

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

**23 MARCH 2021**

**DAY 366**



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Recording & Transcriptions

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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**PROCEEDINGS RESUME ON 23 MARCH 2021**

**CHAIRPERSON:** Good morning Mr Franklin, good morning everybody.

**ADV FRANKLIN SC:** Good morning Chair. Chair this morning...

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** The commission will hear evidence of the – concerning the South African Revenue Services SARS as part of the state capture project. Before I outline  
10 the evidence and the issues to be traversed there are various of my learned friends in attendance and perhaps it might be convenient for them to place themselves on record before I proceed with an opening address.

**CHAIRPERSON:** Yes they may do so from where they are if the microphones are working where they are otherwise if they are not working they can approach the podium which will need to be sanitised before they get there.

**ADV GOODMAN:** Thank you Chair Isabel Goodman I appear for BAIN. I am led by Mr Cockrell who is available  
20 on Zoom.

**CHAIRPERSON:** Yes.

**ADV GOODMAN:** And we are instructed by Mr Bernstein of Baker McKenzie.

**CHAIRPERSON:** Yes thank you. Good morning Mr Cockrell. I think he cannot hear me.

**ADV COCKRELL SC:** Morning Chair – Yes morning Chair sorry.

**CHAIRPERSON:** Yes. Thank you. Yes.

**ADV MBYISE:** Good morning Chair my name is...

**ADV COCKRELL SC:** (Inaudible) I act for BAIN and Company – we act for BAIN and Company South Africa (inaudible) thank you Chair.

**CHAIRPERSON:** Thank you. There is something wrong with how everything comes across when you speak. The  
10 technicians will try and attend to that. Yes.

**ADV MBYISE:** Good morning Chair my name is ...

**CHAIRPERSON:** Good morning.

**ADV MBYISE:** Zanele Mbyise I appear on behalf of Mr Athol Williams.

**CHAIRPERSON:** Thank you. Thank you. Okay alright.

**ADV DU PLESSIS:** Good morning.

**CHAIRPERSON:** Oh there is somebody else yes.

**ADV DU PLESSIS:** Thank you. Good morning Chair.

**CHAIRPERSON:** Good morning.

20 **ADV DU PLESSIS:** I am Max Du Plessis and I am appearing on behalf of Mr Sipho Maseko and Jabu Mabuza I am instructed by Nortons Incorporated and I am accompanied by my attorney Leago Mathabathe sitting next to me.

**CHAIRPERSON:** Thank you Mr Du Plessis. Okay let them

sanitise before you go there. Just wait somebody will sanitise first.

**ADV ZWANE:** Thank you. Good morning Chair.

**CHAIRPERSON:** Good morning.

**ADV ZWANE:** I am sorry I had to come down my mic is not working.

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

**ADV ZWANE:** My name is Ndumiso Zwane I am representing Messrs Makarapolo and Million Mbatha the  
10 employees of SARS.

**CHAIRPERSON:** Okay thank you.

**ADV ZWANE:** Thank you.

**CHAIRPERSON:** Thank you. Okay Mr Franklin unless there is still somebody else I think we have exhausted the list.

**ADV FRANKLIN SC:** Thank you Chair. If I may then proceed to outline the program for the next three days.

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** That is today is the 23<sup>rd</sup>, the 24<sup>th</sup> and  
20 the 25<sup>th</sup> March.

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** As I indicated to the Chair this week the commission will hear evidence regarding the South African Revenue Services and in our contention and the SARS evidence is central to the commission's mandate to

inquire into allocations of state capture.

SARS has featured prominently in allegations of state capture and it will be contended that the actors in question weakened and misdirected operations of SARS particularly its compliance functions, rendering it less effective and all for unlawful purposes and accordingly the SARS evidence falls squarely within the commission's Terms of Reference.

A particular feature of the SARS evidence Chair is  
10 its connection with the so called Nugent Commission as the Chair will be aware the Commission of Inquiry into tax administration and governance by the South African Revenue Services known colloquially as the Nugent Commission operated under Terms of Reference published on the 18<sup>th</sup> of June 2018 and the commission was required to inquire into make findings on and report and make representations concerning 18 specific issues.

Chair there is an overlap between the work of that commission and the present commission. The Nugent  
20 Commission focussed on irregularities at SARS including what it found was the seizure of SARS by Mr Tom Moyane and others whilst on the other hand this commission is of course investigating state capture of public entities including SARS.

So the central question to be answered by the state

capture commission fell outside of the scope of the Nugent Commission references

To determine the correct guiding dividing line between what is a permissible topic of inquiry for this commission and what is not because it has already been dealt with it is necessary to consider briefly what was investigated and found in the Nugent Report.

And in the final report the Nugent Commission made the following overarching findings.

10           The first was that there had been a massive failure of integrity and governance at SARS demonstrated by what SARS once was and what it has become. That state of affairs so it was found was brought about by the reckless mismanagement of SARS on the part of the former Commissioner Mr Moyane.

          What occurred at SARS said the Nugent Commission was inevitable the moment Mr Moyane set foot there because he dismantled the elements of governance one by one and that was described by the Nugent  
20 Commission as seizing control of SARS as if it was his to have.

Furthermore the failure of good governance was manifest inter alia from the fact that senior management was driven out of or marginalised at SARS. Senior management appointed by Mr Moyane were simply

compliant and neglected their oversight function. The development of SARS' sophisticated information technology systems was summarily halted. The organisational structure of SARS that provided oversight was pulled apart. The scent was stamped out by instilling distrust and fear. Accountability to other state authorities was defied and capacity for investigating corruption was disabled and then finally instead of fostering a climate and a culture of healthy descent the Nugent Commission found  
10 that Mr Moyane engendered a culture of fear and intimidation and there was a purging of competent officials.

Now Chair I have no doubt that this commission has no desire to repeat the work of the Nugent Commission nor does this commission seek to re-enter the fray on the same basis. In the absence of any judicial review of the Nugent Commission's Report those findings of course stand and no evidence in contradiction of any such finding we would submit should be admitted.

While the remit of that report was wide there are  
20 certain issues which were not investigated by Judge Nugent and which are now the focus of this commission's work in relation to SARS.

And matters concerning SARS which were not within the remit of the Nugent Commission's work or in respect of which evidence was not led and which are relevant to this



commission's inquiry will properly form the subject matter of testimony this week.

And so Chair the focus will be on the consulting company Bain's actions in connection with SARS and Chair will recall that the Nugent Commission concluded that Bain had not told the full story.

Secondly there will be an emphasis on Mr Moyane's role in SARS and it will be recollected that Mr Moyane did not give evidence before the Nugent Commission.

10 And then thirdly evidence of the impact of the capture of SARS upon the institution.

And so Chair whilst the Nugent Report makes detailed findings as to the institutional dismantling of SARS this commission's mandate requires that the strategic significance of this capture of SARS be contextualised within the big picture of the state capture inquiry.

If I could briefly then just highlight for the commission the – the patterns and processes of state  
20 capture and where the evidence that will be led fits in.

The Nugent Commission's findings and the evidence led showed that the repurposing of SARS followed familiar patterns and processes of state capture that have been observed in other state institutions. And SARS offers we would submit one of the clearest demonstrations of this

pattern of repurposing observed in other state owned entities and state institutions.

And this includes so the evidence will show the collusion between SARS, the executive and Bain with a planned and coordinated agenda in relation to SARS well in advance of either Bain or Mr Moyane's appointment.

Secondly the purging of competent top officials and the climate of fear.

Thirdly the strategic positioning of compliant  
10 individuals and

Fourthly the restructuring and deliberate weakening of institutional functions and all of those are common features which this commission has heard in relation to other institutions.

In addition we will intend that the evidence to be led bears out the pattern of procurement irregularities which have so far loomed large in the evidence heard by this commission and that would include the collusion and the award of a contract. The irregular use of confinement  
20 and condonation to avoid open competition, transparency and scrutiny and thirdly the use of consultants that justify changes that were really only necessary to repurpose SARS.

Chair the witnesses that will be heard this week are as follows:

Firstly today the commission will hear from Mr Athol Williams who is a former Bain and Company employee.

Secondly tomorrow we will hear from Mr Vlok Symington who is a senior employee of SARS.

Thirdly Mr Johan Van Loggerenberg who was a former SARS employee.

And then finally on the 25<sup>th</sup> from Mr Tom Moyane the former commissioner of SARS.

And then Chair an arrangement has also been made  
10 that Mr Moyane will conclude his cross-examination of Minister Gordhan in an evening session which has been set for today the 23<sup>rd</sup> March.

If I may then briefly take the commission to the essence of the evidence that will be led. In relation to Mr Athol Williams a I have indicated he was a Bain and Company employee. He was employed in various roles. The ones we are interested in for purposes of the commission today are firstly that he was engaged as an independent consultant from September of 2018 to  
20 December 2018 to oversee an investigation that had been commissioned by Bain into the award of the contract with SARS and the work which it did at SARS.

Then from January of 2019 until May of 2019 he was employed as an independent advisor to develop a so called remedy plan for Bain.

Then thirdly from May of 2019 to August 2019 he was employed on a part-time basis as a partner serving on the Bain Africa Oversight Board.

And then fourthly he resigned at the end of August of 2019 because he was on the view that Bain had not been transparent with him and the South African authorities regarding their investigation into what happened at SARS under their tenure.

And he made various media statements in 2019 that  
10 Bain was withholding information about the restructuring at SARS and their work at SARS.

Mr Williams was approached by this commission for an interview which was held and pursuant to that a summons was issued against him to produce books and documents which he did and subsequently he furnished the commission with an affidavit dated the 23<sup>rd</sup> July 2020 and annexures thereto and that will form the basis of the testimony that is to be produced today.

Chair you are aware that Bain launched an  
20 application which is to be found in file SE2 44/2020. In it they applied for leave to cross-examine Mr Williams, leave to make oral and written submissions to the commission and then also an order that confidentiality.

**CHAIRPERSON:** Just – just one second Mr Franklin. Yes you may continue.

**ADV FRANKLIN SC:** Thank you. Chair the – the application asked for various relief as I have said and the third prayer was that confidentiality be maintained over certain portions of Mr Williams' affidavit and its annexures and for those to be withheld from public disclosure.

I am happy to say Chair that in discussions with my learned friend Mr Cockrell we have managed to narrow the ambit of that application considerably. You will have seen that there was an annexure X which was updated and that  
10 had various categories and in relation to each of those categories Bain had originally asked that the evidence be kept confidential.

In relation to the first of those sections so called sensitive personal information regarding whistle blowers it has been agreed that the personal details of two persons who are referred to in the affidavit will be redacted and not referred to in relation to the other two people Mr Williams will say that he has been given specific permission by those people to reveal their identities. So that has been  
20 dealt with.

In relation to the category of so called legally privileged materials and information included in the affidavit there was a relatively long list I understand that Bain will persist and place on record that they still regard certain of the information to be led as privileged and

confidential but they do not seek any relief in relation thereto and Mr Cockrell will no doubt outline that for the commission.

Then in relation to the so called commercially confidential information that too falls within the same ambit of the agreement i.e. although it is maintained that it is commercially sensitive and no relief will be sought in relation to that.

And the final category was investigations by foreign  
10 regulatory and other bodies referred to in Mr Williams' affidavit and the approach of the commission is that there is no reason not to refer to those in investigations. I understand that Bain will contend that they ought not to be referred to but there is no specific relief that is sought in relation thereto.

And then that really deals with the application in its totality and the Chair has indicated to – to Bain via the secretariat that the application for leave to cross-examine and to make oral and written submissions will be dealt with  
20 in due course on a date to be arranged by the commission.

The – the sole remaining issue then regarding Bain and what it requires is a request which was directed to the commission in a letter dated the 26<sup>th</sup> of November 2020 in which it seeks permission from the commission that affidavits would set out its version of events concerning its

role at SARS be publicised by some or other means at the same time as Mr Williams' testimony is uploaded onto the commission's website.

I understand Mr Cockrell will motivate that particular request and the approach of the legal team is that there is no basis to exceed to – to that request.

So that is the position in relation to Mr Williams and the Bain application.

There have been various other responses to Mr  
10 Williams' affidavit and there have been letters which have been received as well as affidavits which have been filed and applications for – to cross-examine. I need not go through all of those. They are collected together in one of the SARS bundles and the representatives of certain of those persons have placed themselves on record.

Proceeding then to the second of the witnesses who will give evidence this week that is Mr Vlok Symington. He is currently an employee of SARS and a senior legal advisor. He is represented and tomorrow the  
20 representatives will place themselves on record.

He was asked by the commission to submit himself to an interview in connection with an incident which has been described as a hostage incident that occurred at the SARS offices in October of 2018 and he ultimately provided the commission with an affidavit dated the 2<sup>nd</sup> of November

2020 which will be the subject matter and focus of his testimony.

And consequent upon that various other people also gave affidavits which are also bundled in the – in the SARS bundle.

Similarly such applications as there are to cross-examine as well as Mr Symington's own application to cross-examine various people will be as I understand it dealt with by the Chair on a date set by the commission.

10           The third witness is Mr Johan Van Loggerenberg who as I have said is a former SARS employee. He was also approached by the commission regarding the commission's investigation into compliance units at SARS and the fate of those units and how they have been affected by the restructuring which took place under Bain and Mr Moyane and he provided the commission with an affidavit dated the 11<sup>th</sup> of November of 2020 which will be the subject of the testimony that he will present.

20           There have been various applications which have been served in relation to Mr Van Loggerenberg's testimony. We are in the process of attempting to resolve those if we can if not then the Chair will be asked to hear and determine those applications.

Chair apart from that and there are bundles which have been prepared and which are for the commission.



Returning then to the proceedings for today I understand that the commission would first like to hear Bain's requests and that will be done via Mr Cockrell. Thereafter I will lead the evidence of Mr Williams and following that in the evening session the cross-examination of Minister Gordhan by Mr Moyane's representatives will take place.

So against that background Chair may I ask that we deal with the residual Bain issues.

**CHAIRPERSON:** Yes.

10 **ADV FRANKLIN SC:** And invite Mr Cockrell to make his submissions.

**CHAIRPERSON:** Thank you Mr Franklin. Mr Cockrell are you ready to address me on Bain ...

**ADV COCKRELL SC:** Yes thank you Chair.

**CHAIRPERSON:** Yes you may go ahead.

**ADV COCKRELL SC:** Sorry Chair I – I heard you say invite me to address you and then I am afraid it went dead on my side. I could not hear what you were inviting me to address you on I apologise.

20 **CHAIRPERSON:** Oh no – on the Bain application that is – ja that is what I said.

**ADV COCKRELL SC:** Thank you Chair. Chair I will not have to detain you for very long. I am very grateful to my learned friend Mr Franklin for that very fair summary of where we are.

I need to address you on two issues. I need to bring you up to speed with where we are on the confidentiality application and then I need to address you very briefly on the application by Bain in order to publish its own affidavits.

May I address those in turn? Chair you will know the application by Bain and Company had a number of prayers in the relief.

Prayer 4 sought relief in relation to confidentiality.

10 As my learned friend Mr Franklin pointed out there was an annexure to the notice of motion Chair it was a long annexure, Annexure X. We – Bain reduced that annexure in the course of last week and in the course of Friday we have reduced it even further Chair. So what has happened is there is no longer any point of contestation between us and the commission regarding the various categories of documents.

And Chair I need to make it clear the reason why Bain and Company has effectively decided not to persist  
20 with that application is it is very conscious of the fact that the commission is working under time pressure and it wants this commission not to feel that it is being obstructionist or trying to obstruct the working of the commission.

And so where Bain and Company comes out is this

– is this Chair – if you were to go to Annexure X in the amended version I will go through those categories very briefly and it is large in the line with what my learned friend Mr Franklin said.

Chair Annexure X really had four categories. The first category was sent with personal information included in Mr Williams' affidavit and the view taken by Bain is that because those four people had not given consent for their identity to be disclosed their identity was therefore  
10 confidential.

We are now told by the evidence leader that Mr Williams has permission from two of them and so the agreement we have reached with the evidence leader Chair is that the identity of the remaining two will be anonymised that there is agreement between us in that regard Chair we do not seek a ruling from you.

Chair the second of those categories the privileged information Chair I need to place this on record you will know that Mr Williams came into possession of various  
20 documents in the course of his employment by Bain and Company and the view taken by Bain and Company is that some of those documents are privileged.

Chair I see my screen has frozen are you still there?

**CHAIRPERSON:** We can still see you – we can hear you.

**ADV COCKRELL SC:** Chair – thank – thank you Chair.

Chair those documents in some cases came from the external legal advisors to Bain and Company Baker and McKenzie. In other cases they came from the in-house advisors to Bain and Company. In many cases those documents are core privileged they are labelled privileged.

The view taken by Bain and Company is that those documents are privileged and remain privileged but Chair for the reasons I have given earlier Bain no longer seeks  
10 any ruling from you regarding the confidentiality of those documents. Chair I say again Bain and Company does not wish to hold up the workings of this commission and so it has agreed not to persist with that application.

