicion as to the genuineness of the excuse given by the Minister for not attending the meeting on the Tuesday the 28th and Wednesday the 29th, is that correct?

MR JOHNSTON: Yes that is precisely correct and members of the Committee would also have access to this media article. But they did not seem to care about it.

ADV FREUND SC: Now you then jump forward to the 21st
20 February bear in mind that what we had expected was that this was going to happen in January but we now find ourselves at the 21st February 2018.

And by the way in the interim of course the present Commission of Inquiry had been formally established.

On the 21st of January according to the PMG minute

which you have summarised the Chairperson and I am now referring to paragraph 5.8.72 – the Chairperson of the Committee said he had received two letters as to why the Minister would be unavailable to appear before the Committee.

In the first it was claimed that the Minister was scheduled to answer questions in the NCOP. The Chairperson had pointed out in reply that there was no NCOP meeting that week and that the 21st of February was a
10 date requested by the Minister.

The Chairperson recapped to the Committee that it had not been able to proceed on the 14th of January as initially intended because of member training. So we cannot blame the Minister for that.

The date had therefore been moved to the 14th of February. But the Minister had said he would be writing exams on the 14th of February and that was when the meeting had been shifted to the 21st of February at the suggestion of the Minister.

20 So the reason why we have had this long gap from November to the 21st of February is because the Minister had specifically requested this date.

That is what the records show, am I correct?

MR JOHNSTON: Yes.

ADV FREUND SC: Carrying on from your report in your

affidavit.

In the second letter a different reason was given for the Minister's unavailability on the 22nd of February.

Namely that he had to attend a select committee meeting and then a Cabinet Committee meeting. And you then in a page or two that follows in your affidavit you summarise the frustration by the members of the Committee at the actions of the Minister and especially you say the flimsy and possibly untrue reasons for being unable to attend
10 meetings even when the Minister himself had set the date for the meeting. And so the Chairperson says well we are going to have to decide what to do and there are various discussions and if I can pick up a narrative at the foot of page 286? Members began discussing the possibility of moving towards an inquiry without delay. The Chairperson pointed out that the Minister had already made an appearance before the Committee. It was says the Chairperson the dissatisfaction with his answers to members questions, his evasive manner of responding and the fact
20 that members had more questions that had led to the attempts to get the Minister to appear a second time.

And then you make the point in paragraph 5.8.79 the Committee finally decided that the way forward lay in setting aside efforts to question the Minister again and to commence with preparations for a formal inquiry.

The Committee resolved to meeting the following week to determine the scope content and technical details of the inquiry.

So it seems from your affidavit that their patience has now been exhausted and there is going to be the required inquiry. Is that a fair summary?

MR JOHNSTON: Yes that is how it seems but it – it seems to me that it is a premeditated intolerance at this point because now more than six months have passed so suddenly
10 there is dissatisfaction. So my interpretation is that there is a reason for that happening now. As you say the Commission had then started then in the meantime other things have happened as well.

ADV FREUND SC: Now what you then deal with under the heading 25 April 2018 meeting – a Terms of Reference for that inquiry were in fact then determined and if I can take you to page 584 in the record? Perhaps we should start at page 583.

MR JOHNSTON: I am there.

20 **ADV FREUND SC:** At 583 we see that what we are reading is the PMG Report on the meeting of the Portfolio Committee on Mineral Resources and Energy on the 25th April 2018 and at 584 we see in the second paragraph and this is under the heading Terms of Reference for Oversight Inquiry.

The PMG Report states the following:

“The Committee agreed that state capture allegations were serious and resolved to institute an inquiry in line with the mandate of Parliament.”

Now bear in mind that is the mandate given in June of 2017 and we are now in April of 2018.

10 “The Terms of Reference were that there would be question and answer session to which – during which the Honourable Zwane and any other relevant persons would testify before the Committee. The inquiry would focus inter alia on the role of Honourable Zwane and the DMR in facilitating the sale of Glencore assets, non-compliance with the PFMA resulting in fruitless and wasteful expenditure. Alleged breach by Honourable Zwane and of the Constitution – of the Constitution and the Executive Members Ethics Act as regarded conflict of interest.

20 The handling of mining rehabilitation funds by the DMR and the question of whether the dismissal of DMR officials were subject to external influence.”

And then it talks in more detail about the logistical intended arrangements. Is that correct?

MR JOHNSTON: Yes.

ADV FREUND SC: Now you then say in your affidavit at paragraph 5.8.21:

“But OUTA was contacted in May 2018.”

Perhaps if you just explain to the Chair what this is all about?

MR JOHNSTON: Yes Chair. There was an interaction between myself and the Committee secretary Ms Ayanda Boss and she was interested to interact with us and I
10 suspect although we did not reach the point of that specificity but we were at the time involved in the Bank of Baroda case and I think we had laid charges against the former Minister as well and basically what Ms Boss was trying to arrange was for our legal team and the legal advisors of the Committee to meet to really help inform them about what Terms of Reference to adopt and really just to give them some information.

And the arrangement that they had been seeking was to come to Johannesburg to actually meet with us physically
20 there because it was they thinking that it would be much too costly to invite all the potential witnesses to come to Cape Town because most of them were in Johannesburg so they figured it would be cheaper to actually go to Johannesburg themselves and meet with us there.

So we started those engagements and we came very

close to actually having that meeting but that never occurred and you will see why in a moment.

ADV FREUND SC: I am going to come back to that. You just referred in passing to the Bank of Baroda issue. That is not an issue that I have led you on but it is dealt with in your affidavit at paragraph – at page 270 to page 271 and you refer there to urgent litigation before the Pretoria High Court brought by OUTA and it had a bearing on the issues that we are now discussing, is that correct?

10 **MR JOHNSTON:** Yes.

ADV FREUND SC: Now on the 25th April 2018 the Committee has agreed the Terms of Reference for its inquiry and arrangements are now being put in place for your organisation and one presumes amongst others to furnish information of assistance to the Portfolio Committee in respect of the inquiry that it has now decided to carry on, would you agree?

MR JOHNSTON: Yes precisely.

20 **ADV FREUND SC:** But then what happens we see that the meeting on the 30th May which you deal with from page 287 and follows. I am going to just read into the record extracts from that. Paragraph 5.8.83.

“The Parliamentary”

CHAIRPERSON: Mr Freund. We have gone past one o'clock.

ADV FREUND SC: Yes indeed would this be the convenient time Chair?

CHAIRPERSON: Yes. Let us take the lunch adjournment we will resume at ten past two. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: I am terribly sorry. I lost track of time. I thought we were still okay. So that is why there has been a delay. I am sorry about that. Let us continue.

10 **ADV FREUND SC:** Thank you Chair. Chair...
Mr Johnston, we were at page 287 of Bundle 1. We were about to deal with the meeting of the 30th of May 2018 from paragraph 5.8.82 onwards. Could I ask you please to refer to the source document for this portion which is at page 589 and following in Bundle 1. Five, eight, nine.

MR JOHNSTON: [No audible reply]

ADV FREUND SC: Are you with me Mr Johnston?

MR JOHNSTON: Yes, I am.

20 **ADV FREUND SC:** What we will see from the heading is that this is the PMG report on a meeting of the Portfolio Committee on Mineral Resources and Energy dated the 30th of May 2018 on issues pertaining to Optimum Coal Mine, Shiva Uranium Mine, Lilly Mine progress report on the State Capture Inquiry Programme.

And if I could then take you to page 593 the

portion of these minutes which refer to the Inquiry into State Capture at the Department of Mineral Resources. Bundle 1, page 593. Are you with me?

MR JOHNSTON: Yes.

ADV FREUND SC: Chair, may I just check that you have had an opportunity to find the reference?

CHAIRPERSON: You said 593?

ADV FREUND SC: 593. That is correct.

CHAIRPERSON: Yes, I am at 593. Thank you.

10 **ADV FREUND SC:** Thank you, Chair. Now you will see that under that heading the introductory portion is a report back from Ms Fatima Ibrahim, the Parliamentary Legal Advisor who has recorded the same that:

“At the last meeting the department had indicated that they had set up preliminary meetings with potential witnesses to try and gather more evidence.

20 Some were in response to submissions and other involved persons with the support staff had identified.

The support staff had been due to travel over the weekend to conduct those interviews but late on Thursday afternoon they had been informed that their travels were not approved.

As a result, the trip had not taken place and

they had not been able to meet with the relevant witnesses.”

And it continues and I quote:

“It appeared that this may had been due to budgetary issues which led to two problems.

The first was that a budget was needed to conduct the inquiry.

The department was not based in Cape Town and the majority of the relevant people were not based in Cape Town either.

10

Travel was therefore by no means a luxury but rather something that was necessary because it would not make sense to ask witnesses to come to Cape Town as opposed to three people from the support staff going to Johannesburg.”

This is what you were referring to a little earlier, is it not Mr Johnston?

MR JOHNSTON: Yes, that is right.

20 **ADV FREUND SC:** And then Ms Ibrahim continues:

“The second issue was in the absence of those meetings.

The support staff had been thrown off their work schedule as they were dependent on these meetings to assist them to close the

gaps that they had identified in their research and to start preparing their questions.

She had prepared questions for certain witnesses but needed input from those potential witnesses.”

And she continues. And then the minutes record in the second paragraph at page 594 the following under the heading Discussion:

10 “The chairperson said that he had met with the house chairperson, that would have been Mr Frolick, and in the discussion it had been indicated that no money was allocated for issues of oversight.

The other issue was that with the schedule they had that no arrangements had been made to have a member remaining behind to do this unless there was a very strong motivation beyond legislation.

20 Thirdly was the issue of a cost exercise where the starting point would have been to call the new Executive and establish whether work was being done on the basis of what it had been presented to it.”

And so it goes. So basically, what is being reports is that nothing can happen because no money has been

allocated to oversight. Is that your understanding?

MR JOHNSTON: Yes, it is. And that was not communicated directly to us. That is something that we only came to understand afterwards. But I would just like to digress here because this is something that falls quite squarely in our mandate as an organisation.

We analyse the financials of Parliament and I would like to highlight that this institution gets about R 2 billion of taxpayers' money per annum and the vast majority of that money goes to the facilities and travel expenses of MP's. So the suggestion that there is no money for oversight is quite farfetched.

CHAIRPERSON: I am sorry Mr Johnston. You say the bulk of that money, if I understood you correctly, goes to travelling by MP's and what else?

MR JOHNSTON: Chairperson, it is a range of things and we try to really dissect exactly what it is used for but it is not so clear but we have come to understand or we were trying to understand the funding of constituency officers because the Joint Standing Committee on the Financial Management of Parliament has issued several reports saying that even though money is being consistently allocated to those officers, there is no clarity on whether they operate.

And in some instances, there is no clarity on

whether they even exist but political parties are in control of those budgets. So we try to get more information of exactly where the bulk of this money goes. It is not immediately clear and now we are waiting for political parties to tell us exactly what they do with that money.

ADV FREUND SC: But I think you did ...[intervenes]

CHAIRPERSON: Sorry Mr Freund. Is your point Mr Johnston that you are not – you have not found anything to suggest that there was money that had been
10 allocated for oversight but was not used. But your point is that: Yes, it was not allocated for oversight but they could have taken money from somewhere, from some items and allocated part of it to oversight. Is that your point?

MR JOHNSTON: Yes, Chairperson the latter is my point exactly.

CHAIRPERSON: Okay.

MR JOHNSTON: And in the budget breakdowns, as we see it, there is no dedicated chunk of money that goes to oversight but there is substantial chunks of money that is
20 dedicated to personal luxuries and facilities of members of Parliament. And we believe that that is the sort of money that can very easily be reprioritised for this sort of expense but that was not the case.

CHAIRPERSON: H'm. Okay. Mr Freund.

ADV FREUND SC: Thank you, Chair. The minute

continues quoting Mr Lorimer and opposition MP who said that:

“This was unacceptable because why would Parliament want an inquiry - and bear in mind that this was the mandate that they had been given - and not allocate a budget? The committee needed to write to Parliament and request that a sufficient budget be allocated.”

And that is really where the matter stood. Am I
10 correct?

MR JOHNSTON: Yes, that is exactly right. And I would like to point out one more thing and that is that the support staff here and even senior legal advisors indicated that they are dependent on external sources of information.

And I have had some direct contact with many staff members like this and they have indicated that when it comes to the point where they are on the verge of getting very useful and important information from external sources that are obviously A-political, that they would be
20 prevented from doing so because that would obviously expose issues that politicians might not want to have exposed.

ADV FREUND SC: And... Sorry Chair.

CHAIRPERSON: Yes. Can I just ask this question Mr Johnston? For members of Parliament to perform

effective oversight, they need to have relevant information to be able to ask pertinent questions to the Executive. And to do that they might need persons who could do some kind of investigation prior to them having a meeting with a Minister or a DG or a board or an SOE.

For example, if there are allegations that are in the media that fall within – that relate to a department or an SOE which accounts to that committee, I can imagine that if a committee immediately said that we want to see the
10 Minister before there was some homework that had been done, they might not really be able to ask proper questions or challenge whatever the Minister tells them.

It may be that they need people, I guess some of them might be lawyers, some of them maybe might be accountants, I am not sure, who could go and interview witnesses and collect affidavits or statements or collect whatever information and make sense of the information in a document that is given to the members so that they can then ask proper questions.

20 Now I do not know – I suspect that researchers do not do that because I understand they have got researchers even though maybe they might not be adequate.

But people who could go to Eskom, Transnet where there are issues that the Portfolio Committee is interested

in, interview people and the people at Eskom would be obliged to cooperate or people at Transnet will be obliged to cooperate if those people who are employed by Parliament to all the information.

Are there people like that that are available to various committees or is it only the researchers?

MR JOHNSTON: So there are Content Advisors. I think each committee has a Content Advisor. But in Parliament there are – there is a small group of Legal Advisors and I
10 think the number is 11 and the number of committees they serve is 40. So obviously they are disadvantaged in terms of the workload.

But an important point that I want to make, as I go towards the end Chairperson is. It need not be something that is financed by taxpayers. There are many civil society organisations like us who are sources of external capacity and information that would love to provide this sort of assistance to these committees.

And we made our availability and willingness to do
20 exactly that very clear when we engaged with the Committee Secretary. And we were on the verge of having an entire day in meeting to do exactly that but when the – one can presume the chairperson and members of the committee came to understand that this is what is going to happen, they made a decision that resources cannot be

allocated to that.

So another point I think and I do appreciate in this Commission is that members of Parliament seems to have complete discretion and they can completely arbitrarily decide on what money should be spend.

And when it comes to their salaries, which are exorbitant in my opinion, there is never a question of whether there is enough money. There is always enough money of that. But when it comes to oversight there is not
10 necessarily enough resources. And I think that is just illogical Chairperson.

CHAIRPERSON: Okay thank you. Mr Freund.

ADV FREUND SC: Thank you, Chair. Now we have been dealing with the meeting on the 30th of May 2018. The next date that you refer to which is at page 289 is the 12th of September 2018 which is quite some months down the line. And you refer to the meeting on that date of the Portfolio Committee on Mineral Resources.

You say that was the last time they met with the
20 focus on the allegations of state capture. And you refer to Annexure 5.5. And then all the way through to page 297 you deal in some detail with what happened at that last meeting.

And I would just like for present purposes to jump to the end, which is at page 297, paragraph 5.8.101. And

there, at the end of that paragraph, you say the following and this is reflected in the source documents as you have furnished.

10 “The chairperson said that members were proposing that the committee write a letter, requesting a decision from the house chair, that is to say Mr Frolick, on the budget to be given while still continuing to seek clarity on the status of the four areas that it had requested...”