In short we are so privileged over those documents but Chair we no longer seek a ruling from you in relation to the second category legally privileged documents.

Chair the third category commercial is confidential information again Bain and Company has decided not to persist with that application. We no longer seek any ruling  
20 from you regarding to the confidentiality of those documents.

And Chair then finally the fourth category investigations by foreign regulatory and other bodies. Chair those are allegations in Mr Williams' affidavit which refers to interaction between Bain and Company and

regulators in other jurisdictions. The view that Bain and Company took is because those regulators regarded the interactions as being confidential it was not within the power of Bain to waive confidentiality. And so we had a discussion with the evidence leader last week and we ascertained whether the evidence leader was comfortable eliciting the fact of those interactions and the view taken by the evidence leader is that the commission had no difficulty in that regard.

10           So Chair the – the position of Bain and Company is it regards those interactions as being confidential but it no longer asks for any relief from you Chair. In other words if the evidence leader has no difficulty eliciting that information Bain and Company does not seek any ruling from you regarding confidentiality in that regard.

And so Chair where all of that goes is we are in the – may I say happy position where no ruling is sought from you in relation to any of the confidentiality portions of the Bain and Company application Chair.

20           There is agreement between ourselves and our learned friends Mr Franklin as to how the evidence will flow and we do not seek any ruling from you. I simply place on record what the position of Bain & Company is.

Chair, that then brings us to the second part on what I have to address you on and here, unfortunately, we

do seek a ruling from you. Chair, you will not find it in the Bain & Company application.

This is, in fact, something that was contained in the letter by Bain & Company to the Commission on the 26<sup>th</sup> of November 2020. And Chair, the position is this.

**CHAIRPERSON:** I am sorry.

**ADV COCKRELL SC:** Bain & Company has submitted two affidavits to you.

**CHAIRPERSON:** I am sorry. I am sorry. Mr Franklin, do  
10 you have a copy of that letter? The letter of November 2020 that Mr Cockrell is referring to?

**ADV FRANKLIN SC:** Yes, Chair ...[intervenes]

**CHAIRPERSON:** Or is it in the bundle here?

**ADV FRANKLIN SC:** Yes, Chair, I will endeavour to locate that for you.

**CHAIRPERSON:** Okay alright.

**ADV FRANKLIN SC:** The letter...

**CHAIRPERSON:** Yes, you may continue.

**ADV COCKRELL SC:** Yes. Apology, Chair. I cannot refer  
20 you to the bundle because I do not have it but maybe summarise the letter... [Speaker not clear – distortion in transmission present]

**CHAIRPERSON:** Ja.

**ADV COCKRELL SC:** My learned friend, Mr Franklin, will make it available to you in due course.

**CHAIRPERSON:** H'm.

**ADV COCKRELL SC:** Chair, the position is this. Mr Williams filed his affidavit, his witness statement. When Bain & Company applied to you for various forms of relief, Bain & Company put up two affidavits. One from Mr Min and one from Mr Moolman.

And the difficulty that Bain & Company now finds itself is this. It is simply not sure whether it is in a position to publish those two affidavits once Mr Williams  
10 commences his evidence.

And Chair, that is the basis of the relief that we seek from you today. What Bain & Company is asking for is, is permission from you that it, Bain & Company, can publish those affidavits.

My learned friend, Mr Franklin, with respect, misunderstood it. He seemed to think that we were asking you for an instruction that the Commission must publish the Bain & Company affidavits but that is not part of our relief Chair. We do not ask the Commission to do anything.

20 All that we ask for is permission that Bain & Company, should it decide to do so, can publish its own affidavits, the end form it considers appropriate.

And Chair, the reason why we ask that relief from you is. If one goes to Regulation 11(3)(b). Chair, not the laws of this Commission. These are the regulations.

Regulation 11(3)(b) is drafted, with respect, with a slightly obscure form. This is what it says.

It says:

“No person shall without the written permission of the chairperson:

a) Disseminate any documents submitted to the Commission by any person in connection with the inquiry or publish the content or any portion of the content of such document...”

10

So Chair, what the regulation is saying is. No person shall without your written permission disseminate any documents submitted to the Commission or publish the contents of any such documents.

And Chair, may I say, the contravention of that provision is a criminal offence in terms of Regulation 12. And Chair ...[intervenes]

**CHAIRPERSON:** I am sorry. What ...[intervenes]

**ADV COCKRELL SC:** ...and it is not just it is a ...[intervenes]

20

**CHAIRPERSON:** Sorry, what regulation is it again?

**ADV COCKRELL SC:** Chair?

**CHAIRPERSON:** What regulation is it again?

**ADV COCKRELL SC:** Chair, it is Regulation 11.

**CHAIRPERSON:** 11?



**ADV COCKRELL SC:** Regulation 11(3)(a).

**CHAIRPERSON:** Oh, okay, okay.

**ADV COCKRELL SC:** So Chair, when one reads that regulation ...[intervenes]

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** ...it is not immediately obviously whether it prohibits Bain from publishing its own affidavits. It is a Bain affidavit but Bain submitted it to this Commission. On one reading what the regulation is saying  
10 is that Bain is prohibited from disseminating that document, its own affidavit because it had published it to the Commission.

But Chair, even if that is not the correct reading of that regulation, the difficulty Bain would still find itself in is, the Bain affidavits are, of course, referring to Mr Williams' affidavits which also... to the definition.

So even if Regulation 11(3)(a) does not prohibit Bain from publishing its own affidavits, it would still have that effect in as much as the Bain affidavit is cross-  
20 referring to Mr Williams' affidavit. And so Chair ...[intervenes]

**CHAIRPERSON:** [Indistinct]

**ADV COCKRELL SC:** ...application... by Bain ...[intervenes]

**CHAIRPERSON:** Mr Cockrell, let us just try and see if we

understand what paragraph A says.

**ADV COCKRELL SC:** Yes.

**CHAIRPERSON:** There are two possible interpretations, it seems to me. There is no doubt that the prohibition relates to any document submitted to the Commission. So Bain's affidavit, once it has been submitted to the Commission, would fall under that. And then it says document by any person in connection with the inquiry.

I suspect what you are saying is that the  
10 reference to any person is not a reference to a document of the person who seeks to disseminate the document. If that is what you say.

**ADV COCKRELL SC:** Yes.

**CHAIRPERSON:** So that might be one possible interpretation. Another one might be that the prohibition is intended to make sure that any document that is submitted to the Commission, even your own document, you may not publish without the written permission of the Chairperson.

**ADV COCKRELL SC:** Yes.

20 **CHAIRPERSON:** Now on the face of it ...[intervenes]

**ADV COCKRELL SC:** Yes.

**CHAIRPERSON:** ...the interest that would be sought to be protected by that prohibition are the interest of the investigation of the Commission. So if that is correct then there may be difficulty in the interpretation that would say:

I am free to publish my own affidavits that are submitted to the Commission and I am free to do so without the written permission of the Commission.

Because the mischief that is sought to be avoided would be the same whether I am publishing or disseminating my own affidavit or disseminating somebody else's affidavit. I think that might be the difficulty with that interpretation.

Whereas, if you – if we adopt the interpretation  
10 that the reference to any person includes the deponent to that affidavit or the oath of that document, then that interpretation seeks to make sure that any document that has been submitted to the Commission is now part of the Commission's investigation.

And to protect the investigation of the Commission, nobody should disseminate that document without getting the written permission of the Commission. I would be inclined towards that interpretation, rather than the one that says that as long as it is your affidavit, you  
20 can publish it even if you had submitted it to the Commission.

But you might have something to different to advance or you might say whatever the correct interpretation is, this is what you would like to say.

**ADV COCKRELL SC:** Yes. Chair, with respect, from our

perspective it does not matter which interpretation is correct. May I say, with respect, you are entirely correct Chair. Regulation 11(3)(a) could be read as prohibiting the author of the document from publishing his or her own documents or it could be read that it is only referring to a third person.

But Chair, from Bain & Company's perspective it really does not matter because Bain & Company has written to you, seeking your permission. So no matter  
10 whose interpretation is correct, it runs to be on the right side of you Chair. If I can put it bluntly.

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** So no matter which interpretation is correct, the provision falls away if the Chairperson gives written permission.

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

**ADV COCKRELL SC:** And that is what Bain & Company was saying to you in the letter Chair.

**CHAIRPERSON:** Yes.

20 **ADV COCKRELL SC:** ...saying perhaps the regulation does not apply to Bain & Company's own document.

**CHAIRPERSON:** H'm.

**ADV COCKRELL SC:** But even if that was or were correct, Bain & Company would still have a difficulty because it would certainly apply to Mr Williams' affidavit.

**CHAIRPERSON:** H'm.

**ADV COCKRELL SC:** And Bain & Company is referring to Mr Williams' affidavit.

**CHAIRPERSON:** H'm.

**ADV COCKRELL SC:** So Chair, with effect, on either interpretation... [Speaker is unclear – distortion in transmission.]

**CHAIRPERSON:** I think the ...[intervenes]

**ADV COCKRELL SC:** On either interpretation  
10 ...[intervenes]

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** ...what Bain & Company is asking for

**CHAIRPERSON:** I think the reason why I was looking at the two possible interpretations. I thought that that could have been behind you emphasising that Mr Franklin may have misunderstood your position to be that, you were asking the Commission – you are asking for my permission to allow the Commission to disseminate or publish.

20 And you are saying, no, that is not what you are asking. You are asking to be allowed to publish yourself. So I was wondering what the significance is in terms of the difference, whether the publication is done by the Commission or by yourself because in the end, it is publication.

So I was wondering whether there was any significance to be attached to that that is based on the regulation.

But I think it is clear that you are saying, whatever the interpretation is, you want to make sure that, if the correct interpretation is that everyone who has – everyone who wants to publish a document that has been submitted to the Commission needs the written permission of the Chairperson, you want to make sure that you are on  
10 the right side of the law. So that is – that I understand now. Yes?

**ADV COCKRELL SC:** That is quite correct Chair. So the letter... written, in respect, to your workings.

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** What Bain & Company was saying in the letter is, there may be some interesting... for debate but *our interpretation in terms(?)* of Regulation 11(b)(a).

**CHAIRPERSON:** H'm.

**ADV COCKRELL SC:** But he does not want to have those  
20 debates. He just wants to be on the right side of the law and so the letter... out of respect to you Chair.

**CHAIRPERSON:** H'm.

**ADV COCKRELL SC:** And such as ...[intervenes]

**CHAIRPERSON:** I think that maybe ...[intervenes]

**ADV COCKRELL SC:** [Indistinct]

[Parties intervening each other – unclear]

**CHAIRPERSON:** ...to this. It will help you... Hallo, Mr Cockrell?

**ADV COCKRELL SC:** [No audible reply]

**CHAIRPERSON:** It will help you... if you have an idea what I have in mind. My immediate concern is, why that should be done in this case whereas normally it is not done. But of course, you may say: Well, other people have not applied for written permission. We have applied  
10 for written permission. But that was my immediate reaction to the request. And why... why ...[intervenes]

**ADV COCKRELL SC:** Chair, I do not know what other parties have done.

**CHAIRPERSON:** Yes. I am terrible sorry. We – there is something not so good with the technology. So you, obviously, will address that. But the – what has been happening over the past three years is, basically, that an affidavit will become public when the witness or the deponent to that affidavit has given evidence in public.  
20 Now why should we not stick to that in this case?

**ADV COCKRELL SC:** Chairperson, may I apologise? I do not intend to interrupt you, obviously, but there is a big time lap between – on the Zoom connection, unfortunately. So I do apologise if it looks like I am interrupting you. I have no intention of doing that.

**CHAIRPERSON:** Ja. No, no, no. Ja.

**ADV COCKRELL SC:** Chair, the... [transmission lost]

**CHAIRPERSON:** I am sorry. I think maybe we might have to adjourn to see whether the technicians cannot solve this problem. I am sorry Mr Cockrell. We might have to adjourn a bit to see whether the technicians cannot solve this problem. I think there is both a delay but also I do not know whether they say the network is unstable and whether that can be fixed. Should we adjourn?

10 **TECHNICIANS:** [No audible reply]

**CHAIRPERSON:** Five minutes?

**TECHNICIANS:** [No audible reply]

**CHAIRPERSON:** Okay. Then let us adjourn so that the – our exchange can flow smoothly. We will adjourn for about five minutes to give the technicians the opportunity to fix the problem. We adjourn.

### **INQUIRY ADJOURNS**

### **INQUIRY RESUMES**

20 **CHAIRPERSON:** It looks like Mr Cockrell does not have any signal.

**ADV COCKRELL SC:** I am here, okay.

**CHAIRPERSON:** You are there, okay.

**ADV COCKRELL SC:** I am here, Chair, and ...[intervenes]

**CHAIRPERSON:** We cannot see you but if you can hear me we can continue.



**ADV COCKRELL SC:** It tends to go on and off again.

**CHAIRPERSON:** Yes, I was told the problem has been sorted so but I think the technicians will continue. Let us continue.

**ADV COCKRELL SC:** Chair, can I say from my side I can see the signal is much better because I was getting a signal to indicate it was unstable at the venue and that signal how gone away. So I am happy to continue, Chair, even you cannot see me.

10 **CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** As long as you can hear me.

**CHAIRPERSON:** Yes, no that is fine, I can hear you much better, it is just that I cannot see you now but we can continue in the meantime. I have had the opportunity during the short adjournment to read the letter that you were referring to in terms of which they requested permission to publish this affidavit. So I have looked at it. Subject to what you might say, I do not see anything that justifies that Bain be treated differently from everybody  
20 else in that letter.

**ADV COCKRELL SC:** Well, Chair, may I address you on why that would cause a difficulty for Bain.

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** Mr Williams...

**CHAIRPERSON:** Yes? Oh.

**ADV COCKRELL SC:** Will be (indistinct – recording distorted) that Mr Williams' affidavit going to be released.

**CHAIRPERSON:** Hang on, hang on, Mr Cockrell ...[intervenes]

**ADV COCKRELL SC:** But the difficulty for Bain is, although it is a privileged ...[intervenes]

**CHAIRPERSON:** Hello, I am sorry, we could not hear you for a few seconds so I think start afresh please?

**ADV COCKRELL SC:** Yes, Chair. Chair, I do apologise.

10 Chair, Mr Williams will give his evidence today. As I understand what you said before the short adjournment, the practice of the Commission is that Mr Williams' affidavit would then be released into the public domain. Now Bain and company has applied for leave to cross-examine (indistinct – recording distorted), we do not know whether Bain has applied.

**CHAIRPERSON:** Well, we continue to have problems in terms of technology, there are times where I cannot hear you. I am looking at the technicians whether they need  
20 some time. I mean, I do not mind if we do not see you as long as ...[intervenes]

**ADV COCKRELL SC:** I turn my video off, that sometimes helps.

**CHAIRPERSON:** If it does it is fine.

**ADV COCKRELL SC:** Sometimes they freeze up some

bandwidth, Chair, I have turned off my video.

**CHAIRPERSON:** Yes, okay, maybe start afresh.

**ADV COCKRELL SC:** That may be easier.

**CHAIRPERSON:** Just start afresh and let us continue and see.

**ADV COCKRELL SC:** Yes, Chair, I do apologise for this, I really do.

**CHAIRPERSON:** No, no, no, that is fine, that is fine. I think you had just staying saying the problem for Bain, if it  
10 was to be treated in accordance with the practice that we have would be and then I could not hear. I think you can start from there.

**ADV COCKRELL SC:** Chair, let me back up. What you put to me is that the practice of the Commission is once a person gives evidence before this Commission its affidavit will then be released into the public domain. That is what I understood your statement to be about the practice that the Commission ...[intervenes]

**CHAIRPERSON:** Yes, yes, yes.

20 **ADV COCKRELL SC:** So what that means is when Mr Williams gives his evidence today his affidavit will then be released into the public domain but the difficulty for Bain is, although it has applied for leave to cross-examine Mr Williams, it has not yet been granted leave to cross-examine and indeed he does not even know when its

application for leave to cross-examine will be heard and so the difficulty is, if someone today were to ask Bain at the conclusion of Mr Williams' evidence today, what do you say about Mr Williams' evidence, what Bain would want to do in the ordinary course is to say well, see the two affidavits we have filed with the Commission but Chair, with respect, if the narrow reading of regulation 11(3)(a) is correct, it means that Bain cannot do that. So they cannot refer anybody to the affidavit they are filing and it may be even  
10 worse than that, Chair, because if Bain is advised that it cannot release the affidavit, it may be in a position where it cannot even summarise what it says on an affidavit because that they also be seen to be in contravention, the Section 11(3)(a)

And so the difficulty for Bain, Chair, is although it has filed affidavits before you, it does not know when its application for leave to cross-examine will be heard and so, with respect, if you were to refuse it permission, Chair, which Regulation 11(3) permits you to grant, it would in  
20 effect leave Bain in a most untenable position where it is unable to respond if anyone were to ask it what is your response, Bain and Company, to the evidence of Mr Williams and Chair, you will know the evidence of Mr Williams said some pointed things about Bain and Company.