And you deal with that earlier in your affidavit.

“The members agreed and the meeting was adjourned..”

And then you continue in the next paragraph:

“The inquiry was never carried out.”

So is that really the end of the story?

20 **MR JOHNSTON:** Yes, it is. We tried to get an explanation from the committee staff who we had engaged with before as to why this was no longer going ahead but they just did not answer us. And I presume that it is because it was not their decision and they were probably been told not to relay any explanation because no explanation could be justifiable. But that was the end of it.

ADV FREUND SC: So let us just go back and just look at some of the highlights of that meeting which we know now

it ended. Let us go back to page 289, paragraph 5.8.86. What we see in the second half of that paragraph is that the Parliamentary Legal Advisor, Ms Ibrahim, had been instructed to prepare a draft budget in consultation with the Committee Secretary. They had done that.

But up to this point in time, 4 September 2018, there had been no indication whether it had been approved. So no further work had been done.

10 However, there had been in the previous three months some developments. And so they looked in the course of this meeting at some of those developments. One of those is that the Minister had told the committee – this is now a new Minister I take it – had told the committee that the department had taken certain steps to address corruption.

20 And there was a reference at the top of page 290 of your affidavit. It refers to the Zondo Commission that started looking into allegation into state capture which she, which is to say I think the legal advisor, believed would be related to the former Minister Mosebenzi Zwane and the committee enjoyed benefit of sufficient resources, technical expertise and investigative capacity.

And so the suggesting was then made at the end of that sub-paragraph that I have just been reading from that the committee may wish to review the terms of reference

and to narrow the issues down.

And so there was then a discussion in the course of this meeting of a more limited inquiry. And what I think you have told us is that effectively even that did not happen.

MR JOHNSTON: No, it did not. We had sight of those revised terms of reference and they were quite specific. So I believe it would not have taken a lot of resources to carry out that exercise but that is the way that it was
10 presented.

ADV FREUND SC: So let us just sum up where we got to. Mr Frolick has signed a set of letters in June of 2017 to the chair of this committee, amongst others, saying it is an urgent necessity to investigate and report back into allegations relating to alleged state capture.

Here we are a year later. The committee is frustrated by the non-cooperation of the Minister primarily accountable, wishes to proceed with an inquiry. Makes that very clear. So the documents indicate. And no inquiry
20 takes place. Is that the summary in a nutshell?

MR JOHNSTON: Yes, that is it. And in the meantime, I think it was Dr Khoza who referred to the recycling failure. What had happened was that Mr Zwane was going to be replaced with Mr Mantashe as the Minister and suddenly there was no more interest to speak with Mr Zwane simply

because he was no longer in that position. And this is something that happens very frequently.

We have seen it in state owned entities, in municipalities, in provincial government and in the departments. It happens all the time that when someone becomes tarnished with allegations that have not been resolved they simply shift that person to a different position in the hope that that issue would be forgotten. That is basically how it ended.

10 **ADV FREUND SC:** And where did Mr Zwane end up?

MR JOHNSTON: Excuse me?

ADV FREUND SC: Where did Mr Zwane go?

MR JOHNSTON: Immediately afterwards I am not sure. But I know eventually he was appointed as the Chairperson of the Portfolio Committee of Transport which is where he is today.

CHAIRPERSON: I think he was not appointed to President Ramaphosa's Cabinet at the beginning of 2018, I suspect. Is that your recollection as well?

20 **MR JOHNSTON:** Yes, Chairperson. The majority of tarnished Ministers ...[intervenes]

CHAIRPERSON: Ja.

MR JOHNSTON: ...that I deal with in my affidavit as well were sent to Parliament.

CHAIRPERSON: H'm.

MR JOHNSTON: But the point that I wanted to get to is that Parliament has become kind of like a cooling off zone for tarnished politicians. So even though they did not feature in government, they were still at the very top of the political party list.

And they ended up as the chairpersons of committees in Parliament and I think their salary today is R 1.4 million per annum and that is paid for by taxpayers.

CHAIRPERSON: Yes. Mr Freund.

10 **ADV FREUND SC:** And you deal at the top of page 200...
I am sorry Chair. Can I presume?

CHAIRPERSON: Yes, you may proceed.

ADV FREUND SC: Thank you, Chair. You deal at top of page 298 with an issue you have already referred to, the budget of Parliament. And you say that Parliament receive no less than R 2 billion per annum from the fiscus to finance its operations. Is that correct?

MR JOHNSTON: Yes, that is correct.

20 **ADV FREUND SC:** And it is matter... Well, let me not put that. Now I would like to move and deal briefly with certain other streams of inquiry. You deal with the PRASA issue on paragraph 5.8.1 and 4 which is at page 300 of Bundle 1.

And you deal in particular with a meeting on the 24th of November 2017 and it is a meeting that we have touched on briefly in the evidence of Mr De Freitas

yesterday but you were also present at this meeting. Is that correct?

MR JOHNSTON: Yes, I was.

ADV FREUND SC: And at this meeting, there was an engagement with the so-called Interim Board of PRASA, a legal **animal(?) [00:23:39].** *[Speaker not clear.]* The definition which I have some difficulty in understanding. And you then deal at page 302 and following with what happened in this meeting. You say in paragraph 5.8.118:

10 “Committee members explained that they have been waiting for answers for over a year which explained their level of anxiety.”

And that is in the context of all the various preceding paragraphs in your affidavit. And then you really come to your conclusion in paragraph 5.8.119. Perhaps you should just explain in your own words what the point is that you are trying to convey in this sub-paragraph.

MR JOHNSTON: So would just like to place this in context. The fact that MP's have been waiting is
20 something that members of Parliament tend to do but both in terms of the Constitution and in the Rules of Parliament, they have the power to require someone, anyone, to appear before them at any time. So they obviously choice to wait.

But the point I made in 5.8.119 is that the actual

content of the investigation has been done by Werksmans Attorneys were not discussed at all.

The only point of discussion, and it was quite clear that it was a decision made beforehand, that this would be the focus of the discussion by the ruling party, was the fact that they had contracted a law firm to do this investigation at some extent as supposed to getting some organ of state to do it for them instead.

Chairperson, I would like to raise an issue here I
10 think – it is now common knowledge but at this point only people on the inside of what was happening would know, that many law enforcement agencies and offices such as the Office of the Chief Procurement Officer which could do these kinds of investigations were also purposely hollowed out and incapacitated as part of the State Capture Project.

And in my view that is why this is the very strong preference of the majority of members in the committee is that Werksmans Attorneys should not do this investigation. And regardless of what they find that they should not be
20 paid but that they should rather be handed over to an organ of state.

ADV FREUND SC: And apropos of the substance of what Werksmans discovered and were reporting on. The majority party MP show any interest al in inquiring into what substance was and pursuing the issues that had been

raised by them?

MR JOHNSTON: No, that was not my experience. Until this day, even though I was in that meeting and others, I had no idea what the investigation actually entailed.

ADV FREUND SC: I was going to take you to paragraph 5.8.121 but really I think you have already made that point. You have already also referred and did so at an earlier stage in your evidence and so I took you to the part of your affidavit that dealt with Water and Sanitation. The
10 intended inquiry did not happen, so we will not repeat ourselves there.

But I would like to take you now to the question of communications and Ms Faith Muthambi at paragraph 5.9.14. It starts at the bottom of page 309 but immediately moves on to the next page.

MR JOHNSTON: I am there.

ADV FREUND SC: Now there was a meeting on the 27th of March 2018 of the Portfolio Committee on Communications. This is not a committee to which we had
20 previously referred. And this meeting, apparently, so it is said, was requested by your organisation. Is that correct?

MR JOHNSTON: I am not sure that we requested it but we very much wanted it to happen. Yes.

ADV FREUND SC: And you refer to Annexure 10.1 and Annexure 10.1(sic), page 672. And once again, you have

detailed PMG minutes of this meeting.

Now the minute show and you refer in your affidavit to the chairperson of that committee providing an introduction as to what is called alters allegation which was that Ms Muthambi had sent confidential Cabinet decisions and related information to the Gupta family.

Is that a fair summary of the sting of what you were alleging and what you wanted to have investigated and dealt with?

10 **MR JOHNSTON:** Yes. Although I was not a party on that but I think that was the main point.

ADV FREUND SC: Are you alluding to the fact that there was another OUTA person involved with this particular issue?

MR JOHNSTON: Yes.

ADV FREUND SC: Alright. I understand. And when we look at paragraph 5.9.16, we see that a member of the ruling party, one Mr M Kalako was suggesting that the letter from the Deputy Speaker suggesting this deliberation
20 was vague.

So it seems as if the Deputy Speaker had asked that there should be an oversight by this committee on this issue. But Mr Kalako said it was clear that your organisation that laid charges against ...[indistinct – word cut off] He said Ms Muthambi had lied to the *ad hoc*

meeting dealing with the SABC and he did not understand why her issue was being circulated and he said that the report of the *ad hoc* committee had made recommendations on actions that had to be taken, it was conclusive in his view.

I think, as I recall, that was a recommendation that the President give consideration to maybe relieving her of her duties in that particular portfolio. Is my memory correct in that regard?

10 **MR JOHNSTON:** Yes.

ADV FREUND SC: And then he says, he noted that:

“OUTA has provided evidence and the decision was simple that Ms F Muthambi should be charged and sent to prison. There was no need for an inquiry to investigate, it would be a waste of parliamentary resources.”

And then the Chairperson says:

“There was a clear by you on how Ms...”

When I say you, your organisation.

20 “...how Ms Muthambi had violated the confidentiality of cabinet. It fell under the ethics committee.”

Now we dealt with that earlier, did we not? That is a matter that your organisation referred to the ethics committee, is that correct?

MR JOHNSTON: Yes that is and we had sent them to

them about six months earlier.

ADV FREUND SC: And your evidence this morning was to this day you have had no response to that, is that correct?

MR JOHNSTON: No, we have had no responses.

ADV FREUND SC: So, in short, what came of this request that this committee should investigate and take – and exercise proper oversight over and require proper accountability by Ms Muthambi, what came of it?

MR JOHNSTON: Nothing has come of it and Chairperson,
10 I would like to highlight this point because this is not only non action resulting from our allegations, which we do not know whether the ethics committee has dealt with them or not, but it is also the *ad hoc* committee's recommendations which I think occurred quite long ago as well.

Those recommendations were made by a committee of parliament and nothing happened. On the contrary, Ms Muthambi was then put in a Chairperson's capacity in parliament subsequent to that.

20 So what Dr Khoza said before I think is quite relevant here again and that is that, apparently, for the kind of transgression that we have seen and that we have noted, that we have alleged, that we have put formal complaints together on, that people are rather rewarded for this kind of behaviour as opposed to being punished for it and I think that really speaks to the discretion afforded to

members of parliament and political parties more specifically. It is obvious that the ruling party, of which she is a part, shows not to institute any punishment or any consequences against her. On the contrary, she enjoys a very high public office to this day.

CHAIRPERSON: So it is like people can just engage in wrongdoing and not only nothing happens, not only that there are no consequences, adverse consequences, but they continue or get given higher positions and nothing
10 happens. It is like there is complete impunity.

MR JOHNSTON: Yes, Chairperson, that is exactly right and it goes beyond the recommendations and the sub and the submissions we have made as a civil society organisation but the recommendations made by internal parliamentary staff, who I believe really carry the institutional memory of parliament, these are ignored as well and those people are disempowered as well.

Some of those people have committed suicide and many of those people have resigned from their positions in
20 parliament saying that they are frequently manipulated and abused by senior members of parliament.

So these individuals are not only free from consequences, but they are also free to abuse the staff of parliament, people who I believe are really capable and willing to do their work in the public interest but they are

not allowed to do that.

CHAIRPERSON: This culture of impunity that you are talking about, is it a result of a situation where in order for action to be taken it depends on the majority in the committees or does it – are there other factors? In other words if, for example, the majority party does not want its members to be disciplined then obviously no matter what minority parties say, then there would be nothing that happens or are there some mechanisms within parliament
10 that do not depend on their level of representation of the political parties which are given the power to make decisions or implement ...[intervenes]

MR JOHNSTON: Chairperson, it is the former. There is no accountability mechanism that I am aware of that is independent of a majority's consensus. For example, I also indicated this and I will probably get to it later on, but in the challenges that I see in the code of conduct that is really championed by the ethics committee in parliament, when the registrar makes a finding, and he could have a
20 finding really based on concrete evidence and he could present that evidence. Firstly, it is confidential so the public would not know but then he could present that report to the ethics committee and they can, according to the same code of conduct, they can simply choose not to anything with her, they can simply say that well, Mr

Registrar, we do not like what you are saying, so please stop it, close the report down and let us move on and that is what I suspect is happening and there is no oversight of that.

And one of the key recommendation I would like to make and my organisation has consistently tried to make is that there must be public oversight and for that to happened there needs to be transparency, the ethics committee's deliberations are confidential, always, so we
10 have no idea what goes on there and I think a simple systemic intervention would be to empower both parliamentary staff in parliament and civil society organisations or representatives of the public to really have some oversight of what parliament does itself.

CHAIRPERSON: Yes, thank you. Mr Freund?

ADV FREUND SC: Presumably on the ethics committee issue that you are contending for is that that should not be in secret, that there should be transparency as to the proceedings and the outcomes of proceedings before the
20 ethics committee, is that correct?

MR JOHNSTON: Yes, that is correct. I mean, in the beginning I tried to appreciate what reasons there might be for that and one can understand that some investigations required confidentiality and that an investigation could be jeopardised if all its details were known, that is

understandable but after about four years of complete non-response from this committee, complete non action, which they are free to do, I think my perspective has changed and I think that that committee's deliberations should be transparent and open to the public.

CHAIRPERSON: I am concerned about what you say happens or does not happen in the ethics committee but at the same time I am keeping an eye on not going beyond what is the terms of reference of the Commission and in
10 order to – I mean, we are looking at the parliamentary oversight on the basis that if the Commission finds that levels of corruption that we have reached and that there was state capture, one would want to say what recommendations should the Commission make to try to make sure that state capture does not happen again or to make sure that the levels of corruption are brought down and that is when then says okay, let us look at what structures have a role to play, then you go to the question of parliamentary oversight but one must just be careful.

20 So I want to ask you because you may be able to say well, you would think that how the ethics committee of parliament deals with complaints against members of parliament, this is how it would come in, into the issue of parliamentary oversight or – so that then one can see okay, it falls within because if it falls without maybe one would

just be unhappy but not be able to do anything about it.
Are you able to say anything?

MR JOHNSTON: Yes, Chairperson, I understand that there is a limit to this inquiry's scope and various Constitutional Court judgments have also made the point very clear that it is not the place any judge to say how parliament should do its work and I think that is reflected in the constitution as well. But what I think someone in your capacity has the position to say, is whether or not
10 those mechanisms that are there are being used appropriately and whether those mechanisms that are there actually give expression and proper manifestation of what the constitution demands and in my view, it does not. But that is my view, Chairperson.

CHAIRPERSON: Okay, thank you. You may continue, Mr Freund.

ADV FREUND SC: Yes, thank you, Chair. Mr Johnston, is there any reason why you would think that the ethics complaints that you have been referring, that were
20 unresolved, have any relationship to the question of the proper oversight by parliament in respect of alleged state capture or corruption? Is there a connection or not a connection and if there is a connection why would you think there is a connection?

MR JOHNSTON: I would think there is definitely a

connection. The joint committee on ethics and members' interests are almost solely responsible the conduct, ethical conduct of members of parliament and if there are instances whether either someone external or someone internal is saying that members of parliament are not carrying out their oversight and, as a result, state capture is left unabated.

It that is not followed up, if nothing is done about that, then the ultimate consequence is that state capture
10 continues and I have noticed that many of the witnesses who come here have said that in their view it is continuing at this moment and I believe the ethics committee's non action and their confidentiality are very easy masks behind which our leaders can hide and I think it is a key reason why state capture is continuing.

But it is more general issue, I think the ethics committee is really where the buck stops and they should have brought in consequences and they still should for the fact that other members of parliament and committee
20 chairperson in particular are not doing their work or they did not do their work in the past and, as a result, there was looting in the public sector and taxpayers' money was lost.

ADV FREUND SC: Now we take you back to a paragraph that we have already touched on earlier at page 298 and it is paragraph 5.8.104.

CHAIRPERSON: I am sorry, what paragraph?

ADV FREUND SC: 5.8.104.

CHAIRPERSON: Okay, thank you.

ADV FREUND SC: Do you have that, Mr Johnston?

MR JOHNSTON: Yes, I do.

ADV FREUND SC: The two specific complaints that you have alluded to, lodged by your organisation to the ethics committee related on the one hand to the Minister of Communications, Faith Muthambi, and on the other hand –
10 she was the former minister and also, on the other hand, the former Minister of Mineral Resources, Mosebenzi Zwane. What was the nub of the allegation against Faith Muthambi?

MR JOHNSTON: I would prefer to give that to the Commission in writing, if that is alright.

ADV FREUND SC: Well, we can go to annexure 5.6, if you prefer which is at page 606 and it runs through to page 627, it is an affidavit presented by Stefanie Fick of OUTA and it refers to what Mr Zwane is accused of doing and, in
20 short, it seems to me on a quick reading, that it is at the very heart of alleged state capture or corrupt activities. Do you agree?

MR JOHNSTON: Yes, I agree.

ADV FREUND SC: That is in respect of Mr Zwane. In respect of ...[intervenes]

CHAIRPERSON: That was in respect of Ms Muthambi, is it, Stefanie Fick or both – both Ms Muthambi and Mr Zwane?

MR JOHNSTON: No, on a quick reading, Chair, of this particular affidavit and this particular annexure.

CHAIRPERSON: Yes.

ADV FREUND SC: It seems to refer to Mr Zwane only but I believe that we have referred elsewhere in your evidence today, Mr Johnston, to ...[intervenes]

10 **CHAIRPERSON:** I have seen one that relates to Ms Muthambi, I am not sure where it is but I have seen it and I have read it and it is very useful affidavit by the same deponent, I think Ms Fick.

ADV FREUND SC: Yes, I do not propose, Chair, to belabour the point, the material is before you.

CHAIRPERSON: Yes, yes, but I think the point you seek to highlight or to raise with Mr Johnston is ...[intervenes]

ADV FREUND SC: Well, we ...[intervenes]

20 **CHAIRPERSON:** Is you think the proposition that if the complaint that is referred to or one, it is that to the extent that the ethics committee's jurisdiction is wide enough to include conduct that relates to state capture if members of the executive or members of parliament are alleged to have been engaged in acts of state capture, corruption and so on, then that – then it would be important to look

at what the ethics committee does when those issues – those complaints are referred to it because if it does nothing, it does not deter the members of parliament concerned from continuing because they know there will not be any consequences.

ADV FREUND SC: Indeed, Chair, that is the argument.

CHAIRPERSON: And you would recall, Chair, that we referred only a few minutes ago to the material at page 310 and following of this bundle where the
10 communications committee thought that OUTA has presented such an open and shut case that they should not – it should go to the ethics committee, so they certainly had the view, rightly or wrongly, that it was a matter with ethics committee's mandate.

Bear in mind, Chair, that these ministers were at the time of the alleged misconduct members of parliament and are to this day chairs of portfolio committees and members of parliament.

CHAIRPERSON: Well, I have just found Ms Fick's
20 affidavit that relates to I think Ms Muthambi, it starts at page 682, Mr Freund.

ADV FREUND SC: Yes, thank you, Chair. It is a very comprehensive affidavit. May I ask Mr Johnston, is Ms Fick still with OUTA?

MR JOHNSTON: Yes, Chairperson, she is.

CHAIRPERSON: Okay, no, because I think that the Commission may wish her to – I may wish her to come and testify based on her affidavit, so that is why I wanted to find out whether she is still there. Her affidavit is very comprehensive, I found it would be quite useful. But that is fine, the relevant – somebody in the Commission will be in touch with her.

MR JOHNSTON: Thank you, Chair.

CHAIRPERSON: Mr Freund?

10 **ADV FREUND SC:** Thank you, Chair. Now I just want to go back to another issue in which you engaged the Chair a few minutes ago when we were talking about the question of impunity and there was some discussion about to what extent is this the responsibility of parliament and to what extent might the responsibility lie elsewhere. Now I want to refer you to the evidence of several former witnesses. One that comes to mind is Ms Khoza, Dr Khoza.

20 She says if you look at the rules, the rules provide that the chairs of each portfolio committee are determined by a vote of the members of the committee, in other words the MPs have the power to determine who would become the chair of a commission but she also said, if I remember correctly, and the record will show that I am right or wrong, she also said that in reality the decision is made by the

ANC's deployment committee, that the MPs who come to these committee meetings, portfolio committees, when they are going to elect chair, come with instructions from the portfolio committee or some other structure of the African National Congress as a party as to who is to appointed so that I want to put to you for your comment that the ultimate accountability for the impunity, if it is impunity, of people who have been accused and against whom there is apparently a *prima facie* case of serious
 10 misconduct, when they are put back as chairs of portfolio committees, the accountability must lie with the political party. What is your view on that?

MR JOHNSTON: Yes, that is exactly right and it does not come as a surprise at all. As I said before, it is very clear very often that deliberations on record and the formal meetings that someone like myself, who is not part of a political party, are able to attend but the proceedings are not real and what I mean by that is that decisions are taken beforehand and then they are acted out as if
 20 they were being taken in that meeting and the selection of a Chairperson, I have no doubt that that is exactly the case, that they would be chosen beforehand.

And yes, as I said, it is not so much mysterious anymore, that I think many members of the ANC and perhaps they are not the only political party that

operates this way, but your alignment must be first and foremost with that constitution of that political party, not with the constitution of the country and if those two are in conflict then you must invariably stick to the constitution under demands and directives of the political party not the constitution.

So yes, I would say the accountability and the responsibility lies very much with a political party.

ADV FREUND SC: Now I want to move on and deal with a
10 new issue which is the portfolio committee on Home Affairs and I could possibly deal with it only very briefly. You will recall that in June of 2017 it was a letter from Mr Frolick to the chair of that committee requesting an investigation within that committee's remit of the allegations of state capture and corruption and in particular, it seems, the concern was about the speedy naturalisation in unusual circumstances of members of the Gupta family and related persons. Have I summarised that fairly?

MR JOHNSTON: Yes.

20 **ADV FREUND SC:** Now what you deal with at page 313 and 314 and 315 are two meetings that took place. The first on the 12 September 2018 which is very much more than a year after June of 2017 and the second on the 12 March 2019, it is obviously considerably later and the net result we find, it seems, at paragraph 5.10.5 and this is

only in March of 2019 that this point is reached. There you say:

“The inquiry revolved around the allegedly improper relationship between the former Minister of Home Affairs, Malusi Gigaba, and the Gupta family. Their fast-tracked naturalisation served to lay a foundation for their intentions to enter into lucrative business relations with the South African government.”

10 And then make the same point, which you make over and over again:

“Mr Gigaba has not suffered any consequences as a result of the improper waiver of certain requirements.”

Which I think is what the committee ultimately found had taken place, is that correct?

MR JOHNSTON: Yes, that is correct and I would just like to qualify that very briefly. His discretion was something that was legally permissible and I think the main
20 recommendation that came as a result of this inquiry was to actually change that provision in the Act that allows for ministerial discretion on early naturalisation and not only – once again, not only Mr Gigaba not faced any consequences but in my understanding he has been deployed to Luthuli House as the head of policy. The same

with former Minister Mokonyane.

ADV FREUND SC: Now that completes the evidence I propose to lead from you on what we might call issues of fact but you do also deal at the conclusion of your affidavit in part 6, it starts at page 315 with what you call parliamentary oversight challenges and you then go on to deal with recommendations.

Now, Mr Johnston, you will appreciate that we are under quite considerable time pressure so I would like you, 10 if you could just to speak very briefly to one of your main points and it seems to me that one of your main points is this, that the rules empower oversight by portfolio committees but they confer enormous discretion on the committees and your concern is that whilst they are empowered, the rules, as it were, impose no obligations and I think the argument you advance is that the breadth of the discretion and the absence of obligation is something you think needs to be considered. Is that a fair synopsis of your first core point?

20 **MR JOHNSTON:** Yes, it very much is and I would just like to say that one of the core problems that I see in that is that the empowerment of members of parliament and the empowerment of the public is affectively juxtaposed and obviously that is the opposite of what the constitution really demands, which is that parliament is supposed to be

the institution through which the public can find its expression in political discourse and that just is not the case.

I would build up to this but one of my main recommendations is to really better emphasise Section 59(1) of the constitution which says that the National Assembly must facilitate public involvement in the legislative and other processes obviously and its committees and we are very much of the opinion that they
10 do not do that adequately and that that is one of the main reasons why they have been able to operate with such impunity.

ADV FREUND SC: If I can just interrupt you there, Mr Johnston, it seems to me that you are merging two different points. The point you have now been emphasising is a point that you emphasise in your affidavit, it is a point about the desirability of permitting public participation and civil society organisation participation in the processes during which oversight takes place. Is that
20 one of your core views?

MR JOHNSTON: Yes it is.

ADV FREUND SC: Okay. But I was actually trying to deal with a slightly different point which is the first point that you made and it strikes me as a separate point. If I can take you back to paragraph 6.2 of your affidavit, it is at

page 315, there you cite the fundamental constitutional provision of relevance, Section 55(2) which says that:

“The National Assembly must provide for mechanisms to ensure...”

And then you underline the words “to ensure”

“...that all executives’ organs of state in the national sphere of government are accountable to it.”

And you underline the word “accountable” and I had the
10 impression, on a reading of your affidavit, that a point you
were trying to emphasise, leaving aside civil society
participation, is that whether it is the rules or the culture,
the fact of the matter is, there is enormous discretion as to
whether in fact exercise proper oversight and that is one of
your many complaints. Am I correctly paraphrasing and
summarising one of your points?

MR JOHNSTON: Yes and I also qualify that be referring
to the separation of powers which I think is something that
comes to the fore very frequently in the mobilisation of the
20 *sub judice* rule, for example, where the suggestion is that
if courts or the Public Protector or anyone else, any other
authority beyond the realm of parliament is dealing with a
particular issue that either cannot or should not deal with
that same issue and I disagree with that and even though
Section 52(2) of the constitution says that National

Assembly must provide for mechanisms, it does not really make it explicit that they must use them and I think that is the nub of the problem, is that that is precisely the interpretation that members of the ruling party have taken is that yes, we must provide for those rules and in my view those rules are there, there are mechanisms for oversight but they simply are not used.

ADV FREUND SC: Mr Johnston, I do not propose to ask you any further questions save for this. I am well aware
10 that you have put a lot of time and effort into drafting this affidavit and I am aware that there is a great deal that you deal with in this affidavit that we have not dealt with explicitly in this hearing. Is there any one or two points that you feel that should have been emphasised and that you have not yet had an opportunity to emphasise?

MR JOHNSTON: Thank you, Mr Freund. Most of the points I want to emphasis I have but the one that I made pen-ultimately on the inclusion of the public and the empowerment of the public and parliamentary staff I think
20 is one that I should emphasise again and I also would like to make it clear that both in terms of the finances of parliament and in terms of the laws that govern parliament, members of parliament are the only ones who are effectively empowered and in – I think it is – let me be very clear on that, in Section 58(1) of the constitution it say

that:

“Government members, deputy ministers and members of the National Assembly have freedom of speech in the assembly and its committees subject to its rules and orders but are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything that they said and produced before or submitted to the assembly or any of its committees or anything revealed as a result of anything that they have said and produced before or submitted to the assembly or any of its committees”

And I would like to just give my view on that. I think that is a provision that has been exploited and I think that is also a reason why a minister would be called before a committee before any terms of reference have been put together simply because one can admit wrongdoing and explicitly one would be protected and I think that many people who are in parliament, chairpersons in particular, are people who would rather belong in prison but there is really nothing for the public to do about that and I believe that is something that should change.

ADV FREUND SC: Thank you, Mr Johnston, I have no further questions.

CHAIRPERSON: Thank you very much, Mr Johnston, for availing yourself to assist the Commission, we appreciate it

very much, you are now excused.

MR JOHNSTON: Thank you, Chair.

CHAIRPERSON: Mr Freund?

ADV FREUND SC: Chair, the next witness is Mr Frolick.

CHAIRPERSON: Yes.

ADV FREUND SC: Who was logged in, I just want to check that he is presently accessible. Yes, he seems to be on line. So we can deal with evidence as soon as you are ready to deal with him.

10 **CHAIRPERSON:** Ja, I would like us to take ten minutes adjournment and then start with him. Let us take a ten minutes adjournment, it is twenty five past, so twenty five to. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes Mr Freund?

ADV FREUND SC: Thank you Chair, the next witness will be Mr Cedric Frolick.

CHAIRPERSON: Yes.

20 **ADV FREUND SC:** Perhaps before I ask Mr Frolick any I want to draw your attention to the fact that Mr Frolick's affidavit forms part of Exhibit ZZ1 from page 1 and following of Bundle 1, but you will recall Chair that there is a set of affidavits from representatives of the African National Congress of which this was just one. I would

propose, subject to your views that in due course I move to have admitted the entire exhibit even though not all of the deponents to affidavits will necessarily testify, they have submitted this and I will be moving, if you so approve, for the entire exhibit to be admitted as a single exhibit.

CHAIRPERSON: But the other affidavits are not annexures to his affidavit are they?

ADV FREUND SC: No they are not, if I can take you to page 1 of Bundle 1 Chair.

10 **CHAIRPERSON:** Ja, I am in Bundle 1.

ADV FREUND: So the cover page that I have as page 1 shows that there are actually nine sub-exhibits you might call them, each one of which is a self-standing independent affidavit, so for example the second one is the affidavit of the Late Jackson Mthembu ...[intervenes]

CHAIRPERSON: Okay sorry, I think we are ...[intervenes]

ADV FREUND SC: For example ...[intervenes]

CHAIRPERSON: I think we are not looking at the same page, but I have in front of me Bundle 1, but Bundle 1 – oh
20 okay, no, now I see, yes page 1.

ADV FREUND SC: And you will recall Chair, and I will deal with this through the witness, but you will recall that the Commission, through the Commission's secretary, issued invitations to political parties to submit both evidence and representations and the African National

Congress responded to that by in due course presenting really as a package the affidavits that we see in ZZ1, they are nine separate individual's affidavits of whom I am only proposing to call as witnesses four or five, and one of them you have already heard from but nonetheless my submission will be in due course, subject to your views, that it should be admitted as an exhibit regardless of whether the deponents to all the affidavits actually testify orally.