And so, Chair, with respect, where all of that is, where all of that comes out, in our respectful submission, it is just a question of fairness to Bain and Company. I say again, we are not asking to publish on the Commission's website, that is no part of the relief Bain and Company asked for on the letter to do, all that Bain and Company wants to do is it asked by a client or by a media representative what is your response, it wants to be able to refer to the affidavit that was filed and, Chair, with respect,

10 that is just a matter of fairness to Bain and Company because, without it, Bain and Company in effect in a position where it is unable to respond to what Mr Williams has said and that just does not seem fair, Chair, in our respectful submission precisely because Bain and Company does not know when its affidavit will be released in accordance with the practice that we have referred to Chair.

**CHAIRPERSON:** If you – you spoke about ...[intervenes]

**ADV COCKRELL SC:** But Chair, I think before the tea

20 ...[intervenes]

**CHAIRPERSON:** I am sorry, you also spoke about the possibility of Bain preparing a summary of what its response is as opposed to publishing the actual affidavit. It may well be that that is better than publishing the whole affidavit, I am not sure, but if that were to happen, would

that not satisfy the fairness requirement that you talk about to say well, at least here is a summary of our response, we are not publishing what is in the affidavit, we are not publishing the affidavit itself but this is here is a summary of what our response is, our points to the evidence of the allegations by Mr Williams. What do you think about that as an alternative to publishing the actual affidavit?

**ADV COCKRELL SC:** Chair, may I say, with respect, it would certainly be better than nothing. It may – the very  
 10 possibility you posit to me, Chair, would probably still require your permission because Regulation 11(3)(a) prohibits a party without your written permission from publishing the content or any portion of the content, of such a document. But, Chair, I understand what you are putting to me, is well, if Bain and Company is refused permission to release its entire affidavit could it not at least prepare of a summary of its affidavit? And my response is, that would also require your permission, Chair, under Regulation 11(3)(a) and that is a bare  
 20 minimum, that is what Bain and Company would ask for.

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** But, Chair, what I would say, and I make the submission with respect, is in some ways it is worse for the party, the party has gone on affidavit to put its version, it is now forced to cull that version on affidavit

and try and give a potted summary of that version. In some ways, Chair, the likelihood of inaccuracy is greater when a party tries to summarise his affidavit than if it simply released the whole affidavit.

But, Chair, I do take your point, what you are putting to me is if the practice of the Commission is not to allow a party to release a document including its own document before it gives evidence, then what you put to me is well, would it not at least be fair to Bain to be able to  
 10 release a summary of that affidavit and at a bare minimum, Chair, what is what we would ask for.

**CHAIRPERSON:** Yes, because ...[intervenes]

**ADV COCKRELL SC:** So the first prize, Chair, would still remain for Bain to be able to say here is the affidavit, but, Chair, with respect, if you are not minded to grant that, at a minimum we would at least ask for permission to release a summary of that affidavit.

**CHAIRPERSON:** Ja, you see, what I am thinking is that if one moves from the premise that the mischief sought to be  
 20 avoided by the regulation is possible interference or impediment of the investigation being done by the Commission it may be that the publication of a full affidavit with all kinds of details might be more problematic compared to a publication of maybe a summary of what the response is. That is what I am thinking, that maybe the

publication of all the details in the affidavit might be more problematic in terms of whatever investigation the Commission must still do in relation to that affidavit compared to a summary. That is what is in my mind.

**ADV COCKRELL SC:** But, Chair, let me start by saying, the one thing Bain would not want to do is undermine workings of this Commission so the whole reason why it wrote the letter to you, Chair, was out of respect for the workings of the Commission. So if, Chair, your view is that  
10 the mischief which Regulation 11(3)(a) is directed, if you are of the view that it would produce the mischief that is sought to be averted if the entire Bain affidavit were to be released and, of course, Bain and Company would respect that.

But, Chair, with respect, Bain and Company cannot be in a worse position than if it had not submitted an affidavit to this Commission. So if Bain and Company have never submitted an affidavit to the Commission there would be nothing to prohibit it issuing anything it wanted into the  
20 public domain in response to what Mr Williams said and so, with respect, Chair, it would be completely unfair for Bain and Company to be worse off because it has gone on affidavit to you than if it had never submitted an affidavit to you.

And so, Chair, it does seem at a bare minimum that



Bain must be able to do is to respond publicly if asked. The difficulty for Bain is, on your *prima facie* reading, Chair, on Regulation 11(3)(a) it cannot then – it cannot quote even a portion of its affidavit, it would have to give what is really a summary of that affidavit and I believe what you are positing to me, Chair, is well, would that not be enough as a matter of fairness to Bain? And Chair, my response is again, with respect, it is certainly better than nothing. With respect we would have thought it is simply  
10 much better for Bain and Company to say here is the version on affidavit for Bain and Company to try and summarise what it said on affidavit.

But I come back to my original response to your question, Chair, Bain and Company would respectfully ask for permission to release the entire affidavit. If your view is that that would produce a mischief that the regulation is designed to prohibit then at a bare minimum Bain and Company would require your permission, Chair, to release a summary of that affidavit.

20 It would release that to whoever it wishes to release it to, it may be asked by a client, it might be asked by a media representative, we do not ask for the Commission to assist us in how we publish it, we simply do seek your permission that we may publish it in some or other form if we were to be asked.

**CHAIRPERSON:** Ja, you see, part of what I had looked at is what the effect would be if in every case where a witness is about to testify, those implicated by the witness are allowed to publish their affidavits in response. It seems to me that we may as well not have this regulation/ You know, as I see it, the regulation seeks to say – to lay down the norm, to say the norm is do not publish but the Chairperson is given the authority to depart from that norm and provide written permission and one would say there  
10 needs to be something special in order for the Chairperson to authorise a departure from the norm because otherwise if there is nothing special and the Chairperson authorises a departure from the norm, tomorrow there is going to be another person who is implicated by tomorrow's witness who says I also want to publish my affidavit in response, the following day another one and because there is nothing special that needs to be shown, then the publication becomes of affidavits of implicated persons when the witness testifying is – the witness implicating them is  
20 testing becomes the norm then you may as well not have the regulation. That seems to me that is something that I have to reflect on as well. What do you say to that?

And when I look at the letter, as I said, it does not seem to me that it pleads any special case, it simply says Mr Williams makes very serious allegations against Bain.

All kinds of witnesses come here every day and make serious allegations against people, you know, so I do not see anything that puts Bain's case outside of the normal. What do you say about that approach?

**ADV COCKRELL SC:** Yes. No, thank you, Chair, I am grateful for the question. Chair, we would accept that Regulation 11(3) has an escape valve which requires you to exercise your discretion on an *ad hoc* basis. In other words, Chair, it contains the general prohibition but then  
10 says the Chairperson can give permission which release the affected person from the ambit of the restraint.

So, in our respectful submission, you would have to consider every case on an individual basis and consider whether an appropriate case has been made.

If you were to give permission to Bain, Chair, I understand your concern to be but then what does the Chair do tomorrow or on Wednesday if another person applies? With respect, the answer is you would be exercising your discretion on an individual basis and it  
20 have not precedential effect going forward.

So the case made out by Bain in the letter is simply this. It has gone on affidavit, it does not know when that application is going to be heard and then very serious things are said by Mr Williams regarding Bain and Company.

Chair, I do hear what you say, you say well, very often serious things are said by implicated parties in your proceedings but, Chair, you would have to read Mr Williams' affidavit carefully, consider that Bain and Company is still trading company, in other words it is a company which is still working with customers and you would then have to consider whether a proper case had been made out.

And, Chair, may I also, with respect, suggest that  
10 the other thing that the Chair should take into consideration is this. It would, in our respectful submission, be perverse if you were better off not filing an affidavit before the Commission in terms of responding to what someone were to say about you. If you do not submit an affidavit to the Commission well there is nothing to stop you saying whatever you want when that person says things about you in proceedings before the Commission.

Here what Bain and Company have done, entirely properly, is it read the affidavit of Mr Williams, it put up  
20 two affidavits in response. It would be unfair for Bain to be in a worse position because it has gone on affidavit and, with respect, that may well be one of the outcomes if the discretion were to be exercised in a way that is not favourable to Bain, Bain and Company would then have been in a better position by not going on affidavit and, with

respect, that would not be a sensible outcome. But Chair,  
I instructions

**CHAIRPERSON:** Ja, no, I hear your point about that and I  
will hear what Mr Franklin has to say about it. It may well  
be that the approach – the approach is well, those who –  
those implicated parties who want to operate within the  
regulations will not go outside of the regulations, they will  
say if my case is no different from everyone else who gets  
implicated, that means I cannot apply for or I cannot get  
10 written permission for a departure from the norm but if my  
case is special then I will apply and if the Chairperson is  
persuaded that my case is special, there will be a  
departure from the norm.

And then, of course, there may be parties who  
decide to operate outside of the regulations and do their  
own thing, you know, and say well, we will just publish, you  
know, we will not submit affidavits and we will publish  
outside of the regulations or they might say well, we will  
publish first and then submit to the Commission because  
20 then if we do it that way, we are not in breach of the  
regulation.

So I am saying I hear the point you make but, of  
course, I think you also accept the difficulty of – the  
difficulty that the case made out for written permission  
must – there must be something special to say the least

about the circumstances or the case because if it falls within the norm, the cases that have been here, it is simply says the witness has made serious allegations against me, allegations of impropriety, corruption and what, what, what, what, allegations of corruption and impropriety get made by witnesses in the Commission every day. So if that is enough for me to authorise to provide written permission then I am going to have to provide it all the time and then we may as well not have the regulation but I do appreciate

10 that that is a point I have made, I have put to you and you have addressed it. So maybe I should let you say what you might need to say before I allow Mr – whatever else you might need to say before I allow Mr Franklin to respond, if there is still anything you would like to say.

**ADV COCKRELL SC:** Chair, may I just make two points in response to what you have put to me. The one is this, Chair, as I said earlier, the whole point of Bain and Company writing to you was in order to be respectful towards the workings of the Commission, so we are

20 especially mindful when you put to us but the mischief at which Regulation 11(3)(a) is directed may be undermined if parties were given licence to release their affidavits before the evidence is in fact given. Chair, we hear what you say and we are respectful of that but may I simply say it is not obvious to us how the mischief would be undermined.

A party comes before you, a party submits an affidavit to you. The party does not know when its application, in this case for leave to cross-examine, will be heard and does not know what the outcome would be. Chair, with respect, it is not obvious to us how the workings of the Commission would be undermined if that party were to be given leave to release its affidavit.

And, Chair, it ties in with my second point. It is about the time lag between when the evidence implicating  
 10 the person is given and when in due course the subsequent evidence is given.

In this case, Chair, we simply do not know when Bain and Company's application will be heard, we do not know what the outcome will be and if permission were to be given to cross-examine, we do not know when that cross-examination is going to happen, but it could be a long delay, Chair, so when you say to me well, should there not be extraordinary circumstances for me, the Chair, to exercise my permission under Regulation 11(3)(a)?

20 The other thing we would respectfully draw your attention to is the uncertainty regarding how long it will take before Mr Williams' is cross-examined, if he is ever cross-examined at all, Chair.

But, Chair, those are the only two additional points I would make, I do believe that I have responded to all of

the submissions – I have responded to all of your questions the best I can, Chair.

**CHAIRPERSON:** Yes, no, no, that is fine. Let me say that Mr – or Bain's application for leave to cross-examination Mr Williams can be dealt with. What I do not know is whether all the affidavits are in, whether any responses and so on, but it can be dealt with – or yes, I think there are, there are, there is a response from Mr Athol – I can  
10 see that and I see it is towards the end. I take it that if there is no replying affidavit from Bain it means it has elected not to reply, is that correct, Mr Cockrell?

**ADV COCKRELL SC:** Chair, with respect, it is too early. So we received Mr Williams' affidavit, it was around about five o'clock on Friday, as I recall. If my memory is playing up, Chair, my learned friend will correct me.

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** But my recollection was it was on Friday evening.

20 **CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** And, Chair, we have not yet had an opportunity to study it and to make a decision regarding whether Bain and Company will be filing a replying affidavit.

**CHAIRPERSON:** Yes.



**ADV COCKRELL SC:** That [indistinct] 27.50 must be made, Chair, but my client has not had enough time to study the answering affidavit.

**CHAIRPERSON:** Well, I want to say that – I wanted to say that the application could possibly be dealt with at some stage even this week so I think the sooner you make a decision whether you want to file a replying affidavit or not, the better. But if it is not heard this week I am sure I can allocate time for it next week. So that is one.

10           Two, the undermining – I just mention it now – I thought would be if I grant Bain's application to publish the affidavit, its affidavit, when Mr Williams testifies or when he has finished and Bain's case is not different from every other case, then the undermining would be that if I am to be consistent I would have then to grant written permission in every case that simply falls within the normal case under the regulations and that means the affidavits could be published in their entirety and, of course, if the idea that application of material submitted to the Commission for  
20 investigation may be prejudicial to the investigations of the Commission, then once we have that regime then that undermines the work of the Commission, because then it is as if the regulation prohibiting application is not there. You understand?

**ADV COCKRELL SC:** Sorry Chair, I do understand, and

perhaps we are with respect – we are missing each other. I do understand the proposition you put to me, you say well if there is nothing special about that case wouldn't I as the Chair have to give permission on all future occasions, and then you say wouldn't that prejudice the workings of the Commission.

And the only query I raised was Chair, even if that were correct, let us assume for the sake of argument that in most cases, you would then give written permission  
 10 under the regulations given the VA. It is not obvious to us why that would prejudice the workings of the Commission because these are people who filed affidavits before you and all that they asking permission to do is to release into the public domain, what they have said on affidavits before you.

And with respect Chair, the proposition that that would undermine the working of the Commission is not – Chair we fully understand if someone were to leak an affidavit that should not or has not been authorised there  
 20 we fully understand that would indeed prejudice the workings of the Commission, but what has happened here Chair it is the author of the affidavit is asking the Commission to release the affidavit.

**CHAIRPERSON:** But the disclosure of such information, while investigations are going on, could be prejudicial to

the investigation, is it not? The disclosure of information on matters that are still being investigated, could be prejudicial to the investigation, is it not?

**ADV COCKRELL SC:** With respect Chair, I can only say it is not obvious why that could be prejudicial because what is being disclosed is what the person has said on the affidavit, it is his or her evidence.

**CHAIRPERSON:** Yes, okay thank you.

**ADV COCKRELL SC:** And so Chair, the issue you are  
10 grappling with and may I just say as we do fully understand why you are grappling with it. You say, well, Regulation 11(3)(a) gives me the Chair a wide discretion. How do I exercise my discretion?

And Chair, the one response, which I should give, which I think I submitted earlier but let me say it again, you may well take a different view where someone comes before you and ask for permission under Regulation 11(3)(a) to release an affidavit or some other evidence that he or she is not the author of. But Chair, in this case what  
20 makes the case extraordinary with respect is it is Bain and Company saying, I want you to release my own affidavit and so Chair you say but then wouldn't I always have to give my permission under Regulation 11(3)(a). Well it may well be where a party comes before you and says, I want to release my own affidavit.

But Chair, that would not say anything about the much more difficult case, which is where someone comes before you and says, I want permission to release some evidence of which I am not the author and then one approach that in a completely different way, Chair.

**CHAIRPERSON:** Ja.

**ADV COCKRELL SC:** The only submission we try to make and that we snapshoted is the concern you have that it may create a precedential effect where a party wants to  
10 release its own affidavit. The concern is Chair you put to me, would that not prejudice the workings of the Commission?

And our response is, it is not obvious how it could prejudice the workings of the Commission because it is simply a version on affidavit by that person regarding what he or she did or what he or she says in response to someone else's affidavit.

The version may turn out to be wrong or it may turn out to be wrong, with respect, if it is wrong, it is always  
20 going to be wrong, maybe releasing into the public may in an affidavit that had turned out to be wrong are not going to prejudice the workings of the Commission in this submission. So Chair, before the tea adjournment Regulation 11(3)(a) may not even apply on one interpretation, I put it no higher than that.

It may not even apply where a person seeks permission to release his or her own affidavit but if it does apply and what you put to me Chair, is that is your *prima facie* interpretation. If it does apply, then in our respectful submission there would be no prejudicial consequence of this Chair saying, well, it does apply but I will take a more generous view when it comes to exercising my discretion under 11(3)(a).

When you are the author of the affidavit, then if  
 10 someone else comes before me seeking permission, in other words, there would in effect be two categories. One where you are the author of the affidavit, and the second category where you are the author of the affidavit and Chair, you may well approach those in completely separate ways.

But the concern you have that it would undermine the workings of the Commission, if you were to have a general rule that you are prohibited from releasing your own affidavit in advance. My respectful submission, it is  
 20 not obvious to us how that would prejudice the workings of the Commission.