10 **CHAIRPERSON:** Which ones are we going to have the benefit of their oral evidence, that you ...[intervenes]

ADV FREUND SC: Well Chair we have already had the benefit of Ms Rantho which was ZZ1.8 and the content of that affidavit so overlaps with the contents of her earlier affidavit that she was not taken in any detail through that but you have heard her evidence and she has confirmed orally really the content ZZ1.8. Mr Jackson Mthembu we would of course have called but as you are aware tragically passed away so we certainly have him. The editorial view
20 that the Commission has taken is that it is not necessary to call Bengu, Exhibit ZZ1.4, Noluleka, Exhibit ZZ1.5, as regards Exhibit ZZ1.1 there is an affidavit there from the Secretary General of the African National Congress, Mr Magashule, it is uncertain whether he will testify or whether that testimony might be given by somebody else,

that we don't yet know. Ms Letsatsi-Dube was scheduled to testify but was for various reasons unable to do so this week, and Ms Magadzi is available to testify after Mr de Freitas.

CHAIRPERSON: Yes, okay that is fine, let's go ahead and – so the ones you will call are Mr Frolick and ...[intervenes]

ADV FREUND SC: It was the intention ...[intervenes]

CHAIRPERSON: ...on Mr Smith?

10 **ADV FREUND SC:** Mr Frolick, Mr Smith I do intend to call, Ms Letsatsi-Dube if she becomes available. Ms Budzi and Mr Magashule as things stand at the moment.

CHAIRPERSON: Okay, alright. Okay, let's – let me admit them, I guess that we can regard the admission as provisional and that can be made final in due course once we know who is the – who has been able to testify orally and who has not.

Okay, I think let us proceed on that basis.

20 **ADV FREUND SC:** Yes thank you Chair. As I say Mr Cedrick Thomas Frolick is available and I think we should take the affirmation.

CHAIRPERSON: Mr Frolick, good afternoon Mr Frolick.

MR FROLICK: Good afternoon Deputy Chief Justice.

CHAIRPERSON: I don't know whether to say welcome back because you have testified before me before, but on

that occasion you were here physically and on this occasion I suspect you are in Cape Town or you may be at home?

MR FROLICK: I am at home Deputy Chief Justice, thank you.

CHAIRPERSON: Yes, okay alright. Registrar please administer the oath or affirmation.

REGISTRAR: Please state your full names for the record.

MR FROLICK: Cedric Thomas Frolick.

10 **REGISTRAR:** Do you have any objection to making the prescribed affirmation?

MR FROLICK: No.

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

MR FROLICK: I truly affirm.

CEDRIC THOMAS FRELICK: [Affirmed]

20 **CHAIRPERSON:** Yes thank you Mr Frolick. Mr Freund you may proceed.

ADV FREUND SC: Thank you Chair. Mr Frolick have you been furnished with a hard copy of your own affidavit which you submitted to the Commission with the Commission's pagination numbering evident on the hard copy you received?

MR FROLICK: That is correct.

ADV FREUND SC: And is it correct that the affidavit you received on page 47 through to ...[indistinct – distorted] is your affidavit and that the signature at page 55 is your signature.

MR FROLICK: That's correct.

ADV FREUND SC: And can you confirm the correctness of the facts in your affidavit?

MR FROLICK: I do confirm.

10 **ADV FREUND SC:** In the light of what we have just discussed I presume this affidavit may be admitted as evidence in its own right but provisionally together with the rest of Exhibit ZZ1.

CHAIRPERSON: Yes, the affidavit of Mr Cedric Thomas Frolick at page 47 will be admitted as Exhibit – are we going to say ZZ1 point whatever

ADV FREUND SC: Well Chair strictly speaking ZZ1.3.

CHAIRPERSON: Yes, why don't we stick to that and we will see at the end of it needs to change for now or do you
20 have another proposal?

ADV FREUND SC: No, no I am happy to refer to it as ZZ1.3 and therefore it equals the whole of ZZ1 is also admitted, it will still form part of that ZZ1 bundle.

CHAIRPERSON: Yes, so Mr Frolick's affidavit will be admitted together with annexures if it does have

annexures, it doesn't look like it does and it will be admitted as Exhibit ZZ1.3. The other affidavits that is now the affidavits of Mr E S Magashule, Mr J Mthembu, N R Bengu, Richard Smith, H P Maruleka and D P Letsatsi-Dube are also admitted provisionally as exhibits and the exhibits to be – they will be marked as in the case of Mr Magashule's one Exhibit ZZ1.1, in the case of the affidavit of Mr J Mthembu as Exhibit ZZ1.2, in the case of the affidavit of N R Bengu as Exhibit ZZ1.4, the affidavit of H P
 10 Maruleka as Exhibit ZZ1.5, that of Richard Smith as Exhibit ZZ1.6 and the affidavit of D P Letsatsi-Dube as Exhibit ZZ1.7.

You said the one for Ms Rantho Mr Freund has been taken care of or is this another one?

ADV FREUND SC: Chair I think strictly speaking although I intended it to be admitted formally I am not certain that I requested you to do that so in the interest of safety and prudence I ask that you admit ZZ1.8 as well. The point I make is that when one reads the content of that it is
 20 subsumed into the content not only of her larger affidavit from which she was led but also into the content of her oral testimony before the Commission, so on that basis I would ask for the sake of formality to admit Ms Rantho's second affidavit as ZZ1.8.

CHAIRPERSON: Okay and that – and the affidavit Ms D Z

Rantho as Exhibit ZZ1.8, I think would be admitted finally because she has testified, ja.

ADV FREUND SC: Yes.

CHAIRPERSON: Okay, alright, thank you.

ADV FREUND SC: Thank you. May I proceed Chair?

CHAIRPERSON: Yes you may proceed.

ADV FREUND SC: Thank you. Now Mr Frolick we see from your affidavit that it was deposed to on the 12th of October 2020, is that correct?

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

ADV FREUND SC: And if we go back to paragraph 5 of your affidavit, to page 47 of the bundle we see that a few weeks before that you were informed by your organisation, the ANC, that this inquiry had invited the ANC to make representations on how it had been carrying out its constitutional oversight obligations over the Executive, and holding it accountable for the performance of its functions and the exercise of its powers. Is that correct?

MR FROLICK: That is correct.

20 **ADV FREUND SC:** And in fact, I am not sure if you are aware of this, but there were several letters addressed to the African National Congress at an earlier stage inviting such representations but due to miscommunication problems they didn't – they were not received by the proper persons or they were not – it didn't come to the

attention of the persons concerned and so when it finally did come to the attention of the African National Congress you were one of several people, one of nine to be exact, you were asked by the African National Congress to depose to affidavits as it were in response to the request from the Commission to the African National Congress, is that correct?

MR FROLICK: That is correct.

ADV FREUND SC: May I just make clear for the record
10 ...[intervenes]

CHAIRPERSON: I think Mr Freund it is appropriate for me to say that we appreciate that the African National Congress responded to that invitation because many political parties represented in Parliament did not respond, but as I understand the African National Congress, DA as well or technically not, the DA ...[intervenes]

MR FROLICK: Chair if I may say so the DA were – instructed Ms Mazzone to represent them and the comments that she made in her affidavit were made on
20 behalf of the DA.

CHAIRPERSON: Yes so the DA also responded positively to that invitation. So I am not aware of any other political party represented in Parliament which were invited because I mean, I know that the IFP was invited, the EFF was invited, quite a number of them I think were invited but

it seems only the ANC and the DA responded positively. I do not think we received any responses from the other political parties. Is that your, your understanding as well?

MR FROLICK: Chair to the best of my recollection, the Commission did receive a certain responses by correspondence indicating that other parties would probably be interested in making submissions or evidence, but to the best of my knowledge, that was never subsequently furnished.

10 **CHAIRPERSON:** Yes, okay. alright. Maybe if there are any other parties who, which I wrote to the Commission in response to that invitation and said whatever they said, I would like to see that just so that when I talk about non reaction or no response then I will be accurate because I thought that many of the - I thought all the political parties would embrace this opportunity of assisting the Commission to understand what the challenges are with oversight, performance of oversight functions in mechanisms that Parliament has, whether those
20 mechanisms or oversight are adequate, or what challenges are there and how should they be addressed.

I thought that and what you experiences they have had of over oversight, performance of oversight functions but a number of them did not. So I would like to just know, who responded and said what but otherwise that is fine we

can proceed.

ADV FREUND SC: Thank you Chair, we will endeavour to put that before you in a pack that contains the relevant correspondence.

CHAIRPERSON: Ja, okay alright.

ADV FREUND SC: Now Mr Frolick you say in your affidavit, and this has been referred to by several witnesses before you have testified, that you are the House Chairperson committee's oversight and ICT in the
10 National Assembly and that you have occupied that role from 18 November 2010 until the present, is that correct?

MR FROLICK: That is correct.

ADV FREUND SC: And precisely because you have occupied that role, you were requested by your party to depose to the affidavit pursuant to which you are now appearing before the Commission. Is that correct?

MR FROLICK: That is correct Advocate.

ADV FREUND SC: And you say in your affidavit, that you wish to explain how the House Chairperson functions in
20 Parliament. I am looking at paragraph 7 of your affidavit and perhaps with reference to what you say in paragraphs 8, 9 and 10 you might like to explain the function of the House Chairperson. Am I correct colloquially in the political world; the office has come to be referred to as the Chair of Chairs.

MR FROLICK: That is correct the Advocate.

ADV FREUND SC: Now I am going to use that colloquial term, the Chair of Chairs and if you could just explain what the functions are, but perhaps it might assist you. If we have regard to the rules to which you make reference, am I correct that you were furnished with a copy under the heading of a file under the heading legal framework bundle that you were furnished with the National Assembly rules, eighth edition, and National Assembly rules ninth edition?

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

ADV FREUND SC: Here those two sets of rules comprise the sole content of the legal framework file and in your affidavit, Mr Frolick in paragraph 9 you refer to Rule 262. Now, I asked you to turn to page 322 in this legal file, the top red pagination sequence, if you go to page 322 you will find I think a Rule 262. Is that the rule to which you were referring in paragraph 9 of your affidavit?

MR FROLICK: That is correct.

20 **ADV FREUND SC:** And if we go back to page 170, keep your finger there but just go back to page 170 in the same legal file you will see that that is the cover page of the rules of the National Assembly 9th edition. Is that correct?

MR FROLICK: That is correct, sir.

ADV FREUND SC: It we go to page 172, you will see that that 9th edition was adopted by the National Assembly on

the 26th of May 2016. Is that also correct?

MR FROLICK: That is correct, sir.

ADV FREUND SC: But when you refer to a rule in this affidavit, you are understandably referring to the rules as they currently stand, which are the rules that were introduced with effect from the 26th of May 2016. Do I understand that correctly?

MR FROLICK: Correct.

ADV FREUND SC: But we must of course bear in mind
10 that through some of the events of relevance to the Commission and the evidence on parliamentary oversight, the previous edition, the 8th edition of the rules was in force. Do you agree with that?

MR FROLICK: I agree.

ADV FREUND SC: Nonetheless, so far as I am aware and unless you have pointed out as we go along, my impression is that insofar as it pertains to the House Chairperson the rules as to the responsibilities of the House Chair, there have not been substantial changes between the 8th and the
20 9th editions.

So I am going to assume unless you tell us otherwise, that it is reasonable for us to focus only on the rules as they have been since the 26th of May 2016 but if you feel at any point that it is necessary to draw attention to a difference between the rules as they stood at one

period or another, then of course, you're free to do so.

MR FROLICK: Thank you.

ADV FREUND SC: Now, I took you to and I would like you to go back to page 322. That is the rule as you have already told us, which talks about the scheduling function of the designated House Chairperson that is again another reference to the same office, what we refer to colloquially as the Chair of Chairs. Do we agree?

MR FROLICK: I agree.

10 **ADV FREUND SC:** And what it says is:

“The House Chairperson designated by the Speaker, and that was in the period you have indicated yourself, must as delegated by the Speaker implement any policy directive or guideline on the scheduling and coordination of meetings of all committees and subcommittees.”

Is that correct?

MR FROLICK: That is correct.

20 **ADV FREUND SC:** Now if you would go back to page 309, in the same bundle. We see that that is the portion of the rules from Rule 225 onwards, which deals with Portfolio Committees and I might mention as distinct from certain other committees that are dealt with elsewhere in the rules, is that correct?

MR FROLICK: That is correct, sir.

ADV FREUND SC: And then at - if we go back to para 9 on the preceding page at 309, page 309 in the legal file, we find there is a reference to the forum of Committee Chairpersons which is established by Rule 221. Is that correct?

MR FROLICK: That is correct.

ADV FREUND SC: And it provides in Rule 222 the forum of Committee Chairpersons consists of A, the House Chairpersons. So who would those be?

10 **MR FROLICK:** The House Chairpersons include my two colleagues, there is a House Chairperson responsible for internal arrangements, and there is also a House Chairperson responsible for international relations.

ADV FREUND SC: Thank you, so it consists of those two colleagues of yours and then in Sub B, this forum also consists of the Chairperson of each Assembly Committee and each assembly member who was a Chairperson or Co-chairperson of a joint committee, when assembly member of the committee designated by the Chairperson.

20 If you could just explain that, to those of us who are not familiar with parliamentary officers and officials?

MR FROLICK: Let me approach it first, from the perspective of the National Assembly, it will include all the Chairpersons of any Parliamentary Committee, we also include then include the other House Chairperson it says

per invite and then it also includes any *ad hoc* Committee that may be formed for that Chairperson to become part of that committee.

It also includes the other committees apart from Portfolio Committees such as the Standing Committees and at times, depending on the agenda we have developed the practice that the Chairpersons including its House Chairperson of the Council of Provinces, also at times follow part of these committees, depending on the agenda
10 items to be assumed.

ADV FREUND SC: No you - if we look at Rule 223, that focuses on the Chairperson of that committee and that is you, is that correct?

MR FROLICK: That is correct.

ADV FREUND SC: And that provides in Sun-section 1 of the rule, the House Chairperson designated by the Speaker presides at meetings of the forum of Committee Chairpersons and then provision made for another House Chairperson to preside in your absence, is that correct?

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

ADV FREUND SC: Now above and beyond the rules, to which I have now referred the Chair of this Commission, could you perhaps just explain a little more detail, as it were, the practical reality of what the post of Chair of Chairs comprises?

MR FROLICK: Well, thank you, the Chairperson or House Chairperson of Committees, is a position that is delegated responsibilities by the Speaker. And the Speaker as you have correctly referred to earlier, is directing the House Chairperson then to implement any policy directive guidelines on the shared link or coordination of meetings and also committees and sub-committees.

In practice, what it means is, is that I work with the Chairpersons on a daily basis to oversee the
10 implementation of the program of Parliament. As far as the scheduling of committees are concerned, the program of Parliament is determined by the National Assembly Programming Committee and then also the broader framework coming from the Joint Programming Committee. In practise what it would mean is, is that when there is any clarified scheduling. If a Committee have planned and submitted a program to my office then that program must be implemented and the reason why it is implemented is – or must be implemented as submitted is because it gets
20 published to the public in order to allow for anyone who wish to follow a Committee meeting; to know that such a Committee will be sitting and the items that they may consider.

They also then submit applications, that is the Chairpersons, to my office for...

ADV FREUND SC: Sorry to interrupt you and say when you refer to Chairpersons if you would indicate Chairpersons of what because ...

MR FROLICK: Chairpersons of Committees. I refer to the Chairpersons of the Portfolio and Select Committees in the National Assembly specifically.

ADV FREUND SC: Right thank you.

MR FROLICK: So they will submit their programs and other activities that they want to on the take. On an annual basis
10 it is also the responsibility of the House Chairperson Committees in the National Assembly as well as in the National Council of Provinces to see to it that the budget is sub-divided to the different Committees and that the necessary resources are made available to the Committees to implement their programs.