**CHAIRPERSON:** Okay, the other thing, which I almost forgot to raise with you is, I see that Bain in its application, while applying for leave to cross examine Mr William, did not apply for leave as I read it unless I have

missed it, for leave to adduce evidence itself and subject itself to questioning by the Evidence Leaders and the Chairperson. Is there any particular reason why...[intervene]

**ADV COCKRELL SC:** That is not part of the...[intervene]

**CHAIRPERSON:** Is there any particular reason why?

**ADV COCKRELL SC:** That is not part of Bain's application Chair.

**CHAIRPERSON:** Yes, why is that do you know, or is that  
10 something you have no instructions on? You know, it is important, that the...[intervene]

**ADV COCKRELL SC:** No, Chair I do not have any instructions on that I can only...[intervene]

**CHAIRPERSON:** Yes, let me mention it to you, let me mention to you. We have mentioned these, if Bain for example, had applied for leave to cross examine, you know for leave to adduce evidence of give evidence, it may well be that arrangements could have been made, that whoever was going to give evidence from Bain would have been  
20 accommodated this week.

So that Bain could, within a few days of Mr Williams giving evidence have the opportunity of also putting up its side of the story before the hearing that is a possibility. But also, if somebody wishes to cross examine, whoever implicates them it may well be that is the right thing for

them to subject themselves to questioning by the Commission.

So I mentioned that, simply because I noticed that there is only an application for leave to cross examine but also, I must mention to you that something has crossed my mind with regard to Bain in relation to the Nugent Commission.

I have not gone back to that report for some time but the Nugent Report, Nugent Commission Report, but I  
10 did read it at a certain stage and I recall that, if I recall correctly, somebody who was testifying on behalf of Bain did not complete his evidence before the Nugent Commission, and the reason that was apparently advanced, was that he was sick or something I cannot remember. But my recollection is that Judge Nugent did not seem to buy that story.

And I certainly left with the impression after reading the reports that Bain had decided not to cooperate with the Nugent Commission, and not to complete its evidence and  
20 subject itself to questioning in the Commission. Now, when I see that it does not apply, or leave to adduce evidence in this Commission, but applies for leave to cross examine, Mr. Williams, I wonder whether they are prepared to submit themselves to questioning by this Commission, or whether they just want to cross examine, and make written

submissions, and not subject themselves to questioning by this Commission. You might not be able to say anything about this, but I am just raising it with you because it has crossed my mind.

**ADV COCKRELL SC:** Well Chair, those are all very important questions, and let me respond to them and let me tell you what is on the record. So when you asked me what is the reason for something not being in the Bain application that is obviously not something that I can deal  
10 with. I can only tell you what is in the application.

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** And ask for leave to cross examine it, and ask for leave to make submissions. It does not seek the to give evidence before this Commission.

Chair number two, on the record that point has been taken by Mr Williams in the affidavit he filed on Friday. I think I am summarising it, sturdy enough when I say that is one of the point taken by Mr Williams. He says:

20 “Well, Bain and Company should not be entitled to cross examine him if they are not tendering a witness.”

Now Chair, that is a fight for another occasion, we will have to have that fight when we move our application for leave to cross examine in due course. What I do tell you is that at the moment, that is not part of the Bain and



Company application. Chair, what you refer to in the report of the Nugent inquiry I believe that is Mr Massone. Chair, Mr Massone was said at Mr Williams in his statement, as I understand it Chair, Mr Massone is separately represented because he is no longer an employee of Bain and Company.

And so my understanding and if I am wrong, I am sure one of my learned friends will correct me in due course, but my understanding is he is separately  
10 represented. Certainly I do not hold a brief for Mr Massone Chair, I hold the brief for Bain and Companies South Africa and they no longer employ Mr Massone.

So Chair, the evidence you referred to before Nugent and the finding of Judge Nugent that Bain and Company did not cooperate fully. That indeed, is something referred to by Mr Williams in his affidavit and it is also referred to in the affidavit by Mr Min that serves before you Chair, there is a version in Mr Min's affidavit in response to that.

20 But Chair where all of this goes is the point you put to me is, does Bain and Company seek leave to give evidence before you? And the answer is no.

**CHAIRPERSON:** And then the next question is, is it prepared to submit itself to questioning by the Commission, if the Commission wants them to do that?

**ADV COCKRELL SC:** Well Chair, that is something I would have to take instructions on. I am just not in the position to answer that question. I fully understand the point of the question but Chair for today, I am not in a position to give an answer to that question.

**CHAIRPERSON:** No, no, that is fair enough.

**ADV COCKRELL SC:** That is something my client would have to consider and I would be happy to ask them.

**CHAIRPERSON:** Yes, no, that is fair enough. Mr  
10 Franklin, maybe I should take the tea break and then let you address me after that.

**ADV FRANKLIN SC:** As you please, Chair.

**CHAIRPERSON:** Yes, we are 26 minutes past 11, we will resume at 25 to 12.

We adjourn.

**REGISTRAR:** All rise.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** I realised Mr Franklin that we have taken  
20 much longer than I think we all thought we would with this application.

**ADV FRANKLIN SC:** Indeed Chair.

**CHAIRPERSON:** But it does raise some important issues, so okay, alright. Let me allow you to address.

**ADV FRANKLIN SC:** Yes Chair, I was asked whether Mr

Cockrell might take an opportunity to raise the point of clarification with the Chair.

**CHAIRPERSON:** Yes, okay.

**ADV FRANKLIN SC:** So if I may hand back to him before I reply?

**CHAIRPERSON:** Yes, okay. Alright. Yes, Mr Cockrell.

**ADV COCKRELL SC:** Thank you. Thank you Chair, thank you to you and I have noted my learned friend. Chair, let me see if I can perhaps expedite this. Chair, in response  
10 to your question could my client live with a summary rather than publishing the full affidavit?

The response I gave to you is in some ways that might make my client's life more difficult, because he would have to get a summary that does not reproduce parts of the affidavit, but having said that Chair, I have taken an instruction during the adjournment and my client's attitude now is it does indeed ask for permission to publish a summary of the affidavit.

It no longer applies for permission to publish the  
20 full affidavit and Chair, I said repeatedly in my address to you, my client would not want to do anything that is undermining of the work of this commission. The proposition you put to me is it may undermine the work of the commission if the full affidavit were to be published in these circumstances, and that is why my client now simply

seek your permission to publish a summary of the affidavit and not the full affidavit Chair.

**CHAIRPERSON:** Okay, alright thank you. Mr Franklin?

**ADV FRANKLIN SC:** Thank you Chair, if I may respond briefly to the two topics that have been addressed by my learned friend. The first concerns the question of privilege. As he made clear we no longer seek a ruling in that regard and because of the accommodation that has been reached, but Bain has none the less placed on record  
10 that it does still assert privilege over the identified documents.

If I may briefly respond to that, simply to put on record for purposes of the commission a denial that there is in fact privilege that attaches to any of those documents, as the evidence will reveal Mr Williams was appointed in a special role to oversee an investigation which Bain initiated into its own conduct, and the repeated refrain was that it wished to play open cards, reveal the truth and do right for South Africa.

20 So we do not understand how it can simultaneously make that assertion and then when it comes to revealing documents which are the product of that investigation, to claim privilege over them. In any event all of the documents that are sought to be introduced were given to Mr Williams pursuant to his mandate.

So we simply place that on record, that in our view there is no proper claim of privilege. Secondly, in relation to the letter and the request that Bain be given permission to publish its affidavits or now it seems a summary and for the purposes of record, may I just identify the Bain letter from Baker McKenzie, dated 26 November 2020.

It is found in SARS Bundle 02, Exhibit WW5, which is the correspondence bundle at page 93. Our submission is this. Regulation 11(3)A we would submit does deal with  
10 this situation. It regulates this situation. It says that no person shall without the written permission of the Chairperson disseminate any documents submitted to the commission by any person in connection with the inquiry or publish the contents or any portion of the contents of such document.

That with respect covers the situation that Bain finds itself in, where it has brought an application to cross-examine, and it has in support of that, attached a number of affidavits. So we would submit that with respect, the  
20 Chair's *prima facie* view is correct that Regulation 33A governs the situation.

The upshot of that is of course that it is within the Chair's discretion to grant the permission which has been sought or not and we would submit that there are a number of compelling reasons why that permission should be

refused.

The first is that the mandate of the commission is of course to investigate matters of public and national interest concerning allegations of State Capture corruption and fraud. So by its very nature, that is the subject matter of the evidence which the Chair has heard for months on end.

But there is nothing particularly unique about the evidence that is being introduced which implicates Bain.  
 10 Secondly, we would submit that granting the request would result in Bain not being treated equally with other parties who have been implicated in matters placed before the commission.

That is a central feature which we ask the commission to take into account, and what would happen we would submit, is that one would have a situation where all 2700 I am told is the number, implicated persons would then regard themselves as also entitled to ask the same relief and if one looks at the Bain situation, there is  
 20 nothing unique in the grounds that are set out in its letter.

All it asks for is a right to publish in order for it to be treated fairly. Every implicated person could mount exactly the same argument and so one has a difficulty in granting what should be an exceptional remedy in circumstances where the circumstances are not

exceptional.

Secondly we would submit that publication of the affidavits would defeat the purpose of its application to cross-examine Mr Williams in any event, and it is perfectly entitled to publicise if it so wishes in answer to any query that might be raised.

Yes, we have heard the evidence given by Mr Williams, but we want to let you know that we have applied to the Chairperson to cross-examine and his evidence will  
10 be tested in due course if we are granted permission. That is a perfectly adequate safeguard for addressing the concern which they have.

Really it comes down to this Chair, my learned friend articulates why there is a difficulty for Bain not to get permission and my answer to that is that the difficulty is faced by everyone for permission equally, and so we would submit that the upshot is that practically one would need to depart from the norm in all cases, because these facts are not unique.

20 We also with respect believe that the point raised by the Chair is very significant, because what Bain wants is to blunt the import of Mr William's testimony with affidavits of its own in circumstances where it is not prepared to put up any witness who will himself or herself be subjected to cross-examination.

That is a case of having one's cake and eating it and where fairness is called an aid, we would submit that it would be blatantly unfair for that situation to be allowed. My learned friends have said that a summary would suffice and as I understand it, it would be a publication of a summary of the contents of the affidavits which currently serve before the commission as part of Bain's application.

That via media whilst it may sound attractive, we submit falls foul of precisely the same considerations  
10 which I have set out, because all it is is a shorter version of the evidence which is sought to be put up, and for the same reasons that I have articulated, we would submit that that would be inappropriate.

So the principle is either permission is granted or not, it does not ameliorate the factors which I have outlined in opposition to the grant of the permission by saying we are content with a shorter summary. So in conclusion on this, we submit that Bain is attempting to secure for itself a right which no other party has sought or  
20 being granted. That there is certainly no proper basis upon which the Chair can grant that permission and we would ask that the Chair refuse the permission.

Thank you.

**CHAIRPERSON:** Thank you. Mr Cockrell, do you want to respond to that?



**ADV COCKRELL SC:** Chair, let me respond very briefly. My learned friend [indistinct – 00:10:36] submission he says that Bain will not be treated equally because other implicated parties as I understood it have not applied to be placed in the same position.

Chair, I [indistinct – 00:10:50] through your website this morning. I am not aware of any implicated party who would sought permission under Regulation 11(3)A. So with respect, the fact that Bain is the first party to do so, is a  
10 point in its favour.

So with respect Chair, we simply do not understand the submission that Bain is seeking to be treated in a more favourable way than other parties. The bottom line is that Bain is the only party who has sought your permission under Regulation 11(3)A and that should count in its favour and not against it.

My learned friend then said that if Bain were to be granted permission under Regulation 11(3)A, it would defeat the purpose of the application to cross-examine Mr  
20 Williams. With respect Chair, we simply do not understand the submission.

There is an application to cross-examine Mr Williams, that will be heard in due course. some of the issues you raise with me Chair and they become of some importance in that debate, but all that Bain is seeking

permission to do now, is to release a summary of the affidavit that is placed before you, and how that would defeat the purpose of the application to cross-examine is simply not apparent to us.

Chair, as regards to the summary, my learned friend says well, that is objectionable for the same reasons as the full affidavit. Again Chair, with respect to my learned friend, we simply do not understand the submission. The one thing you have not heard a word of from my learned  
10 friend, Mr Franklin, is how would it undermine the workings of the commission if Bain & Company were to be given permission by you to release the summary of its affidavit.

I want to focus on that because that was the full [indistinct – 00:12:32] of the debate you and I had earlier, and your concern was that releasing the full affidavit may undermine the work of the commission, and now the debate is would releasing a summary undermine the work of the commission.

We listened closely to our learned friend. We did  
20 not understand there to be a single submission regarding why the work of the commission would be undermined. Chair, with respect it is completely counter intuitive, because what in effect you would be saying to an implicated party is when you are implicated in the evidence, you cannot even refer to the affidavit you have

placed before the commission.

You cannot refer to it by way of a ...[indistinct] summary. You cannot refer to it by way of a full summary. In effect if you were asked to give comment, there is nothing you can say because any answer you give is likely to anticipate what you have said on affidavit.

My learned friend says well, you can simply say we have applied for leave to cross-examine, but that is no answer at all Chair. So with respect Chair, it does seem to  
 10 us that the critical issue for you Chair, would be in what meaningful way would it undermine the work of this commission if Bain & Company were given permission under Regulation 11(3)A to publish a summary of the two affidavits if it is placed before you.

Chair, I do not know if you have had a chance to read those affidavits. May I say they are very full affidavits and say for example the debate you and I had Chair, about what Judge Nugent found regarding Mr Massone, that is a topic dealt with in one of the affidavits.

20 The two very lengthy affidavits would not be published in their full form in the amended version of what Bain & Company now seeks. All they ask for is permission to publish a summary and with respect Chair, it would be entirely unfair not to grant that permission to Bain & Company because in effect you would be muzzling that.

You would be muzzling them until some unidentified future time, even when Mr Williams has given his evidence, and so with respect Chair we would continue to ask for the relief in the attenuated form in which my client now asks for it.

All it asks for is your permission under Regulation 11(3)A, to publish a summary of the two affidavits it has submitted before you and Chair, with the greatest of respect to our learned friend, there is no meaningful  
10 answer to why that permission should not be given.

On the contrary it would be extraordinary if the permission were to be refused because it would create a most bizarre outcome where an implicated person is unable to say anything about his or her version. So with respect Chair, we would continue to ask for that relief ...[intervenes]

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** In modified form, in which I have explained it. Thank you Chair.

20 **CHAIRPERSON:** I wonder whether there would be any merits in looking at the possible interpretations of the regulation and seeing whether one of them places less restrictions on an individual's right compared to another one, and whether there may be an ... whether the correct interpretation may well be one, whether it may well be one

which allows that.

Now I am going back. I know we have dealt with this earlier to say which is the correct interpretation. In terms of the one interpretation it was my, the one I was inclined, towards which I was inclined was to say the regulation means anybody.

Nobody is permitted, including a deponent to an affidavit, to publish a document that has been submitted to the commission without the written permission of the  
10 Chairperson. The other one being well, if it is your ... if it is your deponent, if it is your affidavit, maybe the regulation does not cover that.

It is only if you seek to publish somebody else's document or another document, or but of course there was the issue that I raised to say we need to look at what mischief was sought to be prevented from happening. So that there is that, but you made the point that whichever interpretation you believe you should apply for leave and that is why you, that is the approach you have adopted.

20 Do you want to say anything on this?

**ADV COCKRELL SC:** I just want to make this submission Chair. Even if the interpretation were to be adopted which says Regulation 11(3)A does not stop Bain from publishing its own affidavit, the difficulty Bain would still have is the Bain affidavit referred to Mr William's application.

That is why I said on any version we would require your permission.

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** In other words, even if [indistinct – 00:18:35] adopted, there would still be a problem because Bain [indistinct – 00:18:41] to Mr William's affidavit. That is the point I am making.

**CHAIRPERSON:** I guess one of the serious difficulties is simply that there seems to be nothing special in Bain's  
10 circumstances compared to the norm, but you have addressed that, we have dealt with that. Let me hear Mr Franklin ...[intervenes]

**ADV COCKRELL SC:** May I quickly ...[intervenes]

**CHAIRPERSON:** Yes, you want to say something on that?

**ADV COCKRELL SC:** It is difficult for me because I have had some involvement with the commission over the years, but I do not speak in the way in which you function. So I simply do not know the applications you have had before you, but may I simply say the applications by Bain &  
20 Company contains two very substantial affidavits.

So I do not know Chair, whether that is the norm of the sorts of affidavits we have before you, but I would be surprised quite frankly if any other applications before you had affidavits of that length. So if you say what is different about the Bain affidavits, or the Bain application.

Bain & Company put two affidavits before you containing a detailed narrative. It says I want permission, I want your leave to cross-examine. The difficulty Chair is unless the permission were to be given to Bain to publish a summary of those two affidavits, it would be very difficult for it to say anything meaningful.