This budget is a – an allocation that the Committee section receive does not reside in my office it is a political budget that I preside over but the actual budget presides in the Committee section of Parliament.

20 So the Committee section of Parliament will require directives from myself and my colleague in the National Council of Provinces as to how that budget must be allocated.

ADV FREUND SC: Right.

MR FROLICK: If there are any specific issue where

Chairpersons require guidance on related to their Committee work they will approach my office for assistance or if they are busy with public hearings and there are certain issues that may arise they will also make contact with the office that I currently hold.

That is broadly speaking the role and the responsibility of the office and all these activities get reported back to the Speaker of the National Assembly who have designated this function to me.

10 **ADV FREUND SC:** Right. Now I wanted to focus on precisely that next. To understand clearly the proper role of the Speaker and the proper role of the Chair of Chairs in relation to the issues of interests to this part of the commission's investigation which is all about Portfolio Committees and oversight what is the role of the Speaker; what is the role of the Chair of Chairs if any?

CHAIRPERSON: One second Mr Freund and Mr Frolick. Thank you; you may proceed. You may proceed.

ADV FREUND SC: Mr Frolick do you recall the question; did
20 you hear the question?

MR FROLICK: Can you just repeat the question again please?

ADV FREUND SC: Yes. I am particularly interested in the issue of oversight by Parliament over the Executive and I am interested in that question in the context of the work of this

commission which is in relation to allegations of state capture and alleged corruption.

And what I am asking you is to explain to us the roles on the one hand of the Speaker and on the other hand of the Chair of Chairs when it comes to what practically is to be done about oversight functions.

So let us start with the Speaker and then – because you talk about your function is to implement delegated functions. So I am trying to understand what the Speaker is
10 responsible for and what your office is responsible for?

MR FROLICK: The Speaker is primarily responsible to see that whatever decision is taken in terms of specific oversight activities and the work of Committees is executed and implemented by my office.

But that in practice will mean is if the Speaker through any form become aware of any specific issue that needs to be pursued by a Committee or oversight that must be conducted by a Committee she can bring it to my attention and there will usually be a discussion and I will
20 contact the relevant and write to the relevant Committees to transmit the instruction by the Speaker in terms of what needs to be done.

ADV FREUND SC: Alright well let us – let us deal with that in a little more detail because it seemed to me you started with the later before you dealt with the earlier.

The later is ensuring that resolutions of oversight activities are in fact implemented but the earlier must be the process of actually conducting that oversight and making recommendations.

Now did I hear you correctly a moment ago that the Speaker can and presumably sometimes does issue instructions which you then pass on to Chairs of Portfolio Committees that they should – they should implement certain oversight activities?

10 **MR FROLICK**: That is correct Sir.

ADV FREUND SC: And do you also perform such a function? Do you also apply your own judgment from time to time as to what types of oversight functions seem to be necessary and when you think such a function is necessary do you pass that on as a request or an instruction to Chairs of the relevant Portfolio Committees?

MR FROLICK: If there are any specific matters that is discussed in the different forums of Parliament which may be the Chief Whips' forum, the Committee of Chairpersons, it
20 could be a discussion that is being taking place in the National Assembly Programming Committee or any specific matter that is being brought to my attention I will usually discuss it with the Speaker but also very importantly with the Chief Whip of the majority party that is also respond – that also has responsibilities in terms of the implementation of

the program and seeing to it that there is a coordinated way in which we are working in Parliament.

ADV FREUND SC: And would that include discussions where relevant with the Chairs of particular Portfolio Committees?

MR FROLICK: That is correct.

ADV FREUND SC: Now the structures that you have just been referring to if I understand correctly are really all official structures of Parliament as an entity. The Chief
10 Whips' forum and the others that you mentioned, am I correct?

MR FROLICK: That is correct.

ADV FREUND SC: But there is another structure of which I have been told I think it is known as the Political Committee, is that correct – is that the correct name and if so could you explain what it is? This seems to me to be an ANC structure.

MR FROLICK: That is correct the Political Committee is an internal ANC structure consisting of members of Parliament
20 and members of the Executive who has been deployed by the ANC to serve on that structure.

That structure is usually chaired and convened by the Deputy President. It includes the Speaker, the Deputy Speaker, the Chairperson of the National Council of Provinces as well as the Deputy Chairperson of the National

Council of Provinces, the Chief Whip of the ANC, the Deputy Chief Whip of the ANC, the Chief Whip of the ANC in the National Council of Provinces and a few other members as identified by the National Working Committee in the NEC to form part of that structure.

ADV FREUND SC: Now before we deal with the function of that Committee I just want to understand a little more clearly the composition of that Committee and you said members of Parliament and certain members of the Executive.

10 Now if we focus on those who are members of the Executive are those also required to be simultaneously members of Parliament in order to be participants in this ANC Political Committee?

MR FROLICK: That is correct Sir.

ADV FREUND SC: So it comprises in addition to the Deputy President of the country who serves as Chair of this Committee and who is the leader of government business it comprises really some of the very most senior MP's some of whom are Ministers and some of whom are not Ministers,
20 would that be a fair summary?

MR FROLICK: That is correct Sir.

ADV FREUND SC: Now what is the function of the Political Committee of the ANC that you have just described?

MR FROLICK: The function of the Political Committee primarily is to give guidance and to oversee the work of the

deploys of the African National Congress in the National Assembly and also in Parliament – my apologies but also to deal with any situation that may occur that may require further political guidance. That is primarily the role that the Political Committee plays and it is also a forum where colleagues exchange their different experiences to see to it how the institution can function at its optimum.

ADV FREUND SC: Alright. Now going back to your affidavit in paragraph 12 you - you say that the practice has developed over the years that the Chair of Chairs have responsibility to provide procedural guidance and guidance – procedural advice and guidance to the Chairpersons of Portfolio Committees, that is correct is it?

MR FROLICK: That is correct.

ADV FREUND SC: I want then go onto deal with in your affidavit is the fact that prior to the 2009 general elections the National Assembly and the National Council of Provinces adopted what you refer to as the oversight and accountability model. That is factually correct is it?

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

ADV FREUND SC: Now once again I would like to refer you to a document that I believe was and should have been sent to you in the Reference bundle at page 1 and following we found a document that is labelled Oversight and Accountability Model. Is that what you have in mind when

you – is that what you are referring to in paragraph 13 of your affidavit?

MR FROLICK: That is correct Sir.

CHAIRPERSON: One second Mr Freund. Yes thank you I have got it. You may proceed.

ADV FREUND SC: And would it be fair to say that prior to the adoption of this particular model by the National Assembly and by the National Council of Provinces there had been a period of reflection and debate and investigation as
10 to how Parliament should execute what the constitution requires of it namely to maintain oversight over the Executive and to hold the Executive accountable and this was the product of that reflection and this was ultimately the decision of the National Assembly and of the NCOP as to how these things should be done.

MR FROLICK: That is correct.

ADV FREUND SC: And you say in your affidavit at the foot of page 48

20 “The moral service is a policy guide to Parliament on the procedures to follow in order to conduct oversight over the Executive and to hold it accountable for its actions.”

And then you say:

“The oversight and accountability model of Parliament is premised on the sceptre

oversight model you refer to it with the acronym SOM and ushered in a strong intent to grow Parliament’s capabilities to advance and continuously strengthen its oversight and accountability mandate and thereby realise the aspirations of improving the lives of South African citizens.”

I presume you stand by that?

MR FROLICK: That is correct.

10 **ADV FREUND SC:** Now I would like to refer you to some evidence given by the very first witness Mr Godi – when I say first witness the first witness in this stream of evidence and – just bear with me for a moment please? Well perhaps before I do that can I take you in the Reference Bundle to pages 30 to 31?

CHAIRPERSON: Yes.

ADV FREUND SC: Part 4.1.4 of this model which has become known colloquially as the oversight model, am I correct?

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

ADV FREUND SC: and you say this was adopted in 2009 if I recall correctly, is that right?

MR FROLICK: Yes that is correct.

ADV FREUND SC: And it starts at the top of page 30 in the Reference Bundle under the heading Oversight Advisory

Section as follows.

“In developing the oversight model the need was identified for Support Services relating to the monitoring and tracking of issues between Parliament and the Executive and on all other related matters within Parliament’s broader mandate. An oversight and advisory section ought to be created in response to the need identified. Its main functions will be to provide advice, technical support, coordination and tracking and monitoring mechanisms”

And I particular emphasise and tracking and monitoring mechanisms.

“On issues arising from oversight and accountability activities of members of Parliament and the Committees to which they belong.”

And then if we go down a little bit in the same page it says:

“The foreseen objectives of the oversight advisory section encompass the following.”

And the second bullet point is

“Tracking and monitoring Executive compliance in respect of issues that individual MP’s raise flowing from

constituency work.”

The next bullet point:

“Assisting with tracking, monitoring and following up issues raised through the Parliamentary Democracy offices.”

And so forth and then the third last bullet point in that section.

10 “Assisting with monitoring and tracking Executive compliance with House resolutions.”

I want to emphasise that one. Assisting with monitoring and tracking Executive compliance with House resolutions. And then it talks further about the sub-divisions of this envisaged oversight and advisory section and you will see if you turn to the next page at page 31 that there is to be according to this document a tracking and monitoring unit which will address decisions in the Houses of the Committee – at committee level as well as issues – issues from – emanating from the floor of the Houses and from Committee reports that get
20 tabled in the House and then the real nub of it at the end of that portion before the section on the Reserve Bank.

“It is therefore recommended that Parliament must speedily establish this section with full resources, capacity and personnel for the efficient fulfilment of the objectives of

oversight and accountability.”

That was a formally adopted decision of the National Assembly that this should be done, am I right?

MR FROLICK: That is correct.

ADV FREUND SC: Was it done?

MR FROLICK: What happened was that the – the implementation thereof for its full implementation was costed by the administration and at a certain point they indicated that it will have to be a phased in implementation to realise
10 the full objective that has been set.

Subsequently that function resorts under the National Assembly Secretariat the secretary to the National Assembly who together with the committee section is responsible for that.

So that was not fully implemented due to the budget re-constraint that was identified at the time. However I indicated in numerous forums that that situation is untenable for the simple reason that if you do not have enough warm bodies to focus on a daily basis on this important function
20 then you going to have different or mixed outcomes. It was then decided to task the ICT section of Parliament to start developing and that is from about two years ago start developing and looking into putting in place a system to electronically track all the decisions that is taken by the National Assembly and I must also add the National Council

of Provinces after committees have submitted their reports to ensure that we do get timeous feedback from the Executive.

In practice what has happened is that after such decisions have been transmitted via the office of the Speaker to the Executive they will respond.

1. To acknowledge receipt of the report and then secondly in certain instances there is a response as well that goes through to the relevant committee.

However this is a mixed situation because you will find that
10 certain departments and the Executive are very prompt in terms of their response while others do not respond to these reports and the recommendations that has been adopted by the House.

That is where we currently are as far as that specific function is concerned. We have made proposals that the budget that has been allocated to Parliament must be reworked and the current Speaker is paying attention to that so that this critical oversight function and I want to add here Advocate my speeches in the National Assembly when we
20 discuss Parliament's budget vote year after year reflect on this in terms of the resources that are allocated to oversight. If you take into account that the National Assembly alone has plus minus 40 different Portfolio and Select Committees together with the National Council of Provinces the amount that is made available for oversight in its entirety is very,

very little compared to what the expectations are.

So we must continuously then ask for 00:22:06 to be done, for money to be moved around and I can confidently say that I believe that the budget allocation that are given to committees are not sufficient for them to implement and execute all their tasks that they are supposed to do.

ADV FREUND SC: Now we have heard evidence with Parliament's budget exceeds R2 billion, is that correct?

MR FROLICK: If my recollection is correct that is more or
10 less the amount.

ADV FREUND SC: What amount when you say the amount available for oversight over entities is very little, what is that amount?

MR FROLICK: That amount Advocate over the years has been incremental adjustments but it stays in the region between and this is out of a budget of R2 billion it stands between R50 to R60 million.

ADV FREUND SC: So somebody in Parliament or somebody speaking for Parliament has made a choice to allocate a
20 mere R50 to R60 million to the oversight function out of the R2 billion odd available to it, is that correct?

MR FROLICK: That is correct.

ADV FREUND SC: Who makes that choice?

MR FROLICK: Well there is a Budget Committee. There is a Budget Committee that works closely with the Executive

Authority and it also includes the secretary to Parliament and they engage with the Chief Financial Officer with National Treasury on a usual – on a regular basis and then based on what is received by Parliament it is sub-divided into the different programs that are there.

ADV FREUND SC: And that R50 to R 60 million is intended to cover what? Is that intended to cover all the financial requirements of all the Portfolios Committees?

MR FROLICK: That is correct and if I may elaborate let me
10 just give you a bird's eye view of how that money is then spent. That money is allocated to the budgets of the different Portfolio Committees and the Select Committees to do the following:

And that is to plan and also to implement and host their regular meetings that they will have.

The second part thereof is when they want to advertise an advertisement to invite public comment on a piece of legislation.

Now at any given time you will find that there are
20 about between 30 to 40 bills in Parliament and part of the oversight and accountability model also has a section that clearly sets out what public participation must be. So advertisements is one element of that.

Another element could be radio station advertisements and any advert going out to newspapers

these days cost at least a quarter of a million rand per advert for public comment.

Add to that also the oversight visits that are undertaken by the different Portfolio and Select Committees this include the travelling of staff, the members of Parliament, their accommodation as well as any other incidentals such as hall hire, such as the provision of basic refreshment such as water to participants and if you take into account the necessary measures that are in place for
10 transport of members of Parliament it will include the airfare if they are travelling by air, their ground transport as well as transport to get them back home again. So the amount that is there is really to do most of those things.

Now you come to a situation where we found ourselves in 2017 where a need was identified for Parliament to do specific work in terms of those four committees of the National Assembly.

To implement that you must then go back into the budget forum and ask the powers that decide say to the
20 secretary of Parliament let us find more money to fund some of these activities and that is usually done in the forum of a 00:26:37 from other programs that has either not been implemented or there is a delay in the full implementation of those programs.

And this is not sustainable to exercise oversight.

ADV FREUND SC: Well those are your words not mine. But you have also said that you repeatedly raised the inadequacy of this budget if one was serious in requiring or wishing to capacitate the very numerous Portfolio Committees to exercise their oversight functions. I take it that it is implicit in what you have said that you did not get a sympathetic response or that it did not change materially?

MR FROLICK: If there were any changes it was as I say it was simple viaments as the need may arise. And I must add
10 that the Chairpersons when they plan for these oversights they – they go to their strategic planning sessions and they come up with what they want to do and you cost those programs then it usually exceeds by far the money that is available.

And then usually my last point of call you go to the Speaker and the Speaker would say okay I will take it up and there will be a viament that needs to be done. But that is not the way it is supposed to fund the oversight function.

Oversight and committees should be one of those key
20 priorities of how the budget of Parliament is divided and allocated.

ADV FREUND SC: Well I agree with you those are your words and not mine but can I put to you for your comment it seems to be the obvious coronary to what you have said that Parliament has simply not been serious about exercising

oversight over the Executive. If it was serious it would have re-apportioned the allocation resources. What is your view on that?

MR FROLICK: My view is that the Committees and the numerous reports that are there that has been tabled by Committees have done a lot of work in terms of exercising oversight over the Executive. Under these difficult constraints they have exercised their oversight. It is a matter of opinion whether that oversight work that has been
10 done was sufficient or not but I cannot fault the majority of these committees for going beyond sometimes what was possible to do their oversight function and execute their mandates.