If it were asked by a media representative or by a client what is your response to Mr William's evidence. That is so unfair Chair. So when you say what is special  
 10 about Bain, we would say firstly would you have regard to the length of the affidavit, and the level of detail in that, and then secondly would you consider the position of Bain if it works by [indistinct – 00:20:46] what answer could they give, unless they were given your permission in order to publish a summary of that few very detailed affidavits.

**CHAIRPERSON:** Yes. Mr Franklin, do you want to deal with the issue I raised, and I just want to also say to a certain extent is it not correct that there is some unfairness or there may be some unfairness if somebody  
 20 raise all kinds of things about you and you are not able to respond and put your side of the story.

**ADV FRANKLIN SC:** Yes, thank you Chair.

**CHAIRPERSON:** And if there is or may be unfairness, the next question may be whether that is the unfairness that attaches to the regulations as they stand and as long as

they stand that is it, as opposed to any unfairness that might arise from a decision under those regulations.

**ADV FRANKLIN SC:** Yes, thank you Chair. Just on the first issue, the question of the proper interpretation of 3A, as we see it, the phrase any person should be given its ordinary English meaning and it must cover any person. That would include Bain within its purview.

That must be clear. If that is so, then you are given a discretion as Chair to give permission or not, so we are  
 10 back to where we were. As far as the potential for unfairness which you have raised is concerned, we submit that there is none, because of the scheme of the rules and the regulation with which the Chair is very familiar.

It runs along these lines. The commission calls a witness. If the witness implicates parties A, B and C in wrongdoing, then the commission is required to use a Rule 33 notice to those implicated persons. They are then put on notice that allegations of impropriety have been levelled against them.

20 If they fall into that category, they are then accorded certain rights. Those rights are to apply for cross-examination of the accuser and or to apply to lead evidence themselves or present evidence themselves. So that addresses the *audi ulterim partem* issue.

It addresses a situation which would otherwise be



unfair, where an accuser is entitled to say what he or she likes about a person with impunity. They have to understand that if they implicate somebody, they may be cross-examined by that person on the evidence which was put forward, and also that person may be allowed by the commission to him or herself give evidence.

That scheme is perfectly fair. It accords the usual rights which we all understand in the legal practice. We would submit there is no room for a via media, and  
10 especially one in respect of a party who has seen fit not to present evidence himself or herself, and more importantly to subject themselves to cross-examination.

What Bain wants, is to try to blunt the testimony of Mr Williams, by way of publishing of affidavits, without simultaneously asking for the deponents to those affidavits, come before this commission to give that evidence and to be cross-examined.

That is unfair. So we would submit in answer to the points raised by the Chair, that the construct of the rules is  
20 perfectly fair. It builds in the safe cards that and one would want to see, and what is being asked for here is not something which would be granted, because there are adequate rights which exist for Bain in any event, and we would also contend that it would be a not a salutatory practice for implicated parties to adopt this same

procedure.

So we certainly do persist with the opposition to the publication.

**CHAIRPERSON:** So just to summarise your points or your approach. You say the commission operates within the framework of obviously the constitution, the Commission's Act, the regulations and the rules and you say that framework makes provision for fairness to happen in a certain way, and that means if you are implicated by a  
10 witness you get even a Rule 33 notice.

That is part of the [indistinct – 00:26:26] rule and that is part of fairness. You are then given an opportunity to apply for leave to adduce evidence, to cross-examine and to call any other witness you wish to call so as to put your side of the story.

That frame work may well mean when one reads the relevant regulation and other parts of, and other regulations, may well mean that your side of the story you are not able to tell your side of the story at the time that  
20 you would prefer.

But you will be given a chance to tell your story. Particularly if you wish to, me and you, comply with the regulations and the rules. In other words you apply for leave to adduce your evidence and if you want leave to cross-examine, you get it through that.

You will get that chance and unless your case is exceptional, there is no ground to seek to find fairness outside of that frame work.

**ADV FRANKLIN SC:** With respect the Chair has summarised my points more than adequately.

**CHAIRPERSON:** Ja, okay. No, thank you. Mr Cockrell, do you ... what you wanted if I were to grant you leave or the written permission would be, would be for your client to publish the summary at least at the same time as when Mr  
10 William's affidavit gets made public by the commission.

Is that right? Or did you want to publish it while Mr Williams was still continuing with his evidence? I did not think it would be the latter.

**ADV COCKRELL SC:** Chair, in the letter to you, Chair the letter to you seeks permission to publish what would now be a summary at the moment when Mr Williams commences his evidence. Chair, if you would regard that as being prejudicial you would then fix a more appropriate time frame at which my client can release the summary.

20 In other words if you wish it to be later on, we would be in your hands in that regard, but the letter seeks permission to publish what would now be a summary at the time when Mr Williams commences his evidence.

**CHAIRPERSON:** Well, part of the reason why I was asking is that I was thinking that maybe I could give my decision

tomorrow morning? I think Mr Williams is likely to take the whole day, we already have taken half a day. Would that be fine with you?

**ADV COCKRELL SC:** I need to take - I am reluctant to say it would be fine with me because I would need to take an instruction in that regard.

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** If you could just bear with me for a few seconds. May I just take an instruction? Chair I am  
10 sitting in Cape Town I apologise and my attorney is in Johannesburg.

**CHAIRPERSON:** Oh okay alright where – are we going to need to adjourn for you to take instructions or not?

**ADV COCKRELL SC:** No – no there should be no need Chair if you could just bear with me for a few...

**CHAIRPERSON:** Ja okay.

**ADV COCKRELL SC:** If you can just bear with me for a minute or two Chair.

**CHAIRPERSON:** Okay alright.

20 **ADV COCKRELL SC:** Yes Chair.

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** Chair thank you for the indulgence Chair. My instruction is if the Chair – if the Chair is able to rule on that tomorrow that would be acceptable to my client.

Chair may I simply say this so that the point is not lost in the wash. The submission made by the commission with respect to them is really quite extraordinary because if you consider what it means assume my client in due course is refused leave to cross-examine well on the commission's logic it means my client can never release its affidavit and in fact can never even release a summary of its affidavit. In other words will never be able to give its version in response to Mr Williams in the public domain.

10           It is a most astonishing contention but that is the logic of what the commission is saying to you. Now say there is a period during which my client can say nothing that period may come to an end but if it does not come to an end my client is in effect 00:02:32 in perpetuity.

          Well Chair it is a most extraordinary proposition and Chair what you said at the commencement of the address after the adjournment is well would one not have to consider the different competing rights that are relevant when one interprets Regulation 11(3)(a). Well Chair the  
20   right to freedom of expression is the only response that is relevant because this is my client with its version. Its version happens to be one he has put in affidavit before you. What the commission is saying is for a period of time and potentially in perpetuity my client cannot give its version in the public domain. Well with respect Chair that

is an extraordinary attitude to be taking and we submit that it is not the submission that has any merit whatsoever.

But Chair subject to all of that Chair we would – we would respectfully ask you to rule on that and we understand that you will rule on that tomorrow morning.

**CHAIRPERSON:** Yes.

**ADV COCKRELL SC:** Thank you Chari.

**CHAIRPERSON:** Yes, no I will do that tomorrow morning but I have given you this further bite at the cherry I just  
10 wonder whether Mr Franklin wants to say something about this last point that you have emphasised.

**ADV FRANKLIN SC:** Chair I have made my submissions with respect that is the construct of the rules and no doubt it contemplates that an appropriate decision will be made in relation to the requests for leave to cross-examine or to present evidence.

**CHAIRPERSON:** Yes okay alright. Then I – I will give my decision tomorrow morning. Okay. Thank you.

**ADV FRANKLIN SC:** As it pleases.

20 **CHAIRPERSON:** Thank you. Are you ready to call Mr Williams or you need a few minutes to...

**ADV FRANKLIN SC:** No we would – we would wish to call him if we could.

**CHAIRPERSON:** Ja. Let us do that ja. You may administer the oath or affirmation.

**REGISTRAR:** Please state your full names for the record.

**MR WILLIAMS:** Athol Williams

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

**MR WILLIAMS:** No.

**REGISTRAR:** Do you – sorry – 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.

10 **MR WILLIAMS:** I truly affirm.

**CHAIRPERSON:** Thank you. Thank you Mr Williams for availing yourself to come and assist the commission.

**MR WILLIAMS:** Thank you Chair.

**CHAIRPERSON:** Thank you. Mr Franklin.

**ADV FRANKLIN SC:** Thank you Chair. Good morning Mr Williams.

**MR WILLIAMS:** Morning.

**ADV FRANKLIN SC:** You have a bundle before you which is marked SARS Bundle 01. You have that?

20 **MR WILLIAMS:** That is correct I do.

**ADV FRANKLIN SC:** Please turn to the paginated page on the left hand side that is SARS 01-011 – page 11. You have that?

**MR WILLIAMS:** I am there.

**ADV FRANKLIN SC:** You see that is a start of an affidavit

in your name please turn to page 119 of the same bundle.

**MR WILLIAMS:** I have got it.

**ADV FRANKLIN SC:** You see that there is a date 20 August 2020 and a signature, can you confirm that this document from page 11 to page 110 of SARS 01 is an affidavit attested to you by – by you on the 20 August 2020?

**MR WILLIAMS:** That is correct Chair I did.

**ADV FRANKLIN SC:** And can you confirm the truth and  
10 accuracy of that affidavit?

**MR WILLIAMS:** I can yes.

**ADV FRANKLIN SC:** Thank you Chair I would ask that the affidavit be admitted as Exhibit WW1.

**CHAIRPERSON:** The affidavit of Mr Athol Williams which starts at page 11 will be admitted as an exhibit together with its annexures and will be marked as Exhibit WW1.

**ADV FRANKLIN SC:** As you please Chair. Mr Williams I intend to take you to various parts of this affidavit and its annexures and we shall do so topic by topic. I will ask you  
20 to answer my questions in relation to specific issues which are put before you. If we could start please with your qualifications and experience. You deal with it at paragraph 14 page 17 of the affidavit. In each instance I am referring to the page number in SARS Bundle 01 and if I change bundle I will of course tell you. Please go to



paragraph 14. You have that?

**MR WILLIAMS:** I am there.

**ADV FRANKLIN SC:** And can you confirm that you have a Bachelor's Degree in Mechanical Engineering from Wits University, a Master's MBA from the Massachusetts Institute of Technology, a Master's Degree MSC in Finance from the London Business School, a Master's Degree MPA from Harvard University in the United States, a Master's Degree MSC in Political Theory from the London School of  
10 Economics.

**CHAIRPERSON:** I am sorry Mr Franklin what – from what page are you reading?

**ADV FRANKLIN SC:** At page 17.

**CHAIRPERSON:** Page 17.

**ADV FRANKLIN SC:** Paragraph 14 Chair.

**CHAIRPERSON:** Oh okay. Yes okay thank you.

**ADV FRANKLIN SC:** Thank you. I was busy outlining the various degrees that Mr Williams has. The penultimate one is a Master's Degree MPHIL in Political Theory from Oxford  
20 University. You confirm that that is correct?

**MR WILLIAMS:** That is correct.

**ADV FRANKLIN SC:** And is it correct that you are presently busy with a Doctorate Degree which is a DPhil from Oxford University as well?

**MR WILLIAMS:** That is correct Chair.

**CHAIRPERSON:** How many Master's Degrees have you got Mr Williams? Is it four or five?

**MR WILLIAMS:** Five.

**CHAIRPERSON:** Shew.

**MR WILLIAMS:** I clearly need more hobbies Chair.

**CHAIRPERSON:** No that is – that is very commendable. That is very commendable. Yes.

**MR WILLIAMS:** I think – and I think that is relevant to part of the role I was called to play at the Bain was – blow my  
10 back and was in business.

**CHAIRPERSON:** Yes.

**MR WILLIAMS:** First three degrees qualified me in business, the last three in ethics.

**CHAIRPERSON:** Yes.

**MR WILLIAMS:** Five degrees in corporate ethics.

**CHAIRPERSON:** Yes.

**MR WILLIAMS:** So I basically retrained myself.

**CHAIRPERSON:** Yes.

**MR WILLIAMS:** Midway through.

20 **CHAIRPERSON:** Yes thank you.

**ADV FRANKLIN SC:** Thank you Chair.

**ADV FRANKLIN SC:** Then if I could deal briefly with your career at Bain we are of course interested in the latter part but would you look at paragraph 21 on page 18.

**MR WILLIAMS:** Yes I am there.

**CHAIRPERSON:** You must just say on a light note Mr Williams that you cannot have so many Master's Degrees and not complete the Doctorate so you have to complete the Doctorate.

**MR WILLIAMS:** I am trying Chair.

**CHAIRPERSON:** Okay Mr Franklin.

**ADV FRANKLIN SC:** Thank you Chair. If I could run through this which I doubt will be controversial. You first joined Bain in 20 – in 1995 as a Summer Associate or  
10 intern as is generally known. Is that correct?

**MR WILLIAMS:** That is correct Chair.

**ADV FRANKLIN SC:** And then thereafter you had three periods of full time employment. 1996 to 1997 in Boston. 1999 to 2001 in London and Boston with extended periods in New York and then 2009 to 2010 in Johannesburg.

**MR WILLIAMS:** That is correct Chair.

**ADV FRANKLIN SC:** Is that correct? Let us jump forward to your time in Johannesburg which you deal with in paragraph 24 page 19 of the statement. You joined Bain  
20 as a partner in September 2009 in Johannesburg after they approached you with an offer. They were restarting their South African operation after having left the country in 2002. Then could you just explain please when you worked for that period September 2009 up to 2010 in Johannesburg what was the setup at that office? Who was

in charge and who were your colleagues?

**MR WILLIAMS**: So when it started in late 2009 there were very few of us. There were two partners and one part-time partner and the idea was we were going to need to have a managing partner, the boss essentially. And so for 2009 we kind of just got the office going a bit but in early 2010 the managing partner arrived and this was Mr Vittorio Massone. So he arrived from Italy as the Head of the South African business.

10 **ADV FRANKLIN SC**: But Mr Massone, M-a-s-s-o-n-e.

**MR WILLIAMS**: That is correct.

**ADV FRANKLIN SC**: He is the man who gave testimony before the Nugent Commission?

**MR WILLIAMS**: That is correct Chair.

**ADV FRANKLIN SC**: Alright. Was there also a Mr Moolman at the office at that time?

**MR WILLIAMS**: That is correct. So myself and Mr Moolman were the two South African partners and then Mr Massone came he was the third partner then.

20 **ADV FRANKLIN SC**: Right in paragraph 25 you have set out certain concerns which you had at that time regarding Mr Massone. Could you summarise them for the Chair?

**MR WILLIAMS**: So Chair very early on in 2010 after Mr Massone arrived in fact myself, Mr Moolman and some of the other senior people in the office began to be concerned

about the way Mr Massone was behaving towards clients, the way he was interacting with other people.

Concerned enough that we contacted – myself and Mr Moolman contacted the London office – the South African office at that point reporting to London. We were so concerned about whether this person Mr Massone was the appropriate person to be the business based on his behaviour that we contacted the London office and asked them to come and investigate what was happening in South  
10 Africa.

And some of the things that were happening was – where I personally doubted Mr Massone's ethics. I doubted whether he was honest, I doubted whether we could trust what he was saying. I got to a point where one of my clients said to me if you bring that person along again Athol we will not speak to you. Mr Massone was shouting at people in the office.

And so we did not feel you know as the evidence leader suggested I – my career with Bain started in 1995  
20 so as a career Bain Consultant I knew the culture vain Bain fostered and the way we interacted with our clients and our people. And we did not feel that Mr Massone represented that.

So we asked the head of the London office to come and investigate. He then came to Johannesburg and we

were convinced that Mr Massone was going to be relieved of his duties but he was not. And so the way we interpreted that was it was Bain Global basically endorsing Mr Massone's behaviour. We had told him – we had told him our concerns, they still kept in that position so much so they 00:15:01 after that I chose to leave the business on those grounds.

**ADV FRANKLIN SC:** Right and you went to London as you have said for a short while. You returned in 2010 Mr  
10 Massone was still in charge of the office.

**MR WILLIAMS:** Ja.

**ADV FRANKLIN SC:** You then resigned in 2010 and you took on a role of senior advisor on ad hoc basis?

**MR WILLIAMS:** That is correct Chair.

**ADV FRANKLIN SC:** Alright. You worked then in permanent employ of Bain for the period from 2010 until 2018.

**MR WILLIAMS:** That is correct. I was not a permanent employee ever again from 2010.

20 **ADV FRANKLIN SC:** Alright. Then if we could go ahead to 2018. You were aware that the Nugent Commission of Inquiry as we call it colloquially was set up in 2018 and took evidence from various parties including Mr Massone. You heard the testimony that was given by Mr Massone?

**MR WILLIAMS:** That is correct.

**ADV FRANKLIN SC:** What was your reaction to it and what did you do about it?

**MR WILLIAMS:** I was shocked to hear Mr Massone's evidence Chair. In a way given my concerns back in 2010 already hearing – hearing the allegations against Bain and hearing Mr Massone's evidence did not surprise me in a way.

In fact it was you know my worst fears coming through because I suspected that he probably was not  
10 going to be an ethical leader. I left the business, was not part of the business and here eight years later I saw a manifestation or heard a manifestation of my earliest concerns.

Upon hearing his testimony I did not get two things. The one was I wrote an email to Mr Massone's boss effectively who I had not met but I knew who he was and expressed my disappointment as a former Bain partner, someone who was still proudly associated with Bain that we had raised the concerns in 2010 they are now  
20 materialising in a very negative and damaging way.

So I expressed my disappointment. I basically said in many ways we are not surprised but then I did offer my support still as a loyal Bain person of long standing that if there was a way I could help Bain through this crisis I would.

The second thing I did was to contact an investigative journalist because I saw there was a journalist writing quite a bit about the Nugent Commission and so I offered as a Bain partner – former Bain partner that if I could be of any assistance I would offer that assistance.

**ADV FRANKLIN SC:** Right. Could I ask you to look at Annexure AW7 which is at page 135.

**MR WILLIAMS:** I have got it.

10 **ADV FRANKLIN SC:** That is an email which you sent to Mr Moolman dated the 6<sup>th</sup> of September 2018 is it correct that you set out there some suggestions as regards to the role that you might play?

**MR WILLIAMS:** That is correct Chair. I had – Mr Massone's evidence to the Nugent Commission ended at the end of August 2018. A few days after that Mr Moolman had sent an email to all ex Bain employees. So Bain alumni I was included in that. So I got this email from Mr Moolman saying that they are dealing with this crisis.

20 I did not reply to Mr Moolman with my same disappointment I had expressed to Mr – Mr Massone's boss saying this is just unacceptable. Mr Moolman had called me and we had a phone call – in fact I think we might have had two phone calls. So we had a phone call where he basically said is there a way I can help them given my



knowledge of Bain, my knowledge of management consulting and my knowledge of ethics of business ethics was there a way I could help them. And I said I will give that some thought.

The next morning – ja the next morning or the same night just after that phone call I set out a few thoughts and the one thought was around things Bain could do you know think about whether they need to acknowledge the harm they have caused with a – issue an apology absent plan  
10 around restitution.

So some of the very standard things you would expect of anyone who wants to make amends for something that they had done wrong. I think importantly from my standpoint I – I express a willingness to get involved in the short term and I said I am willing to help but be very clear what I have called a hierarchy of interest. I want to be clear to Bain that if I was going to help them it was going to be in the interest of South Africa. And I said at the bottom of the list for me is Bain then myself then South  
20 Africa.

So where there is going to be conflict or a decision to made about what was right – the right thing to do I wanted them to be clear that if I got involved my prime interest was doing the right thing for South Africa and that is the basis on which I engaged.

**ADV FRANKLIN SC:** Right you refer to a statement to the Bain team please look at AW3 page 125 to 126 is that the statement that you are referring to?

**MR WILLIAMS:** Page 125.

**ADV FRANKLIN SC:** Left – top left.

**CHAIRPERSON:** What is the page? Is it 125?

**ADV FRANKLIN SC:** Correct Chair.

**CHAIRPERSON:** Okay.

**MR WILLIAMS:** That is correct Chair. So that – this was  
10 the email that was sent by Mr Moolman to all of Bain's alumni.

**ADV FRANKLIN SC:** Alright we will see different iterations of this as we go on. Then please look at AW4 at page 128 that is an email dated the 4<sup>th</sup> of September 2018 from you to Bain Africa Alumni and you addressed it to Mr Moolman – that is Tiaan, is that correct?

**MR WILLIAMS:** That is correct.

**ADV FRANKLIN SC:** And just summarising it you took issue with his description that Bain Alumni may be deeply  
20 uncomfortable and you said that that surely realises the real impact on Bain. Is that the message that you conveyed?

**MR WILLIAMS:** That was exactly the message Chair for the – the reason I – I reacted so strongly to this was as a management consultant, as a business advisor your

reputation is it and I think 00:21:17 most professions your reputation is all you have got and I state my reputation hugely on the fact that I was former Bain partner. That was – that was what I carried as an element of pride. And so these things that were happening in my mind was destroying this asset that I felt I had and I felt that the statement from Bain trivialised that damage that all of us as former Bain employees carried from having 00:21:44 Bain employees. And I was a Bain partner. I was a senior  
 10 person at Bain and so the calls I got from my clients CEO's in South Africa saying Athol you assured us who gives the impression of Bain as a company of integrity look what is happening now. So I was very disappointed in the – where they trivialised the issue.

**ADV FRANKLIN SC:** Yes please turn to AW5 page 130. That is a response from Mr Moolman to you dated 5 September 2018 in relation to the press release correct?

**MR WILLIAMS:** That is correct.

**ADV FRANKLIN SC:** And reading from the third paragraph:  
 20 “What I can assure you is that all current Bain employees mine self included are having an even harder time also through no fault of our own. We are facing an incredibly difficult situation and we are now – sorry – only now learning some of the real

facts. There is a very genuine desire from Manny Maceda – M-a-c-e-d-a down to the team in SA left to address this disaster to do the right thing. Since the real facts started to come out on Friday I have pulled into a process to find the right way forward true to our values.”

**CHAIRPERSON:** I am sorry – I am sorry Mr Franklin. You have left me behind.

10 **ADV FRANKLIN SC:** I am sorry.

**CHAIRPERSON:** I was still at page 128 but I think you are on another page now.

**ADV FRANKLIN SC:** Yes 130.

**CHAIRPERSON:** 130. Okay.

**ADV FRANKLIN SC:** And Chair I have...

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** Read out the third paragraph.

**CHAIRPERSON:** Oh yes I see it yes, ja.

**ADV FRANKLIN SC:** Into the record.

20 **CHAIRPERSON:** Ja.

**ADV FRANKLIN SC:** Yes so that – that was the – the view expressed by Mr Moolman to you at that time.

**MR WILLIAMS:** That is correct Chair.

**ADV FRANKLIN SC:** Alright you – you have told the Chair that you had offered yourself as a potential consultant as it

were in order to assist Bain in the predicament it found itself. Correct?

**MR WILLIAMS**: That is correct Chair.

**ADV FRANKLIN SC**: Please turn to AW8 on page 138.

**MR WILLIAMS**: I have got.

**ADV FRANKLIN SC**: As I understand it this was a prelude to an agreement that was concluded.

**MR WILLIAMS**: That is correct.

**ADV FRANKLIN SC**: And it is dated the 7<sup>th</sup> of September  
10 2018 an agreement between Bain and Company South  
Africa and Mr Athol Williams and just summarising again it  
sets out an intention to enter into an independent  
contractual agreement amongst the responsibilities you  
would be given and William shall observe Bain's  
compliance with ethical business practices and  
professional standards.

And then paragraph 5 if I may read that out.

20 "If Williams is not satisfied that Bain has  
acted or intends to act in a manner that will  
address his concerns he shall in no way be  
restricted from bringing his concerns to the  
attention of an appropriate third party  
outside of Bain and Williams shall not be  
deemed to be in breach of his  
confidentiality obligations to Bain in such

an event.”

So just pausing there it speaks for itself that there appears to be a sentiment expression between you and Bain that you should be allowed to have access to such information as you wish in order to bring concerns to an appropriate outside party if you believe that was necessary.

**MR WILLIAMS:** That is correct.

**ADV FRANKLIN SC:** And then in paragraph 6

10           “Bain further agrees that in the event of a situation arising under Section 5 above it shall not assert any claim of legal privilege to prevent Williams from bringing his concerns to the attention of an appropriate third party.”

Is that the understanding again under which you – you worked eventually?

**MR WILLIAMS:** That is correct Chair.

**ADV FRANKLIN SC:** And you have obviously been party to  
20 the application that was brought initially for a number of the annexures in your statement to be kept from the public – from public disclosure. What is your comment on that attempt in the light of these two paragraphs?

**MR WILLIAMS:** Chair my understanding from the discussion I had with Mr Moolman and with the – the

discussions I had that led to this letter of intent was that they really wanted to do the right thing in South Africa. These were again – these were not strangers to me. The leadership at Bain now were all people who started with me 20 odd years ago so I have known them all for many, many years and so that just comes with a level of trust. So in my interpretation something has gone wrong at Bain and that needed to be dealt with. But now Bain wanted to make sure the right thing was being done and – and the  
10 evidence leader mentions Manny Macedo and Manny Macedo was the worldwide management partner – the worldwide management partner of Bain. The insult was saying we want to do the right thing. And this is even written in capital letters. So my understanding was that I had this open access – I was going to work from inside Bain but my reason for being there was not to protect Bain my reason there was to make sure we did the right thing for South Africa. And if for whatever reason I thought there was a conflict or I was not happy with what Bain was  
20 doing or how they were conducting themselves I was free to go to a third party with that concern. So when I see an application that then says the materials that I have gained is legally privileged and that Bain has taken great liberties I must say Chair with describing me in all sorts of horrendous ways like being dishonest and being disloyal

and being disgruntled and being uninformed I obtained that information in the context of being asked by Bain to do the right thing for South Africa and that was the – that was the context in which I revealed all of that information to the commission. So that application, that attitude that I am contravening the intent of my engagement is strange to me.

**ADV FRANKLIN SC:** Please look at Annexure AW12 page 147. I could actually see that that goes onto page 148 and  
10 then has Terms of Reference from 149 to 150. Is that the agreement which was concluded between you and Bain and Company South Africa Inc on 7 September 2018?

**MR WILLIAMS:** That is correct Chair. So subsequent to the one page letter of intent we then entered into this more comprehensive agreement.

**ADV FRANKLIN SC:** I am going to highlight certain parts of it on page 147.

20 “Dear Athol we are thankful that you have agreed to provide independent oversight of Bain’s investigations into its work at SARS. This service agreement – the agreement is effective as of September 7, 2018 by and between Bain and Athol Williams and...”

I do not need to read the rest.

“This agreement describes how Bain and or



its affiliates may engage you to provide oversight of the investigation. Find its services and how you will provide services.”

And it then contains various other provisions but I am interested in are the Terms of Reference that are referred to in the body of the agreement. Those appear at page 149 to 150. Is that correct?

**MR WILLIAMS:** That is correct.

**ADV FRANKLIN SC:** Under the first heading Context first  
10 bullet point it is recorded

“Bain is cooperating with the Nugent Commission of Inquiry – the commission to understand the facts of Bain’s engagement with SARS in 2014 and 2015.”

And then if I could look at the second bullet point.

“To reinforce Bain’s commitment to transparency to the commission and to support Bain’s ...[indistinct – word cut] with the Commission, Bain has secured the  
20 services of Athol Williams. Bain... in respect of independent advisor.”

And the third point.

“Bain’s intent in securing Mr Williams’ services is that he does what is right for South Africa without restriction.”

And then the fourth.

“Mr Bain’s(sic) role is to provide independent oversight of the external and internal investigations that Bain are conducting.”

I am just stopping there...

**MR WILLIAMS**: Yes.

**ADV FRANKLIN SC**: And those are self-explanatory, but can you explain to the Chairperson what were the internal  
10 and external investigations that are referred to here?

**MR WILLIAMS**: Chair, so I was not engaged to conduct any of my own investigation. Bain had started, after Mr Massone’s testimony, Bain had started amongst themselves, amongst the internal legal team and some of the senior people to begin to ask questions about what had happened at SARS. So that was classified as the internal investigation.

That was, I think, largely ad-hoc, just to get a quick sense of what was happening. The external  
20 investigation was the investigation where Bain had retained the services of Baker McKenzie, a law firm, to conduct a more comprehensive, a more thorough investigation.

But going to what happened at SARS *that in due* Bain’s work in many of the SOE’s because Bain had worked

across most of the SOE's including parts of government as well.

So this – so my role was – and this was – it was my understanding, no president for this. There was no handbook that I could go. I did not have training on how to provide oversight to an investigation but the intent was clear.

The intent was: Athol, we want to do the right thing here. We will give you access to what Baker  
10 McKenzie is doing. You will have meetings with them. You can see the documents. You make sure that, at the end of this investigation, we can – you can write a report where you give your assurance as an independent person..

I might say you have pseudo independent, right, because I was not associated with Bain but I was now independent - you can give the public assurance that this investigation was independent and it was reported truthfully. That is how I understood my role.

**ADV FRANKLIN SC:** Continuing with the Terms of  
20 Reference. At the bottom of the page there is a heading, Operating Procedures. The first bullet point:

“Mr Williams will have full access to the interim and final reports of the internal and external investigations and will have weekly meetings with the leads of these

investigations...”

I am just pausing there. What interim and final reports are contemplated, as you understand it?

**MR WILLIAMS:** I think it is, if it makes sense, confronted to – so the interim investigation sort of wrapped very quickly. So it was – the idea was, if that continued, I would have oversight of it but preferable that... extended because the external investigation became the focus.

But the idea was that Baker McKenzie, you will  
10 have under... conducting the investigation would produce, ultimately, a report of their findings which should go to the Nugent Commission. So that was the intent. And an interim...

I think if I remember correctly there was – we were mindful of the timing of the Nugent Commission. So the idea was to give the Nugent Commission an interim report which would give the commission an update of the findings but with a final report later on.

So the understanding was that Baker McKenzie  
20 are going to produce these two reports, an interim report and a final report and I was to have access to both of those.

**ADV FRANKLIN SC:** And as it turns out. Were you ever given access to an interim or a final report empowered by Baker McKenzie?

**MR WILLIAMS:** I was not Chair. Despite my constant pleading for it and arguing for it, I was not given access during this contract...

**ADV FRANKLIN SC:** Alright. Then look at page 150 under the heading, Outputs. The second bullet point which says that:

“Mr Williams and the commission are free to communicate directly on matters relating to the commission’s investigation, et cetera...”

10

And then it said:

“...with respect to any such communication...”

First sub-bullet:

“...Bain agrees that it shall not deem any such communication by Mr Williams with the commission to be at breach with Mr Williams’ confidentiality obligations to Bain.

And secondly, Bain agrees that it shall not seek to assert a claim of legal privilege to prevent Mr Williams from beginning his concerns to the attention of the commission...”

20

That is, mirrors, it seems the similar two provision that were in your letter of intent.

**MR WILLIAMS:** That is correct Chair. Can I also mention that – because there is mention of the commission, the Nugent Commission. I had, through an investigative

journalist, I contacted – established a connection with Judge Nugent and so again to make this role of mine or it was already bizarre, even more bizarre.

We established this understanding between Bain and myself and Judge Nugent that I will speak to both parties. So Judge Nugent had a copy of my contract. He understood what I was there to do and he welcomed comments from me, information from me, all... all of these communications but he, Judge Nugent, welcome  
10 communications from me.

So this idea to be able to communicate with the commission... I was free to do that in my contract and Judge Nugent and I had a strange number of emails and had a few – one or two face-to-face meetings as well.

**ADV FRANKLIN SC:** Alright. We will get into the detail of what was used as a consequence of the investigation but can I ask you to look at para 7, page 13 of your statement or affidavit, rather?

**MR WILLIAMS:** I have got it.

20 **ADV FRANKLIN SC:** What you say is:

“This affidavit relies on documents and emails that I received or used during my 16-month period of engagement with Bain...”

Now I am just pausing there. You give the Chair an idea of what document production exercise was carried

out by whom and when you were shown such documents...

**MR WILLIAMS**: So Chair, I think these documents can be divided into three categories by the three roles, different roles I played at Bain as the evidence leader described earlier. So during my role as this – providing oversight of the investigation.

I – like I said earlier, I had meetings with Bain, with their lawyers, with the Baker McKenzie's investigators. In fact, there were meetings I had with only the Bain,  
10 Baker McKenzie's investigators without Bain. So I had opportunity to ask questions and engage with them.

What Baker McKenzie had started doing was to, because the concern about the widespread possible improper behaviour within Bain, had begun accessing the devices of many of its personnel. So laptops, cell phones, looking at Bain's server. So from that search, they have collected vast volumes of documents.

Baker McKenzie went through a process of reducing that from, I think, it was a few million documents,  
20 as I recall, down to a much smaller number but all those relevant documents that they had classified as relevant, those were shared with me so that if – in fact it all came to me by email.

So there were periodic updates, face-to-face meetings but also these documents that came into our

possession as part of that role.

So I was given these documents or Baker McKenzie had alerted me and others to something they found which they thought was relevant. So the bulk of the documents that I got and I presented to the commission came during that period. So it was documents that Baker McKenzie had found from Bain's staff and shared that with me.

I do not – well, I know it was not everything that  
10 was collected because this idea of privilege emerged again and so I do not know what the full set was collected. I just know what I received but I know that it was established that there were none – they were privileged documents that I would not see. I would only see the non-privileged documents.

So that was that first period. Then in the second period where I was this independent advisor then helped to develop their remedy plan, I received no new documents on the investigation. So, to the extent that there are  
20 documents here, they are emails, basically. And then the period when I was employed by Bain, I received more documents and many emails.

So when I say I produced documents. What I mean is, I produced emails. I produced none of the documents that are included here. Everyone of the



documents included in my affidavit are documents presented to me by Bain or Baker McKenzie.