ADV FREUND SC: Well if it is a matter of opinion what is your opinion? Is it ...

MR FROLICK: My opinion is if I may?

ADV FREUND SC: Alright carry on.

MR FROLICK: My opinion is that with the limited resources that has been made available the committees in Parliament
20 and remember committee work is one element only of oversight. There is other forms of oversight that also happens in Parliament in the National Assembly and in the National Council of Provinces have under these difficult conditions they have gone very far to exercise their oversight in terms of what the rules and the constitution is

demanding from them.

ADV FREUND SC: Alright now let us go back a step. I took you to pages 30 to 31 of the overt model to the Tracking and Monitoring Unit that needed to be resourced and needed to be effective if oversight was to be effective. Do you recall that?

MR FROLICK: That is correct.

ADV FREUND SC: I now want to take you to the evidence of Mr Godi. Mr Godi said in his affidavit that a matter of
10 intense frustration to him and to his committee SCOPA was the absence of tracking and monitoring of the multiple recommendations that that committee made for what you might remedial action. Things to be done and to be reported back on.

And he says there was simply no system in place that achieved that. Now do you agree with him that his frustration and his concern was absolutely legitimate?

MR FROLICK: I can recall that I had a discussion with the Honourable Godi specifically around Monitoring and
20 Tracking and the full implementation and realisation of that. That capacity was created in the office of the Secretary to the National Assemble for our purposes now and also in the committee section.

However, that Monitoring and Tracking system had its flaws because it was not fully implemented as

envisaged in the Oversight Accountability Model.

ADV FREUND SC: Now onto being a little bit euphemistic. Was it not frankly a dismal failure? Was it frankly completely unable to or perhaps unwilling to monitor and check the adequacy of the executive responses to the recommendations of portfolio committees which had been adopted by The House and therefore became House resolutions?

MR FROLICK: Well, from the position where I sit and the
10 work that goes through the National Assembly, I know there is very dedicated people working at that National Assembly table and also in the Committee Section who are dedicated to their work and we have never ever received any instruction as far as I am aware to simply ignore the reports and what has been sent through and to keep track of that.

I do think that the full implementation of that Monitoring and Tracking mechanism by properly resourcing it and creating my view was, even though the model does
20 not say that, was to create a dedicated unit of people who know how the National Assembly Secretariat works together with the Committee Section and to be seized with that on a daily basis.

Instead you would have found now that some of the Human Resources at the National Assembly table

together with the Committee Section also became seized with that matter coupled with the other work that they were doing.

And that made it extremely difficult for them to be effective and to give timeous responses in terms of what has been responded to.

CHAIRPERSON: Well Mr Frolick ...[intervenes]

ADV FREUND SC: Let me read ...[intervenes]

CHAIRPERSON: I am sorry Mr Freund. Mr Frolick, why
10 was that allowed to happen? You are one of the senior people in Parliament number one. You have access to the Speaker. You have access to the leaders of the majority party. Why was that allowed to happen?

MR FROLICK: Deputy Chief Justice, I indicated earlier my frustration that I have shared, not only with my colleague who is also a House chairperson in the Council of Provinces because the same would apply there, and to share it with the Speaker when it comes to the implementation of these things.

20 Also, with the Chief Whip of the majority party and the late Minister Jackson Mthembu is also on record in terms of the poor resourcing. So the decision makers who sit there and divide that budget of Parliament is where the problem is.

For one reason or another, this was the allocation

that was given and the monitoring and function was never implemented to the extent in which it was envisaged.

ADV FREUND SC: Now I still want to put to you what Mr Godi says.

CHAIRPERSON: I am sorry Mr Freund. Just to – I want to make sure I understand what Mr Frolick is saying. Are you saying, a certain structure, maybe it is a committee within Parliament has the task or had the task of allocating budget for these activities of Parliament but they simply
10 did not allocate enough. Is that what you are saying?

MR FROLICK: Yes, Deputy Chief Justice. And if I may add? If I may?

CHAIRPERSON: H'm.

MR FROLICK: What will happen is, is that once Parliament and this structure develops the budget proposal for Parliament it gets submitted to the National Treasury.

And every year you will hear that Treasury has said they cannot give the amount that has been requested and that we need to cut back on the different programmes
20 that are there based on the amount that the Treasury is giving to the National Assemblé.

And as a result, you will find that there are certain key programmes such as this that we are talking about now who always are at the shortest end of what is allocated ultimately in Parliament its structures.

CHAIRPERSON: So as you see it, the source of the problem is lack of adequate funding for these activities?

MR FROLICK: That is one of the key reasons Deputy Chief Justice.

CHAIRPERSON: H'm?

MR FROLICK: Because for committees to do this oversight work, they also need staff, they need the personnel. And if you have a budget shortfall it does not only impact on the budget that the committee has but also
10 on the support staff that can be appointed to assist them in these critical functions.

That is one of the primary reasons why we sit with a situation where I can make a statement confidently to say that the oversight function of Parliament is not properly funded.

CHAIRPERSON: Well, my own impression, and I have not reflected this on this extensively, but my own impression is that the oversight role or function of Parliament must be the second most important function of Parliament coming
20 after the function of making laws.

And if that is so, one would have expected that Parliament and the majority party would be concerned if such an important function of Parliament was severally underfunded.

Is my understanding of the oversight function

being maybe the second most important close to your own understanding in terms of the functions of Parliament?

MR FROLICK: I concur with you Deputy Chief Justice.

CHAIRPERSON: H'm.

MR FROLICK: Oversight includes different types and categories of oversight.

CHAIRPERSON: Yes, yes.

MR FROLICK: And what one of the key financial oversight.

10 **CHAIRPERSON:** Yes.

MR FROLICK: So if you are constraint in terms of this and let me go further to use an example. That when the budget is presented by the Minister of Finance and it runs now into trillions of rands, you need to oversee the expenditure, not only necessarily at the National Legislature, but the need to oversee the expenditure that takes place nationally, provincially and locally.

And one would – I am of the firm belief that you will empower that oversight function to ensure that the
20 intended objectives of the Minister of Finance and the government is achieved.

If you do not do that you run the risk that certain things may slip through or that you do not have the requisite capacity and tools to effectively monitor those budgets that are there.

And that is why we rely heavily, for instance, on the Office of the Auditor-General to assist portfolio committees also in that regard because we have a common approach that financial oversights are of critical importance if we wish to implement the programmes and improves the lives of the people.

CHAIRPERSON: Mr Freund, just continue. I think what you are going to be going into in terms of Mr Godi's evidence will touch on some of these issues and I might
10 have other questions connected with these issues later on but I think just continue.

ADV FREUND SC: Thank you, Chair. But I just, if I may with your leave, I just wish to address some of the evidence just given. Mr Frolick, I understand that Parliament may wish to receive from Treasury's proposed budget a bigger overall budget that it receives.

It seems to be the iron law of political life. Everybody wants more from the Treasury. But your own evidence, as I understand that, is that of the order of
20 R 2 billion.

In others words, R 2 000 million is allocated to Parliament. Are you still there? I cannot see if you are still there.

MR FROLICK: I can hear you.

ADV FREUND SC: And how many portfolio committees,

select committees, incomparable committees are there in the National Assembly and the NCOP?

MR FROLICK: At any stage there is no less than 50.

ADV FREUND SC: Not less than 50. And what you have told us is that of that R 2 000 million, R50 to R60 million is allocated to the oversight function. Have I understood that correctly?

MR FROLICK: That is correct.

ADV FREUND SC: So approximately one million rand per
10 committee per annum. Is that correct?

MR FROLICK: That is correct.

ADV FREUND SC: Now that allocation decision is a decision entirely within the control of Parliament as to whether they have to prioritise oversight and allocate more than R 50 million to the oversight function. Do you agree with that?

MR FROLICK: That is correct.

ADV FREUND SC: So it is not Treasury but Parliament that has decided to so substantially downplay the
20 resourcing of the portfolio committees which serve as what many people call the Engine Room of oversight. Would you agree?

MR FROLICK: That is correct.

ADV FREUND SC: Now that is the context in which Mr Godi, the first witness in this stream, gave evidence.

And he gave evidence that, according to him, it was acutely aware, it is SCOPA was acutely aware of very substantial and deteriorating irregular expenditure as well as wasteful expenditure in the other categories dealt with in the PMFA. Are you still there Mr Frolic?

MR FROLICK: Yes. We are experiencing probably load shedding somewhere. So at times my video gets blurred.

ADV FREUND SC: Alright. If you do not hear me, please tell me.

10 **MR FROLICK:** I can hear you. I will alert you if I cannot hear you.

ADV FREUND SC: Thank you. So Mr Godi's evidence is. Objectively and accordance to the information furnished fully and correctly by the Auditor-General's office, there is not a minor problem of irregular expenditure. There is a huge problem of irregular expenditure getting progressively worse.

And he says, SCOPA routinely issue reports which not only note the nature of the problems but make
20 proposals for their corrections. And he says but our proposals are very largely ignored. We receive no substantive feedback.

Now do you have any reason to dispute factually that evidence by Mr Godi?

MR FROLICK: No, Mr Godi is correct sir. As I have

indicated, that with the limited resource and what – in terms of Human Resource of following the executive action that needs to be done and the mix response that we receive, Mr Godi – he came to the correct conclusion.

ADV FREUND SC: Alright. Now Mr Godi says that when that – that when he experienced that problem, and he chaired SCOPA both in the 4th and 5th Parliament. He said the following and I am quoting from page 116 in Bundle 1, paragraph 6.31 of his affidavit. I do not think you would

10 have this Mr Frolick.

MR FROLICK: Yes.

ADV FREUND SC: He says this:

“But there was no structured mechanism in place to follow up adequately and ultimately to hold the Executive accountable.

In my view and the view of the committee, this severely hamstrung the exercise of adequate oversight.

20 Committee members became increasingly frustrated with the lack of responsiveness of the Executive.

In an effort to remedy this, I approached the Chair of Chairs, Mr Cedric Frolick sometime during the 4th Parliament.

He gave me an assurance that the office of the

Speaker would configure a dashboard which would keep track of deadlines and follow-up and ensure compliance with all House resolutions but no such dashboard was configured and no alternative mechanism was adopted by Parliament to monitor and enforce compliance with House resolutions.”

Are you saying he is mistaken? Are you saying there was a compliance mechanism?

10 **MR FROLICK:** Well, we had a discussion. Mr Godi and myself had a discussion around the matter of the Monitoring and Tracking and how it can be improved.

However, that dashboard that he is talking about, as well as everything that goes with it, was implemented. It is only two years ago that – and well before Covid we were supposed to receive a report on it from the ITC Section, to on – at the click of a button to see what was happening.

20 Instead in its place due to budgetary constrain that was there, that Monitoring and Tracking mechanism was then put in place, not in a dashboard form but at the National Assembly Table supported by a certain section in the Committee Section.

ADV FREUND SC: Well, it is there that I am taking issue with you or at least seeking further clarification from you

because I get the impression that the impression you are trying to convey is that it was not perfect but it was functional. It was reasonable functional.

And that there was a procedure which monitored and responded when there was inadequate executive response to the requirements of House resolutions. And I want to put to you that cannot possible be correct just on what you have already told us.

So I want to give you a final opportunity to tell us
10 to what extent you agree that the mechanism that was in place was in fact inadequate to monitor compliance and to report on non-compliance and to prompt the necessary action to secure compliance.

MR FROLICK: The mechanism that was put in place was to put a system in place not as a replacement for the Monitoring and Tracking as envisaged. There were flaws in that system that are put in place because it takes time and there is a lot of paperwork going to and thro, and it could possible not achieve the original objective that was set.

20 **ADV FREUND SC:** Well, let us just consider this conceptually and systemically. The purpose of Portfolio Committee oversight and then reports on such oversights to The House is to identify malpractice and other problems and to propose what should be done to remedy that. And that is as a matter of practice when the committees are

functional contained in reports that they submit to The House for adoption. Is that correct?

MR FROLICK: That is correct.

ADV FREUND SC: And as a matter of routine formality, The House is in the habit of adopting those committee reports. Is that correct?

MR FROLICK: That is correct.

ADV FREUND SC: And what you say, and I do not think that Mr God for one would dispute this, is that the next
10 step is for the Speaker to take responsibility to ensure that those resolutions of The House are communicated to the relevant representatives of the Executive. Is that correct?

MR FROLICK: That is correct.

ADV FREUND SC: Now, those reports, those resolutions of The House frequently required certain steps to be taken by certain persons by certain times. Is that correct?

MR FROLICK: That is correct.

ADV FREUND SC: And therefore if one is going to exercise oversight effectively it is essential that somebody
20 is responsible for ensuring that they know by when what responses are required from whom. Would you agree with me?

MR FROLICK: Correct.

ADV FREUND SC: And to be effective, that system would need to have a mechanism to detect when there has been a

failure to report back adequately and substantively by the specified time. Do you agree with that?

MR FROLICK: Correct.

ADV FREUND SC: Now you say that there are some departments that do, not only acknowledge receipt of the reports, they also respond substantively – and I suppose some of them must respond appropriately and substantively – and they must do what is required in some cases, at least. Would that be correct?

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

ADV FREUND SC: But I take it that you would agree that it is not at all uncommon for the representative of the Executive were required to take remedial action by a certain time. Firstly, not to do so and secondly not to report back that they have done so as it is required by House resolutions.

MR FROLICK: That is correct.

20 **ADV FREUND SC:** And will you agree with me that despite the fact that that is true, there has not been in place an effective mechanism to address that problem and to ensure that where remedial measures were required by House resolutions, the required remedial measures were in fact taken by the representatives of the Executive?

MR FROLICK: That is correct.

ADV FREUND SC: Let us then move on. Chair, I do not

know whether that is the time at which you would want to raise any further issues in that regard?

CHAIRPERSON: Yes. Yes, let me just follow-up on your last few questions. Mr Frolick, as I understand from your previous evidence – I did not check on this affidavit – you have been a member of Parliament from either late 1990's or early 2000's. Is that right?

MR FROLICK: 1999, Deputy Chief Justice.

CHAIRPERSON: Oh, at least I was right about late
10 1990's. [laughs]

MR FROLICK: Yes, Chair. [laughs]

CHAIRPERSON: Well, that means you have been in Parliament for about 21-years or so?

MR FROLICK: That is correct.

CHAIRPERSON: So. And half of that period, you were occupying the position of Chair of Chairs.

MR FROLICK: That is correct.

CHAIRPERSON: That should give you enough experience of what is happening in Parliament to be able to tell me
20 how long this has been going on, namely there being no proper mechanism put in place by Parliament to follow-up and check resolutions that have been taken.

Are followed up and that reports that are supposed to or responses that are supposed to be send to Parliament by members of the Executive, DG's and officials and

whoever, that they are properly monitored and checked.

And if there is no – if those lines are not met, something happens. How long has this situation been going on?

MR FROLICK: Deputy Chief Justice, when I was – when I arrived in Parliament the first time, that problem existed. And that is part of the reason why over the years leading up 2009 when the Oversight and Accountability Model was then formally adopted, was to address the problem that
10 existed for some time.

And the problem that you have is, is that as you change and try to push to work in a new format and go ahead in a new format, it is not so easy to change people's behaviour.

And for that, you need the requisite support from all the relevant stakeholders who are there. Everyone has a role to play in that. But it is not a new problem.

CHAIRPERSON: Of course you, probably, can only speak about the time that you have been in Parliament but if you
20 tell me that when you arrived in 1999, this problem was there, probably the problem has been there from 1994.