**ADV FRANKLIN SC:** Right. And you have set out the process by which you received those documents in paragraph 7.1 and following of your affidavit.

[Speaker's voice drops – unclear]

**MR WILLIAMS:** That is correct. It is what I have just described.

**ADV FRANKLIN SC:** You also have face-to-face meetings  
10 with Bain employees and with Baker McKenzie  
...[intervenes]

**CHAIRPERSON:** Mr Franklin, just remember not to speak too far from the ...[intervenes]

**MR WILLIAMS:** I am sorry.

**CHAIRPERSON:** From the ...[intervenes]

**ADV FRANKLIN SC:** I am sorry Chair.

**CHAIRPERSON:** If it moves, you could move it closer if it is more convenient for you to put your file on the other...

**ADV FRANKLIN SC:** Yes.

20 **CHAIRPERSON:** Okay.

**ADV FRANKLIN SC:** Thank you, Chair.

**CHAIRPERSON:** Okay alright.

**ADV FRANKLIN SC:** What I had asked the witness is whether during the course of his engagement he had meetings with Bain employees and also Baker McKenzie...

**MR WILLIAMS:** I did Chair. So a lot of Baker McKenzie meetings were structured meetings around what they had found and whether I had any questions. The Bain meetings were less structured. I was given access to the office and so there were times where consultants would come into my office and raise their concerns, share their experience with me.

So I got a sense from formally what had happened but also from people in a coffee area or at the lifts, cornering me and saying: I think you should know about this.

**ADV FRANKLIN SC:** Right. Could I ask you? Your final conclusion, before we get into the detail, what was it? Was it that Bain had come clean with the commission and with South Africa or not?

**MR WILLIAMS:** It was definitive not. I – like I mentioned earlier Chair. I looked at my role as, did Bain with Baker McKenzie conduct a comprehensive and rigorous investigation?

And there, largely, I said yes because I thought the terms of reference were adequately designed. I have these meetings with Baker McKenzie. So I knew where they were looking, who they were speaking to, what documents they reviewed. So I felt comfortable with the comprehensiveness of an investigation.

The parts I could not be comfortable with was, I could not attend the interviews. So I felt that those meetings where they were interviewing staff as opposed to just reviewing documents was very relevant but those interviews were regarded as privilege and I was denied access to the interview notes that came from those meetings.

So I could not be sure of what happened in those interviews. So I – in my view it was, it seemed  
10 comprehensive except for the fact that I could not get access to those interview notes.

On the truthfulness part. There I – two parts. One. Judge Nugent kept writing to me *as did Bain*, saying that Bain are being evasive, they are obfuscating, they are not – you know they were assembling documents only when he asked for it. They are not addressing the real concerns.

I knew what Judge Nugent's conclusion was. Mine was simple. I was hired to judge or make a – form an opinion on whether Bain had reported truthfully to the  
20 commission. I was going to judge that by looking at Bain's report to the commission against all the evidence and discussions that I have been part of.

But when Bain refused to give me access to the findings report, I could make no assessment of truthfulness and in my mind Bain were, therefore, not truthful with me

because I could not see the final findings and they are not truthful to the commission because they never submitted any findings to the commission.

And in fact, how could evidence suggest this was a conscience decision on Bain's part to not submit – to not file the report with the commission and not to make that report available to me.

**ADV FRANKLIN SC:** Alright. You resigned from your engagement with Bain at the end of 2019.

10 **MR WILLIAMS:** August 2019.

**ADV FRANKLIN SC:** What led to that resignation...

[Speaker not clear – voice drops]

**MR WILLIAMS:** It was Bain continuing to withhold information that I thought was relevant. You know, I had all these assurances and you – we have read through those emails earlier that Bain had full intent to do the right thing.

Part of doing the right thing, by my estimation was, to make full disclosure of what had happened. The  
20 fact that Bain continued even when I was employee, a partner brought in to deal with these issues, they continued to withhold that that from me.

Convinced me that I could not then be part of that. So it was the same issue that started in the beginning, was withholding of what had really transpired at

SARS and other SOE's.

**ADV FRANKLIN SC:** Now could I ask you to look at para 9, page 15 of your affidavit?

**MR WILLIAMS:** I have got it.

**ADV FRANKLIN SC:** Paragraph 9, page 15. And if I can ask you to look ten lines down? You say:

10 "It was only after I left and after Bain made offers to me that I interpreted as being aimed at silencing me, did I really look closely at all the evidence in my possession and studied it closely.

This process started in late December 2019 and concluded in March 2020.

A catalyst for reviewing what I had in my possession and organising it was the summons I received from the Zondo Commission in January 2020.

20 Putting together the contents of the 500 plus documents and emails, combined with the numerous phone calls and meetings that I attended at Bain plus my knowledge of Bain. Management consulting and business ethics, has allowed me to develop the sequence of events and understanding that I present in this affidavit..."

I think that is self-explanatory but is that an accurate recordal of what in fact transpired? Did you took a closer look at the totality of this evidence through the prism of your experiences as a Bain partner and employee and put together what we have before the Commission today?

**MR WILLIAMS:** That is correct Chair. I – when I – in 2018 and during my oversight role – my work was really geared toward assisting the Nugent Commission which was  
10 focussed squarely on what was happening at SARS. So the extent I looked at and reviewed evidence and had discussions with Baker McKenzie and Bain, was very targeted, largely, on what was happening at SARS.

After I had left Bain and the Commission approached and I said I have got documents that I think might be useful to the Commission, I then looked at everything I had, not just what was relevant to SARS and it is when I looked at all – everything I had, actually formed a very different view that I had in 2018 when I was engaged  
20 to provide an oversight.

**ADV FRANKLIN SC:** Right. And then in paragraph 45, page 27 you have also explained that in the sections which follow in the affidavit, you rely on information contained in documents and emails that were in my possession during the period of my engagement with Bain and that those are

the ones you have exchanged with employees of Bain or those conducting the investigation i.e. ...[intervenes]

**CHAIRPERSON**: I am sorry Mr Franklin. Was 27 the paragraph or the page number?

**ADV FRANKLIN SC**: At... 45 was the paragraph. 27 is the page...

**CHAIRPERSON**: Oh, thank you. Okay.

**ADV FRANKLIN SC**: Thank you, Chair. Just... I was just highlighting that:

10                    “The emails and documents or both that I exchanged with employees of Bain or those conducting the investigation, that is Baker McKenzie, or emails and documents that were given to me by employees of Bain or people conducting the investigation...:

Is that an accurate summary...

**MR WILLIAMS**: That is correct Chair.

**ADV FRANKLIN SC**: Chair, I am about to proceed into the detail of the affidavit and I wonder if this would suit Chair  
20 to adjourn for the lunch break?

**CHAIRPERSON**: Yes-no, that is fine. We will adjourn for lunch. We are meant to have the evening session for the continuation of Mr Gordhan’s cross-examination by Mr Moyane’s counsel this evening.

The evening sessions normally start at four or

five. It may be that during the lunch break you might wish to consider what should be done in – at that time and if need be talk to all concerned.

One approach is that we will continue with Mr Williams, stop at a certain time, maybe five o'clock. Have that cross-examination take place which I think should not go beyond an hour and then resume with Mr Williams after that.

Now I am mentioning that, that I am alive to the  
10 fact that not everybody might be aware that my expectation is that we could go into the evening but I know there are a lot of people who are aware now that we are trying to use as much time as possible to try and finish.

So what one option is that we will do that but obviously it is subject to hearing if everybody that needs to be here or anticipate is able to or whether there are any problems But I think to a large extent people try to make a plan and cooperate in helping the Commission.

**ADV FRANKLIN SC:** Yes, we will do that.

20 **CHAIRPERSON:** H'm.

**ADV FRANKLIN SC:** Chair, just one issue. Of course, there will still be re-examination...

**CHAIRPERSON:** Oh, ja, there will still be re-examination. Oh, so that could it beyond an hour.

**ADV FRANKLIN SC:** Yes.



**CHAIRPERSON:** So that is one – the one option is that we will stop with Mr Williams at a certain time, maybe five o'clock, maybe six o'clock. The other parties could wait a bit where we still continue a bit but obviously not too long. We do not want to keep them waiting for too long.

And then maybe, depending on how long the re-examination takes, most of the re-examinations that we have experienced in the Commission have been reasonable short. Then we need to see whether we would want to  
10 continue after that or that will be too late for some of the people affected.

I – as we approach the end of the time for oral evidence in the Commission, are more and more prepared to sit quite late but obviously that is not always convenient to everybody and that has to be taken into account. So.

But another option might be that we stop with Mr Williams at a certain time today, this afternoon or maybe this evening or whatever time. And then continue tomorrow morning with him and finish with him before we  
20 start the next witness.

So I thought I would raise this thing so that maybe during the lunch break you could reflect and so when we come back we can have some discussion.

And to the extent that whatever we plan to do might affect people who are not here now. There might be

a need for some discussion.

**ADV FRANKLIN SC:** Yes, thank you, Chair. We will investigate all that.

**CHAIRPERSON:** Ja, okay alright. We will take the lunch adjournment and resume at two. We adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay, let us continue.

**ADV FRANKLIN SC:** Thank you, Chair.

10 **CHAIRPERSON:** Are you able to tell me anything about later today? You will let me know later or now?

**ADV FRANKLIN SC:** No, I will let you know later but the preliminary indication, Chair, is that we would not want to continue with Mr Williams after the cross-examination/re-examination.

**CHAIRPERSON:** Yes, yes.

**ADV FRANKLIN SC:** Because not knowing precisely when that will be.

**CHAIRPERSON:** Yes.

20 **ADV FRANKLIN SC:** And, if necessary, with your leave, we will rather continue.

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

**ADV FRANKLIN SC:** And that is in order for Mr Williams.

**CHAIRPERSON:** Yes, okay. No, that is fine.

**ADV FRANKLIN SC:** Thank you, before lunch, Mr

Williams, you had set the scene for the Chair and you had explained how it is that you came to take this oversight role in relation to the Bain investigation. I would now like to proceed to some of the detail of the affidavit and if you could turn to page 27 of your affidavit, there is a heading:

“Bain’s entry into the public sector through a paid intermediary.”

Do you have that?

**MR WILLIAMS:** No, not yet.

10 **CHAIRPERSON:** Just remember not to be too far from the microphone. Okay, no, that is fine.

**ADV FRANKLIN SC:** Thank you. Right, so for this section I would like you to start please with AW18 which is on page 176. AW18, 176, do you have that?

**MR WILLIAMS:** I have got that.

**ADV FRANKLIN SC:** Right, that is a contract which is headed:

“Business development and stakeholder management contract.”

20 And we see from page 179 that it was concluded on 1 November 2013 and it is between Bain and Company South Africa Inc and a company known as Ambrobrite (Pty) Ltd, is that correct?

**MR WILLIAMS:** That is correct, Chair.

**ADV FRANKLIN SC:** Now before you get into the detail of

that could I ask you who is Ambrobrite, to your knowledge?

**MR WILLIAMS:** Chair, by Bain's own due diligence this company Ambrobrite did not have any internet presence, no website, never filed financials, had a tax certificate which SARS seemed to think was fraudulent, no trading history, no financial statements. So this Bains' due diligence found that. This company today does not exist. Even in this contract the name changes from Ambrobrite to Ambrorite, it is not clear whether they exist today. Per this  
10 contract and I understand it, is a company set up by two gentlemen, Mr Duma Ndlovu who is a TV producer, I think he produces the TV show Muvhango and Mr Mandla KaNozulu and both of them are artists, they do they creative work and so they describe themselves as an events management company, this is not a business consulting or management consulting company, this is an events company. This is an events company.

**ADV FRANKLIN SC:** Right, please turn to page AW19, page 189 to 190. That appears to be an extract from a  
20 website of some sort. Do you know what this is?

**MR WILLIAMS:** Page 189, you said?

**ADV FRANKLIN SC:** Correct.

**MR WILLIAMS:** This is a website which is actually – so one of the Ambrobrite principals, Mr KaNozulu – so this is his personal website where he describes his credentials

and his background.

**ADV FRANKLIN SC:** Right, could you go back to the contract itself starting at 176? Firstly under paragraph 1, the parties involved, these are two people who have been identified by you, Dr Duma Ndlovu and Mr Mandla KaNozulu. Are those the two people you referred to earlier?

**MR WILLIAMS:** That is correct, Chair, the two Ambrobrite principals.

10 **ADV FRANKLIN SC:** Alright, then under paragraph 2:

“Current context. It is said that Bain and Company SA in collaboration with Ambrorite has identified the government and state owned enterprise sector as a strategic priority.”

Then if I could go to the second paragraph under that heading:

20 “In addition, Ambrobrite intelligence has allowed Bain in the last few months to acknowledge that in the next few years a number of state owned enterprises and agencies will be subject to leadership and strategic changes and will require significant transformation and turnaround processes.”

Then the last paragraph on that page:

“Bain and Company South Africa is of the opinion

that a collaboration of Ambrorite would substantially benefit its business and the probability of success in this sector.”

Just pausing there, I take it you are familiar with this contract, you have looked at it before?

**MR WILLIAMS:** That is correct, Chair, I have.

**ADV FRANKLIN SC:** What did you understand to be the objective of the contractual engagement between Bain and Ambrobrite?

10 **MR WILLIAMS:** Well, Chair, there is what they state in this contract and then what – I think what materialised and what happened but what they state in this contract in and of itself is shocking.

For them to just that statement that the evidence leader read that based on their intelligence. So again, we are not talking about public sector consultants or business consultants, we are talking artists who say by their intelligence they know of strategic changes happening our public institutions and leadership changes. For me that is  
20 incredibly troubling and I think that begins to hint at what this contract is about.

So as much as this contract talks about business development and giving Bain the strategic advice, which is a bizarre thought, Bain was one of the preeminent strategy consulting firms in the world, why would they turn to two

artists to give them strategic advice?

So this contract seemed to portray itself as one where these are local experts who were going to help Bain be successful. When I read this it sounds like these are two individuals who are very close to politicians and are able to open doors to politicians for Bain.

**ADV FRANKLIN SC:** Right, please look at page 177 under the heading C Business Development, the third bullet point there:

10           “Facilitate the introduction or directly introduce  
Bain partners to those key leaders and decision-  
makers.”

Do you know who those identified people are?

**MR WILLIAMS:** I do not know explicitly, Chair. Again in the context here it says it was public sector. Right, so earlier on it said this is about government and public sector, so I am assuming when they talk about key leaders and decision-makers they are talking about key public sector leaders and decision-makers. And even then I do  
20 not think is necessarily problematic if someone says we introduce you to decision-makers in the public sector, I think that is fine, I think to be introducing us to politicians, that becomes more problematic in my mind.

**CHAIRPERSON:** But even then, why should somebody have a contractual arrangement with somebody else to

introduce them to somebody who is in the public domain?

**MR WILLIAMS:** [indistinct] 08.25 but they also say they can offer intelligence on procurement processes.

**CHAIRPERSON:** Because who, if you are talking about politicians, assuming that would be right, anybody can know who the politicians are in different government portfolios. If you talk about DGs, everybody can find out who they are.

**MR WILLIAMS:** Ja.

10 **CHAIRPERSON:** And why do they not phone and make a call and ask to introduce themselves to them, why do they need a contractual arrangement with somebody to introduce them to those people?

**MR WILLIAMS:** I am assuming it is a rhetorical question, Chair.

**CHAIRPERSON:** H'm.

**MR WILLIAMS:** Ja, okay.

**CHAIRPERSON:** It is.

20 **ADV FRANKLIN SC:** Following from the Chair's question perhaps you can just highlight on page 178 below the four bullet points:

“The ultimate objective of the collaboration is to drive commercial success for Bain and Company SA in the government and state owned enterprises sector.”



I think that pretty much summarises what you said you understood the purpose of this to be and then under:

“Governance and timing of the project”

We see that:

“The relationship between the parties will be led by Mr Massone on behalf of Bain.”

Do you see that?

**MR WILLIAMS:** That is correct, Chair.

**ADV FRANKLIN SC:** Right, over the page on page 179:

10 “Financial Terms Aligned Incentives”

It then sets out the fee that will be paid to Ambrobrite for these services and they speak for themselves, but there is a retainer fee of R100 000 per month and then success fees, depending upon meets expectations or exceed expectations, performance. Do you see that?

**MR WILLIAMS:** I do, Chair.

**ADV FRANKLIN SC:** Right, now you comment on the quantum of that fee in paragraph 65, page 34 of your statement and would you go to that please?

20 **CHAIRPERSON:** Did you say page 44?

**ADV FRANKLIN SC:** 34, Chair.

**CHAIRPERSON:** Oh, okay.

**ADV FRANKLIN SC:** Paragraph 65 of Mr Williams’ affidavit. And what I am interested in there is that you say in the second sentence, the third sentence:

“For Ambrobrite wealth was accumulated in the form of payments from Bain of 3.6 million per year.”

Etcetera.