MR FROLICK: That is quite possible Deputy Chief Justice. As I said, when I arrived there it was there. So it could not have all started in 1999.

CHAIRPERSON: It is unlikely that there was such a

mechanism before 1999 and it was stopped. Probably, the problem has been there from 1994 and that means – is it 26-years?

How is it possible that Parliament would not address such a critical part or such a critical problem that would affect the effectiveness of its oversight? How is it possible that that...

I struggle to understand that, if Parliament took its function of oversight seriously? How is it possible that a
10 problem like this could go on for so long without being addressed?

It happens every year, year in and year out. One term of five years in and one term of five years out and it is not addressed. How is it possible? What is the problem?

I am tempted to say - and I want to say this before you respond so that you can deal with all of this. I am tempted to ask the question whether it is not – the fact that the problem has not been addressed for so long, does not
20 suggest that Parliament does not take the issue of oversight, its constitutional obligation of oversight, seriously enough. What can you share with me?

MR FROLICK: Well, Deputy Chief Justice. As I have said, the 2009 oversight and Accountability Model was part of a number of interventions from the time that I can recall,

1999 and onwards on how to address this dilemma and this problem. It is a key-function of Parliament.

And part of that oversight and Accountability Model has one monitoring and practising mechanism but it also gives then the other areas that has been implemented such as the budget office has then been put in place, the public participation process that has been in put in place. The rules, for instance, that has been amended.

And we are talking now to the – I think it is the 8th
10 Edition of the National Assembly Rules that are there to further strengthen the oversight. But we deal with warm bodies of members of Parliament and also of staff who must work together towards one outcome to address.

Also Parliament, Deputy Chief Justice, it is a political environment where there are political dynamics that are playing itself out there. And members of Parliament belong to the different parties, to the majority party for that instance.

Each one of them work in this environment where
20 oversight is important and oversight over your direct peers must be done. And at time that is very, very difficult to achieve and to move towards...

My approach was to find an improved and a full proof method to ensure that you do get the requisite responses by the time you need it because that will further

empower the oversight work by the different committees.

But due to the non-implementation of other key-stakeholders where the budgets are allocated, this could not be realised.

CHAIRPERSON: But would it not be correct to say that the majority party in parliament wanted these measures to be implemented and was sufficiently committed to ensuring that these measures are committed that it would not have been a problem to implement them because in some cases
10 the minority parties say we can say whatever we say, if it does not get approved by the majority, there is nothing we can do, it gets defeated.

So I am asking the question whether there is any reason why these or any other measures aimed at addressing this issue or problem why they would not have been effected if the majority party was sufficiently committed to solving these problems.

MR FROLICK: Deputy Chief Justice, I do believe that with the flaws that was identified, there has been a commitment
20 to address the situation. However, when we come to this specific point, for me are crucial in terms of monitoring and tracking the reports and resolutions of the house. That is where we have not achieved what we should have achieved by now and that would have demanded the support of everyone involved led by the majority party of course.

CHAIRPERSON: At a practical level, apart from maybe some equipment, maybe what was referred to in Mr Godi's affidavit as a dashboard, or was in your affidavit? I think Mr Godi's affidavit, it is what the two of you talked about, I am assuming it would have been some equipment where you could press some button then have a picture of compliance and the levels of compliance and so on and so on. Apart from that, is the position that all that is otherwise needed to achieve this is to employ sufficient

10 staff who are dedicated to this for the 50 or so committees.

MR FROLICK: Deputy Chief Justice, apart from the hard infrastructure that was required and the staff that are being required, it is also and it remains the responsibility of each portfolio committee to also follow up and say but listen here, we have asked and our report has been adopted on x, y and z, why has something not happened and as part of the oversight and accountability model, we introduced a budget review and recommendation report process where committees throughout the year and it also is part of the

20 previous reports of the committees where they have an opportunity when they interact with the executive to go back and to say that but earlier on we have recommended the following, the report was adopted by the house. That requires political leadership at the different political – oh sorry, at the different committee levels in parliament and

that is also an area where you would find that there is engagement with the relevant members of the executive and I am not saying this because I monitor them every day, it is when we sit with the auditor general, for instance, and the auditor general gets invited to come and address our meetings at least twice a year to give us the audit outcomes and then the same chairpersons will say but there is regression taking place now in this department that we are overseeing and when our BRRR report that
10 gets tabled in the house and gets sent to the Minister of Finance, these are the matters that we have identified but it does not improve.

So it does not only require the infrastructure to be put in place, it requires the political leadership of the chairpersons of those different committees to ensure that the recommendations that they have made and also that report that has been tabled has been driven but we also need to continuously reassess and assess and one of the assessments that I did regularly together with my colleague
20 in the National Council of Provinces is that a fully functioning, monitoring and tracking mechanism will add that capability to the arsenal that the different members of portfolio committees as well as the National Assembly have to follow executive action.

CHAIRPERSON: Well, you touch on a point which I think

is important, namely without even employing a lot of maybe admin staff, why is it not the function or the duty of the chairperson of each portfolio committee to monitor whether, for example, ministers in respect of whom his or her committee have made certain recommendations which have been approved by the initial assembly, whether those ministers have complied or not or if is DGs or CEOs of SOEs, why can they not do that?

MR FROLICK: Well, Deputy Chief Justice, that is exactly
10 what the chairpersons or let me say most of the chairpersons over the years that I worked with have continuously raised but it seems as if there is this view in terms of the separation of powers between the judiciary, the executive and the legislature, that the legislature has a more junior role to those other two arms of the state and that is a continuous battle the chairpersons will also have to ensure that exactly what you are talking about get the necessary attention.

There has been numerous occasions where I know
20 where the Speakers that I have worked with over the years, after the chairpersons bring those frustrations to them, engage those relevant members who - from the executive and at times the committees engage the accounting officers that are there why certain actions are not being undertaken but we need to address the power relations

between the legislature and the executive as far as this is concerned.

CHAIRPERSON: But I imagine that the separation of powers cannot prevent the Chairperson of a portfolio committee from saying to a minister or CEO of an SOE or whatever saying this is what the committee or this is what the National Assembly said you should do by a certain date, you have not come back to us to say you have done it or you have not come back to us to say I have not done
10 it and these are my reasons.

It may be that they might even say well, I do not think it is parliament's job to dictate to me which of various solutions I should choose in resolving this problem. It may be that by virtue of the separation of powers they could raise that to say, well, there are various ways in which this can be resolved, you as parliament have said this is the way, I am entitled to see it differently and by virtue of the separation of powers you must leave it to me but at least they come back and report back to say what have we done
20 about it and if they have not done anything and they refuse to do so, at least let it be known that they have taken the stand that they refer or they might say this is what we will do to address the issue, not the way you, as the portfolio committee, have we should do it.

But what should not be allowed, I would imagine, is

a situation where a recommendation has been made by a portfolio committee and the National Assembly has approved that to say certain things must be done or should not be allowed to continue and the executive just keeps quite and the deadline goes by and they do nothing. I do not think that that should be acceptable. At least if they disagree they should come and say we disagree and then we know the executive and the legislature disagree but, as I understand the position in part from your evidence, in part from other witnesses' evidence is it looks like very largely there is noncompliance with many resolutions and that is the end and it is not a situation where they come back and say no, we have a different way of addressing it that we too would refer, what would you say to all of those remarks?

MR FROLICK: Look, Deputy Chief Justice, just in brief response and I tend to follow and agree with what you say is that I must reiterate that there are a number of members of the executives over the years have seen who does exactly what you are saying, to say that parliament, you have made recommendations in this and that regard or to the portfolio committee but this is the reason why this or that cannot be done. But our biggest problem remains the issues of financial oversight and the remedial action that is required and remedial action meaning acting against and

the accounting officer taking up that responsibility acting against certain officials that through SCOPA reports or other reports are pointed to have fallen foul of what they should have done and that is a situation that needs to be addressed and I would say that we cannot be happy with a situation where it is happening in certain instances where there a number of departments are responding to what parliament say in terms of its recommendations, we need a situation that that must the standard and the norm and for
10 that to happen, we need the cooperation of everyone involved and the assistance of everyone involved.

There is also at times when you find these type of difficulties where you would even engage through the leader of government business office to say that but you know what, there is a certain ministry or department that there is certain things that are not happening the way it should happen or they are nonresponsive about certain things. So even that office gets engaged in various ways to address the situation but the situation is certainly not
20 what it should be.

CHAIRPERSON: Thank you. Mr Freund?

ADV FREUND SC: Thank you, Chair. Now you would agree with me, Mr Frolick, that for every department accountability rests on the minister.

MR FROLICK: Well, that is a point that has been debated

over the years and they say when it comes to the issues in terms of financial accountability is the responsibility of the accounting officer which is the head of the department and the minister is responsible politically for what is happening in that department but the minister is the most senior person in terms at the political level who is in charge of...

ADV FREUND SC: Precisely. I of course accept that if one looks, for example, at the PFMA, if one looks at the responsibility of accounting officers and accounting entities
10 there are certain legal obligations where the buck stops with them but the minister is accountable for the performance of all the accounting officers in the minister's department, am I correct? Politically accountable.

MR FROLICK: The minister is politically accountable for what is happening in the department.

ADV FREUND SC: Yes and in fact our constitutional structure is that the executive is accountable to the legislature, am I right?

MR FROLICK: Correct.

20 **ADV FREUND SC:** And the leadership of the executive is to be found in the ministers, correct?

MR FROLICK: Correct.

ADV FREUND SC: Now would you go please to the reference bundle at page 32?

MR FROLICK: Yes.

ADV FREUND SC: This is part of the OVAC responsibility which you have told the Chair was adopted by the National Assembly and the NCOP in 2009. Paragraph 4.1.9:

“Sanctioning noncompliance by the executive”

I am going to read it into the record, the entire paragraph:

10 “It is recommended that parliament develop rules to assist it further in sanctioning cabinet members for noncompliance after all established existing avenues protocols have been exhausted. For example, naming the cabinet member by the Speaker of the National Assembly of the Chairperson of the Council based on a full explanation.”

Would you agree with me that no such rules have been developed?

MR FROLICK: That is correct.

ADV FREUND SC: And would you agree with me that what this very recommendation indicates is that by no later than 2009 and in all probability long before that the
20 problem of executive failure to implement the requirements specified in house resolutions was a well-known [indistinct – break in recording] assist in sanctioning cabinet members.

MR FROLICK: Advocate Freund, you broke up, I could not hear you clearly, can you repeat that please?

ADV FREUND SC: Would you agree that by no later than 2009 it was already recognised that it was necessary to address this problems by means of developing rules to enable the sanctioning of noncompliant cabinet members?

MR FROLICK: That is correct.

ADV FREUND SC: Could you perhaps venture an opinion as to why, as you have confirmed, no steps whatsoever have been taken to implement such rules?

MR FROLICK: Well, that is the responsibility of the
10 National Assembly rules committee that is chaired by the Speaker of the National Assembly and I cannot off the cuff give an opinion as to why that did not take place. We have had review of the rules and there is a committee, a subcommittee on the review of rules, they only met this morning again, which should be continuously seized with the implementation process of any decisions that has been taken in terms of the rules.

ADV FREUND SC: Well, let me put to you a similar
20 question to the question put to you on a comparable issue by the Chair. Would you agree that if the majority party, the African National Congress, as represented in parliament wanted this to have happened they could have made it happen.

MR FROLICK: The majority party together with all the other political parties have a responsibility but it is

important for the majority party to lead these processes.

ADV FREUND SC: And if they had wanted it, they had the capacity to bring it about.

MR FROLICK: As I said, I know there was a review of the rules with that edition of 2016 that you were looking at and they are currently again in the process, that subcommittee of reviewing the rules. I do not have any explanation or reason why it was not done.

CHAIRPERSON: Yes, but Mr Frolick the question is do
10 you not agree that if the majority party was really committed to having it done it would have been done, just like they are able ...[intervenes]

MR FROLICK: No, I agree, I agree.

CHAIRPERSON: You agree, yes. Okay.

ADV FREUND SC: Yes, thank you.

CHAIRPERSON: Thank you.

ADV FREUND SC: Chair, I think it is fair to the witness that I should convey something that was conveyed to me before the witness started to testify.

20 **CHAIRPERSON:** Yes.

ADV FREUND SC: And that is that the witness had other commitments for today but rearranged his responsibilities.

CHAIRPERSON: Oh.

ADV FREUND SC: And I have been led to understand that he cannot continue beyond 6 p.m. this evening, is that

correct, Mr Frolick?

MR FROLICK: No, thank you for bringing that to the attention of the hearing, Advocate Freund, in fact I have been on standby since Wednesday to deliver testimony in front of the Commission and I was not even given the way that the proceedings unfolded if I was going to give evidence today.

CHAIRPERSON: Yes.

MR FROLICK: I was supposed to be a speaker deployed
10 by the African National Congress in parliament at the funeral of Ms Tozama Mantashe this morning and I had to indicate after discussions with Advocate Freund who indicated that I will testify today that I could not do it. Plus I also have another commitment, Deputy Chief Justice, at 6 p.m. this evening but I can probably for another half an hour after six o'clock, if you will permit that.

CHAIRPERSON: Yes, so if we continue and stop at six you would be fine with that?

20 **MR FROLICK:** Absolutely, Deputy Chief Justice .

CHAIRPERSON: Yes. No, no, that is fine, I think we will need to accommodate you because we have kept you waiting for some time and if we do not finish I am sure arrangements can be made in the next few days, maybe if everybody is available for you to maybe come in either

early in the morning or in the evening and evening session. You know, we have these evening sessions and on the basis of video link as you are giving evidence today, so we could finish one of these days, maybe next week, but Mr Freund would talk to you to check your availability.

MR FROLICK: I am at your disposal, Deputy Chief Justice , as long as the arrangements can be made timeously.

CHAIRPERSON: Yes.

MR FROLICK: So that I can complete the testimony for
10 which you want me here.

CHAIRPERSON: Yes, okay alright. Let us continue then until six o'clock and then we release you.

ADV FREUND SC: Thank you, Chair. Chair, may I also on the same issue indicate that there are two further witnesses who have been waiting patiently, Ms Magadzi and Mr Smith to testify.

CHAIRPERSON: Yes.

ADV FREUND SC: It is my impression that we are not going to reach their evidence and my suggestion that we
20 should release them if they wish to be released for today.

CHAIRPERSON: Yes.

ADV FREUND SC: And we make arrangements with them.

CHAIRPERSON: No, that is fine, we can release them and maybe I should mention this to you which I was going to mention later, the witness who was going to give

evidence on Monday will no longer be able to give evidence because he is not well. So to the extent that you might be available to make use of Monday, whether during the day or maybe evening session, or both, there is an opportunity to do that. So if Mr Smith and the other witness for example are available and Mr Frolick is available for us to finish with his evidence on Monday, we can look at that.

ADV FREUND SC: Yes, certainly, Chair, we will follow
10 that up after the conclusion of today's session.

CHAIRPERSON: Ja. Okay, alright.

ADV FREUND SC: Mr Frolick, can I take you to some
different topics? You deal from page 3 onwards of your
affidavit with the various rules that regulate the powers
and functions and duties of portfolio committees. I do not
think it is necessary to deal with those in detail because it
is quite clear, is it not, that a portfolio committee has an
obligation to exercise oversight and for that purpose it has
a power to summon any person to appear before it to give
20 evidence and to permit oral evidence and to conduct public
hearings. They have got the powers they need.

MR FROLICK: That is correct.

ADV FREUND SC: Now I want to explore with you the
problem of what appears to be delay and quite possibly
culpable delay in the legislation exercising appropriate

oversight as regards allegations of state capture and corruption and I want to deal with this issue in the knowledge, that we all have, that during June of 2017, you issued certain letters to the chairs of four portfolio committees requiring them to, as a matter of urgency, commence investigations into then current allegations of state capture and corruption. Have I got that correct?

MR FROLICK: Correct.

ADV FREUND SC: And I want to make clear that I have
10 no difficulty at all with the propriety of the letters that you sent, it seems to me to have been manifestly necessary at the time but I want to make equally clear to you that it seems to me at least to be arguable that there was a culpable delay to do similar things much earlier and I want to deal with that in a little bit of detail.

Now I want to read to you from bundle 2 page 561 – and you will not have this, I do not think. I want to read to you the first couple of paragraphs of a headline article on the front of the Sunday Times ...[intervenes]

20 **CHAIRPERSON:** One second, Mr Freund? I think my registrar did not hear you refer to the bundle for her to give it to me.

ADV FREUND SC: It was bundle 2, Chair, bundle 2 at page 561.

CHAIRPERSON: Okay, alright, thank you. Thank you, Mr

Freund.

ADV FREUND SC: Thank you, Chair. I want to read to you, Mr Frolick, from an article published in the Sunday Times on the 27 February 2011 under the heading:

“Ministers “shiver” went summoned to family’s home.”’

The article says in the first part:

10 “A revolt is brewing within the ANC and its alliance partners against influence of the Gupta family over President Jacob Zuma and his government. The anger has become so widespread that some of Zuma’s traditional backers are privately intimating the controversy could hamper his bid for a second term as President. Members of the top ANC leadership structures, the National Working Committee and the top six party officials recently raised concerns about senior appointments that were being made in the government and at parastatals when the party’s deployment was being

20 sidelined. The Sunday Times understands that the Gupta’s role in influencing the appointment of CEOs and chairmen in key state owned enterprises was recently raised at an NWC meeting and will be formally at its next gathering in a week’s time.”

And it continues. What I want to put to you is, when

allegations of that type are not only published in the newspaper but are regarded as so serious that they should be discussed in repeated meetings of the National Working Committee of the African National Congress, is that not material that ought to have been the subject matter of oversight activity on the part of the responsible portfolio committee?

MR FROLICK: Well, Advocate, unfortunately I do not have that article in front of me and I was also not furnished
10 with a copy. What usually happens is you will find that there is a lot of different stories and articles that appear in the different newspapers. You yourself make reference to it that in the article it is said that the matter will be discussed at the NWC and the NEC but there was at no stage ever anyone of the portfolio committee who took the matter up to an extent where the committees will look at it. I will have to go back in my record of that year to see if indeed there were any portfolio committee or standing committee that further delved into that matter but I cannot
20 give you a clear response on what you are raising now.

ADV FREUND SC: Alright. Now let me put the question this way. Let us assume that the evidence shows to this Commission that, for example, the public – the portfolio enterprises did not raise that and did not seek to pursue it and did not seek to investigate whether as published, and

apparently concerning to the NEC and the NWC it is true that the Gupta's role in influencing the appointment of CEO's and chairmen in key state owned enterprises whether you think it ought to have been the subject of oversight by the committee responsible for the oversight of public enterprises?

MR FROLICK: Advocate Freund you know over the years I have seen in some instances articles appear in certain newspapers, it's either inside leaks coming from within
10 certain meetings that's going to take place in ANC structures and I don't want to work on that assumption in terms of, as I have indicated that I have not seen what you are referring me to now but ordinarily, ordinarily committees should be seized with issues and whatever there is and any political party can propose an item to go onto the agenda of the different portfolio committees and then they should have looked at it, but I don't want to arrive at any assumptions at this stage.

ADV FREUND SC: But I just want to check that I
20 understand what you have just said, when you said they should have looked at it that implies that if the information I am giving you is correct that that is what was alleged and apparently alleged sufficiently to raise concern for the NEC and the NWC do you think it should have been looked at by the portfolio committee?

MR FROLICK: You know it is difficult for portfolio committees to deal with those type of sources where you have no clear indication as to where it is coming from or anyone is not specifically prepared to come forward, it is nameless people who you cannot put a face to, so what I am saying is ordinarily in the work of portfolio committees if there were any instances or indications that there were things happening then I would have expected that that would have formed part of the discussions of those portfolio committees, but not having seen the records of
10 the meetings of – in this or Public Enterprises Committee for that year or years I cannot come to an assumption that indeed it happened or it didn't happen.

ADV FREUND SC: No, that I understand. Now let me refer you again to material that you may not have, this is Bundle 2, page 541.

CHAIRPERSON: I am sorry Mr Freund don't forget your question, I just want to go back to this newspaper article to which you referred Mr Frolick, may I understand this Mr
20 Frolick, that you accept that any member of a portfolio committee, I assume it might be more than one portfolio committee, that read this article and it seemed that there were matters, allegations made there which would fall – which would be the type of allegations that his or her committee should be concerned about, do you accept that

anyone, any member of a relevant committee or relevant committees who read this article should have wanted their committee to discuss the matter and see what should be done about it, because the allegations were quite serious.

MR FROLICK: Deputy Chief Justice I would say that any member of a committee and as I say I don't have the article, I don't know what it is exactly talking about, would have had an interest to that article.

CHAIRPERSON: Yes.

10 **MR FROLICK:** Would have had an interest in the article and depending on how they approached the matter could have taken it to their portfolio committee.

CHAIRPERSON: Yes, on that is fine, it is a pity you haven't - you don't have this but as Mr Freund said you know the headline was "Ministers shiver when summoned to family's home" and then it goes on to make allegations that the Gupta family as involved in the appointment of ministers and other functionaries, of course there could be some articles, I think nobody would say there are no
20 articles that members of a particular portfolio committee would look at and say well it falls within our jurisdiction but really this it does not appear to be something serious enough but certainly some articles might have allegations that are quite serious that committee members might want to look at and I would think that if an article with such

serious allegations came up you know if I was a member of a committee that has jurisdiction on those issues I would certainly want these types of issues to be discussed. You accept that if it talked about Ministers or people outside of government having – who have not been elected having – and who are not the ruling party having a say on the appointment of Ministers and calling Ministers to their home and Ministers shiver, that would be something that really should be of interest if it was within one's
10 committee.

MR FROLICK: I agree Chief Justice that is what I indicated.

CHAIRPERSON: Yes, yes, thank you Mr Freund.

ADV FREUND SC: Thank you Chair. You also indicated Mr Frolick that the committees had the powers they need, they can summon any person and they have the capacity, if they wished to use that capacity to investigate allegations of that type by requiring it necessary people to testify, if necessary under subpoena, am I right?

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

CHAIRPERSON: Can I ask this as a follow up on that, I haven't had a look at the rules I would imagine that the committees, portfolio committees also would also have power to require anybody to depose to an affidavit and say what they know about certain matters and send such an

affidavit to the portfolio committee, even if they didn't come to give oral evidence, is that correct?

MR FROLICK: That is possible Deputy Chief Justice and that is why the legal services of Parliament is there to guide those committees in those processes.

CHAIRPERSON: Yes, thank you. Mr Freund?

ADV FREUND SC: yes thank you. Just while we are on that question there are rules that regulate the powers of portfolio committees and one of those rules, I think it is referred to in your affidavit as Rule 227 and it says:

“A portfolio committee may monitor, investigate, inquiry into and make recommendations concerning any such executive organ of state and so forth.”

So they have that power, they have the authority to make such investigations, you would agree with that?

MR FROLICK: Correct.

ADV FREUND SC: And there are other rules that regulate not only portfolio committees but all Parliamentary committees, and you might know the rule far better than I do, can you just point me to the rule that confers the relevant powers.

MR FROLICK: Rule 167.

ADV FREUND SC: 167, Chair it is at page 286.

CHAIRPERSON: Of which bundle?

ADV FREUND SC: The legal bundle Chair, that is the

bundle that has only two sets ...[indistinct].

CHAIRPERSON: Okay, 256?

ADV FREUND SC: 286 in the legal.

CHAIRPERSON: I have got it thank you.

ADV FREUND SC: Thank you, and it says as follows, under the heading “General Powers”:

“For the purposes of performing its functions a committee may, subject to the Constitution legislation and the other provisions of these rules and resolutions of the Assembly:

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[a] summon any person to appear before it to give evidence on oath or affirmation or to produce documents”

And then:

[c] permit oral evidence and so forth.”

So they have those powers, I think you would agree.

MR FROLICK: That is correct.

ADV FREUND SC: Now you said a moment ago and I agree with you, that issues of this sort if they came to the attention of a member of a relevant portfolio committee would be such that any member would be entitled to raise a concern about that issue in the portfolio committee and request that it be addressed, am I right?

20

MR FROLICK: That is correct.

ADV FREUND SC: And if such a request were made in

relation to allegations of that type do you agree with me that the responsible decision given that there is a constitutional obligation to exercise oversight over the executive, would be to accede to such a request and to conduct such an investigation?

MR FROLICK: That is the power of the committee as we refer to in 167.

ADV FREUND SC: Yes I know they had the power, but I am asking you a different question, should they not in that
10 scenario that I painted, consider it for the moment an academic scenario, a hypothetical scenario, should they not as a matter of political responsibility and legal responsibility exercise the power to conduct such an investigation where such a matter is drawn to its attention and where a request is made to please exercise your powers and to investigate and if necessary summon witnesses.

MR FROLICK: You would expect the committee to do so, the committee what usually happens Advocate Freund is
20 that when a certain member raises something and they want it to be added to the agenda the committee deliberate on the matter and they decide when to and how to proceed with the matter.

ADV FREUND SC: And with allegations of the type that we have been referred to the responsible decision would

be to investigate?

MR FROLICK: That is correct.

ADV FREUND SC: Now – and Mr Frolick it does appear to me that we are not going to finish your evidence today, if we are going to – so in fairness to you we will make arrangements in the same way as we did last night with certain other material to transmit to you before you next testify copies of documents to which I am now referring, but I have referred to one press article you hadn't
10 previously been alerted to and I want to refer now to another such article, and if you feel after having read it when you come back that I have been in any way unfair to you then you can raise it and we will deal with it at that occasion, but for the moment I would like to refer you to page 541 in Bundle 2, which you won't have, but this is part of the affidavit of Ms Rantho who has testified. I don't know if you had an opportunity to watch her evidence?

MR FROLICK: Advocate Freund I watched some part of
20 her evidence, I did not watch everything that was happening on that day.

ADV FREUND SC: So in paragraph 8.13 of her affidavit she is talking about the situation as pertained by March of 2016 and I want to put to you that in my mind that is a critical moment in history, March 2016, and she says in

March 2016 a host of allegations had been made public including the following; ...[indistinct] claim reported in the Sunday Times on the 13th of March 2016 and confirmed by his public statement of the 16th of March 2016 that the Guptas had offered him a R600million bribe in October 2015 if he would take the post of Finance Minister and do their bidding which he said he had refused. An allegation that the person then appointed instead of him as the new Finance Minister in early December 2015, Mr Des van
10 Rooyen, was accompanied to his new post on his appointment by Gupta linked aides. Vygie Mentoor's allegation during a radio interview that in 2010 she had been offered Barbra Hogan's job as Minister of Public Enterprises by the Guptas if she cooperated with them in assisting Jet Airways to replace SAA on the Mumbai route and Barbra Hogan's allegation that there were definitely sinister forces operating behind her back when she was Minister of Public Enterprises until October 2010 and that she too had faced pressure regarding Jet Airways.

20 You will recall those incidents and allegations at about that time, am I correct?

MR FROLICK: I recall some of the Advocate Freund.

ADV FREUND SC: Now would you agree with me that by that time if the Portfolio Committee on Public Enterprises received a request that there should be an inquiry within

that Committee to inquire into whether there was truth in these allegations and other allegations referred to in the evidence of some of our witnesses thus far, the responsible and appropriate response should have been to accede to that request and to agree to conduct such an inquiry within the portfolio committee.

MR FROLICK: Well advocate as I have said I watched part of the testimony of the Honourable Rhanto and I have not been furnished with the material that you are referring
10 to at the moment but given the background that you have given to then it would have been something that the Committee should have been seized with.

ADV FREUND SC: Should have been seized with, and does that mean should have investigated and utilised its powers to try to get to the bottom of?

MR FROLICK: Well depending on how the committee wanted to proceed on the matter on the matter, because also in terms of Rule 167, your 167 and [f] makes it clear that the committee can determine their own working
20 arrangements.

ADV FREUND SC: Yes.

MR FROLICK: So it was entirely in the hands of the committee to decide how they wanted to proceed.

ADV FREUND SC: Yes, I accept that, and I want to make clear that not only do I accept that, I accept that it is not

your function as the House Chair of Chairs to substitute your judgment for their judgment, they are entitled to make a judgment, I accept that, but what I am asking you is what judgment you think they should have made, and I think you would agree with me from what you have already told me that you think that if they were acting responsibly they ought to have agreed to investigate those allegations, am I correct?

MR FROLICK: The committee should have applied their
10 mind to the matter, and should have decided what would be the best way to proceed with that matter, in the absence as I said of the material that you are referring to.

CHAIRPERSON: Yes, so I seem to – it seems that it would be better that you know exactly what material was before them, is that correct? Mr Frolick?

MR FROLICK: Can you just repeat Chief Deputy Justice, I couldn't hear you clearly?

CHAIRPERSON: Yes I am saying it seemed from what you are saying that you are reluctant to pass judgment or to
20 say what they should have done without knowing what material was before them, but if you were to ...[intervenes]

MR FROLICK: Correct Chief Deputy Justice.

CHAIRPERSON: If you were to be given the same material that was before them then you can take a view as to what the responsible was that they – you think should

have happened?

MR FROLICK: That is correct Deputy Chief Justice.

CHAIRPERSON: Okay, alright. Mr Freund?

ADV FREUND SC: Chair that being the case, and it being five to six I would be amenable should you feel it is appropriate to take the adjournment now.

CHAIRPERSON: Yes.

ADV FREUND SC: Alternatively I can proceed certainly.

CHAIRPERSON: No, no, no that is fine, I mean five
10 minutes is not going to make much difference, okay, let us
adjourn and then once you have, Mr Freund had chance to
talk to witnesses and look at your own availability about
Monday you will let me know during the weekend, the
earliest you can let me know the better, because in case
you are not able to use Monday there is a possibility
another evidence leader from another work stream might
be able to rearrange their programme in such a way as to
be able to use Monday as well, but I accept that it is short
notice so it might not be easy, but just do the best you can.

20 **ADV FREUND SC:** Chair I would think that there is a
reasonable prospect from my side that that can be done. I
have other commitments for Monday but I am hopeful that
that can be rescheduled and so it will be a matter of
checking with the witnesses and I will communicate with
the structures of the Commission hopefully in the course of

tomorrow.

CHAIRPERSON: Okay, no that is fine, but also to the extent that the day session might not – you might not be able to use it then the possibility of looking at some evening sessions next week that must be kept open if we – if all concerned would be available so we can try and do as much as possible.

ADV FREUND SC: Yes Chair.

CHAIRPERSON: Ja, okay, alright, thank you very much
10 and thank you to everybody that we have been able to sit until this time. We are going adjourn and then on – next week from Tuesday at least I think up to the end of the week it would be evidence relating to Eskom that the Commission will be hearing, this is just for the benefit of the public, I am making the announcement for the benefit of the public.

We adjourn.

INQUIRY ADJOURNS TO 8 FEBRUARY 2021

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