“This made Ambrobrite the second highest paid of the 52 advisers that Bain worked with worldwide and it was paid 50% higher than the next highest paid adviser.”

Can you just look at the remainder of the paragraph and then give your comment to the Chair about the appropriateness or otherwise of this quantum of fees in the  
10 context of your knowledge of Bain?

**MR WILLIAMS:** So, Chair, Bain does work with advisers around the world, it is part of their normal practice and advisers bring a particular narrower expertise that Bain would rely. Like I was an adviser for Bain for a while.

The advisers are typically ex-CEOs of companies, former public officials or former Bain partners, like myself. That is a typical profile of an adviser and even with that highly skilled experienced profile of adviser, being paid  
20 R3.6 million a year is not what Bain typically pays those advisers, so already we are talking about getting advice, which you normally get from experienced CEOs, you are getting from artists and you are paying these artists far more than you pay those experienced CEOs and I am not making this judgment, it is actually in the emails, internal

Bain emails where Bain's global head of marketing writes to Mr Massone and says I have looked at this contract with Ambrorite and what you are paying them is actually the second highest of all our advisers and she expresses a concern that if anyone sees this contract they might interpret this as not just a fee for advice. And so in my mind it is quite extraordinary to pay these artists R3.6 million a year plus success fees for doing something which typically a very [indistinct] 12.56 person does.

10 **CHAIRPERSON:** But going back to the contract, you remember we dealt with that part where the contract says Ambrorite would facilitate the introduction of Bain to public sector leaders or whatever.

**MR WILLIAMS:** Ja.

**CHAIRPERSON:** That part does not talk about advice, is there another part that talks about Ambrobrite giving advice to Bain?

**MR WILLIAMS:** It is in the contract, Chair.

**CHAIRPERSON:** Yes, okay.

20 **MR WILLIAMS:** Yes.

**CHAIRPERSON:** Okay, no as long as you state...[intervenes]

**MR WILLIAMS:** No, it is in the contract.

**CHAIRPERSON:** And what kind of advice, strategic?

**MR WILLIAMS:** It is strategic advice, it is advice on

procurement processes.

**CHAIRPERSON:** Does it say so expressly.

**MR WILLIAMS:** Well, it says decision-making around procurement, decision-making around all things which to a point is knowledge.

**CHAIRPERSON:** Yes, yes, ja. And, of course, if you seek legal advice as to what procurement requirements are, what procedures are, then you go to lawyers, you do not go to artists.

10 **MR WILLIAMS:** Exactly right, Chair.

**CHAIRPERSON:** Ja. Okay, alright.

**ADV FRANKLIN SC:** Thank you, Chair. Please then look at AW26, page 211. At the bottom of the page there is an email from Mandla KaNozulu to Mr Massone and he attaches invoices for September and October. Now we have seen that the contract was signed in November, so it would appear that work was being done for Bain by Ambrobrite prior to the conclusion of a written contract, is that correct?

20 **MR WILLIAMS:** That is correct, Chair, one of the things that Ambrobrite had done with Bain was arrange a party that included President Jacob Zuma.

**CHAIRPERSON:** I am sorry, just repeat that please? Mr Williams, just repeat that?

**MR WILLIAMS:** The evidence leader asked me or was

saying this seems to indicate that Ambrobrite had done work with Bain before November 2013 and I was saying that is correct. One of the things that Ambrobrite had done with Bain before November 2013 before the contract was signed was to arrange a party with Bain that included President Jacob Zuma.

**CHAIRPERSON:** Oh, okay, okay.

**ADV FRANKLIN SC:** On that score please turn to page ...[intervenes]

10 **CHAIRPERSON:** Well, I note, Mr Franklin, that the email from Mr Mandla KaNozulu to Mr Massone says:

“Kindly find attached invoices for September and October.”

And then says:

“Please note that these are calculated at a very happy(?) rate. Should you require me to adjust please do not hesitate to say so.”

**MR WILLIAMS:** Correct.

**CHAIRPERSON:** Okay, alright. You may continue.

20 **ADV FRANKLIN SC:** Thank you, just on the point of a function in relation to the former President Zuma, please look at AW24, page 205, that is an email from Mr Massone to colleagues at Bain to which he says he has drafted the terms of the collaboration of Ambrobrite and then in the fifth paragraph he says:

“They have started working with me in September  
e.g. on SARS, the event with the President.”

Is that what you were referring to?

**MR WILLIAMS:** Correct, that is what I was referring to,  
Chair.

**ADV FRANKLIN SC:** Right, you earlier told the Chair that  
Bain itself through its due diligence processes had  
established some concerning features of this relationship.  
May I ask you please to turn firstly to page 193 and that is  
10 AW20. Do you have that? There is an email string there.  
Could I direct attention to the first one and that is sent on  
the – looks like the 18 December 2013 from a Mr Geoff  
Smout, S-m-o-u-t to Bain people. Do you know who Mr  
Smout is?

**MR WILLIAMS:** Chair, so at that time Bain – Mr Geoff  
Smout was head of finance in London in Bain’s – sorry,  
was director of finance in Bain’s London office but he also  
oversaw finance for the South Africa office. So a contract  
like this would have needed approval of the London finance  
20 team.

**ADV FRANKLIN SC:** Right and what Mr Smout says from  
London is:

“This whole situation seems very dodgy. Do you  
know anything about the background of the people  
who run Ambrobrite or who are named in the

contract?”

And then if we could just look at the strings which precede that, the one immediately below that, which is to Mr Smout from Mr – sorry, a Nicole Olmesdahl. Do you know who that is?

**MR WILLIAMS:** So the Nicole Olmesdahl was the finance person in South Africa and at the time she was quite junior so she reported to Mr Smout in London.

**ADV FRANKLIN SC:** And what she says as well:

10            “I have just been to SARS who could not verify the  
TCC and suspect it is fraudulent.”

Do you know what a TCC is?

**MR WILLIAMS:** Chair, the TCC is a tax compliant certificate. So she had received the tax compliance certificate from Ambrorite, was – it looked dodgy to her, she even took it – sorry, I should not use the word dodgy, it looked unusual to her, she took it to SARS, even SARS says they suspect it is fraudulent.

**ADV FRANKLIN SC:** Right and then going down the page,  
20 the last third of the page, an email of 17 December 2013 from Mr Smout to Olmesdahl, says:

“For some reason I do not trust the situation I would like to see their certificate of incorporation and VAT certificate too. What else do we typically get asked for?”

Now just stopping there, do you know from your investigation of the documentation whether these described by Bain itself as dodgy features wherever satisfactorily answered or resolved?

**MR WILLIAMS:** Chair, from what I saw they were never resolved. They – I never saw these documents, I never saw any emails or was not part of the discussions where it is seen that these were resolved. In fact subsequent to this, and maybe we are going to get to it, Mr Smout himself  
10 then sends an email to Mr Massone saying he remains concerned all of these things.

**ADV FRANKLIN SC:** But could I ask you, what is your comment on Bain commencing business relationship with a consultant prior to having concluded a written contract, is that normal or not.

**MR WILLIAMS:** Chair, Bain is a highly professional organisation who would, you know, cross t's and dot i's and, you know, even I comment on the spelling errors in this contract, this to me just seems like it is not a typical  
20 Bain contract. Something very odd just to me. But even this idea of having done business with another organisation without a contract to me just seems highly unusual and it seems the desire for this contract only emerges when they now have to pay Ambrobrite, so it gave me the impression that Bain was quite happy to continue



without a contract given even with a claim they were working with another established business.

**ADV FRANKLIN SC:** Right, going back in time, if I may, please look at AW25 page 207, an email from Wendy Miller to Mr Massone dated the 15 January, 2014. Do you have that?

**MR WILLIAMS:** I do, yes.

**ADV FRANKLIN SC:** And who is Wendy Miller is the – at Bain at the time was the global head of marketing for Bain  
10 and also sat on Bain’s highest management committee, the global operating committee.

**MR WILLIAMS:** Right, she raised a number of concerns. I will refer you to some of them. In the second paragraph she says:

“I reviewed the contract you sent through and I did talk to Stuart Min about it as well.”

Stopping there, who is Stuart Min was the global head of legal for Bain also serving on the global operating committee.

20 **ADV FRANKLIN SC:** And she says:

“I just want to confirm again that:

1. Neither of the two people mentioned by the name in the contract nor any of the other employees of Ambrobrite are SA government employees.

2. There is no plan for money or favour changing hands between these two people or other Ambrobrite employees on any target executives or companies. Either of these would be explicitly against the law.”

So that is a concern that she had raised having reviewed the contract, is that correct?

**MR WILLIAMS:** That is correct, Chair.

**ADV FRANKLIN SC:** And then in the second paragraph:

10 “Assuming this is not the case, I come back to a concern about the sunshine test here.”

Are you familiar with that term and what does it refer to?

**MR WILLIAMS:** Its term used quite broadly but certainly in Bain the sunshine test is if we are doing something and it becomes publicly known, how will it appear. So, you know, the culture was always we should only do things that we assume will become publicly known and we would be publicly known so it passes that test.

**ADV FRANKLIN SC:** Right, it appears from the way in  
20 which the email is structured that Wendy Miller had posed certain questions to Mr Massone and he then answered them and his answer is imbedded I imagine and the original it is in colour but I think one can distinguish it, can you?

**MR WILLIAMS:** That is correct, Chair.

**ADV FRANKLIN SC:** Right, in answer to the sunshine test

proposition one sees – that is referred to a way down the page, Mr Massone says:

“I do not think the parallel with lobbying companies is right and I would not contract someone for that despite this being legal in the US. It is simply business development arrangement where these people would inform us if they are aware of changes in the key positions in a few selected companies, provide us intelligence on the current situation of a company’s strategic and operational issues and possible leadership evolutions, try to position Bain and introduce us to the relevant decision-makers.”

That is how Mr Massone saw the engagement. Do you have any comment on that?

**MR WILLIAMS:** Chair, I think that describes quite succinctly what you were asking earlier about – talk about strategic and operational issues but it was really again for me very troubling this idea of identifying leadership changes. Again, why would you want the artists – and why would even a management consulting firm be targeting where there is leadership changes? So the focus here was you introduce us to the key decision-makers where there is leadership changes so that we can get in there.

**CHAIRPERSON:** And that is quite interesting when viewed against the background that SARS they appear to

have chosen the time when there was to be a new Commissioner of SARS. This is – this email is early 2014, that the - they started in 2013 or 2012, I am not sure.

**MR WILLIAMS:** That is correct.

**CHAIRPERSON:** So that is quite interesting because why do not go there when there is somebody, whoever there is, who is in charge of the organisation and put your ideas there where you think there is something, then some business you would like to do there.

10 **MR WILLIAMS:** Chair, if I can make one comment on that. To be fair to Bain in this respect, as a management consultant when a company has got a new CEO it is an opportune time to go and speak to him and her because they just come into the new job and they have got a lot of questions and issues so you could help them be more effective. So that was pretty normal. But this idea of seeking out information about state owned entities that are going to make leadership changes, for me that is just very unusual.

20 And then your observation about SARS is exactly right, this was the same model at Telkom. So this was a model obviously set out in this contract. So the same thing happened at Telkom, the same thing happened at SARS and probably other places as well.

**CHAIRPERSON:** But even with what you are telling me,

why should it be when there is a new leader that you want to come in as opposed to saying we will examine each entity irrespective of whether there is a leader who has been there for quite some time and see whether there is a need to for us to assist, you know, why must it be when there is a new leader because the new leader could be somebody quite seasoned, quite experienced who does not need your assistance but you could have a situation where somebody has been there for some time but he or she has  
10 great need for your kind of assistance.

**MR WILLIAMS:** I think it is exactly right. I point out only the new leader because I think as a consultant you often look for – you would have – firstly, you would have relationships with CEOs and so you have them over ten years and lot of my clients were multi-year clients, but you have a relationship firstly. So whenever they have got a need they might call. And, as you say, Chair, you could look a company and observe the need and so you would approach them.

20 With a new leader it is just another one of those events where you might want to engage with them, you know, another one of the – you see a company's results and the profits are blocked by 50%, that might be a time for you to go and speak to them.

**CHAIRPERSON:** Okay. Mr Franklin?

**ADV FRANKLIN SC:** Thank you, Chair. Just continuing with the concerns that Wendy Miller had articulated. At the bottom of page 207 what she says is:

“I am also concerned that we are trading off short term access for long term issues. If these individuals are so well-connected with the current President and his administration, by association with them Bain too will become associated with this faction and as will certainly be the case when he and his associates fall out of favour, Bain will also fall out of favour or even worse.”

Now if I could go then to the end of that paragraph:

“Or they may twist this contract into an accusation of impropriety in how Bain is getting our business that we paid people close to the President to use their influence to get our man the CEO job and so we get the work.”

This is certainly what the journalist was insinuating in the Telkom article, they could use this contract as evidence.

20 Can you just elucidate for the Chair please, if you know, what the reference to Telkom is and how it fits in here?

**MR WILLIAMS:** Chair, the accusation in this article was that Mr Sipho Maseko was appointed as the Group CEO of Telkom. He had also received this CEO coaching that Bain talks about. So just like with Mr Tom Moyane at SARS

would work with Bain for a year before he got appointed, Bain had also worked with Mr Siphon Maseko for a time before he got appointed as a Group CEO. Now Bain had worked with Mr Maseko before or had met Mr Maseko before but certainly in his preparation with his new role at Telkom he worked with Bain, but Bain and Mr Maseko had also been to meetings with President Zuma and so there was an argument that or an allegation that there was some impropriety there, so what was going on that Bain works  
 10 with Maseko, Bain and Maseko go and see the President, Bain, Maseko and Mabusela, who ends up being the Chairman of Telkom later, together go and see the President, and then you know later on Maseko is appointed as the CEO.

So, there was an article sort of mentioning all these questions, and of course in this context of Ambrobrite and some of the SARS work Wendy Miller was saying well those allegations can be seen to have some merit if this kind of arrangement of Ambrobrite be seen to come to  
 20 light.

**ADV FRANKLIN SC:** Continuing with Wendy's email, at the bottom of page 208 it says here that there was concern at the fee rate and what is said in the last paragraph is this,

"In your second mail you raised the point that

\$100K as a retainer and a maximum of 300k is not immaterial and higher than other advisory contracts in that a) the role is different and the workload is much higher (as an example) organise a 40<sup>th</sup> birthday dinner with the three business associations and the President”,

And then he continues, that would appear to be Mr Massone’s justification for the high fee, is that why ...[indistinct – dropping voice].

10 **MR WILLIAMS:** That’s correct Chair, and part of what he’s saying is this is no ordinary advisor role, so while we might hire Athol as an advisor to give us some specific technical advice, these two gentleman that we are hiring, ...[indistinct – dropping voice] organise parties with President Zuma and ...[indistinct – dropping voice] higher fee.

**ADV FRANKLIN SC:** Alright going further back in time, AW40 page 41 the bottom of the page, an email from Wendy and this is also in relation to the ...[indistinct –  
20 dropping voice] contract in paragraph 3 on page 242 this is what you said ...[intervenes].

**MR WILLIAMS:** That’s correct, verbally Chair.

**ADV FRANKLIN SC:** This is what he says,

“So, here’s my main question, how are two artistic producers qualified to provide us with intelligence



on company's strategic and operational issues, ending leadership, changes, etcetera which Vittorio, let me just stop there, that's Mr Massone"?

**MR WILLIAMS:** That's correct Chair.

**ADV FRANKLIN SC:** "Claims as the purpose of the arrangement. It's quite possible that they are well connected in the SA Black Business community and so would have independent access to this information. Again, it just seems ingenuous for Vittorio to not acknowledge in  
10 any way that we hope these guys will use their connections with President Zuma to influence Executive selection decisions. We might still decide, collectively that this is what it takes to develop business in SA, others play this game too and so we're willing to proceed with them, but I think we should have a fully informed decision and I just feel that Vittorio is not giving us the full picture",

I think that is self explanatory what Mr [indistinct – audio distorted], has identified as a problem. Now against that background, I've taken you to a number of emails in  
20 which Bain himself has identified what can be described as troubling aspects of the Ambrobrite relationship. Please turn to page AW – sorry page 248 Annexure AW43, this is an email from Bain to Ambrobrite that...[indistinct- audio distorted] June 2016, you can read it, but it appears to be an extension of the Ambrobrite contract, is that correct?

**MR WILLIAMS:** That's correct Chair.

**ADV FRANKLIN SC:** Am I correct, chronologically, that these various concerns were raised by very senior people at Bain but not withstanding that the contract was signed on the 1<sup>st</sup> of November, correct?

**MR WILLIAMS:** That's correct Chair.

**ADV FRANKLIN SC:** And then in addition to the contract that was signed there was an extension to that contract on the 2<sup>nd</sup> of June 2016.

10 **MR WILLIAMS:** Chair, in fact, the contract was renewed every six months including up until June 2016.

**ADV FRANKLIN SC:** Right, could I then ask you to turn to your statement – sorry your affidavit and at paragraph 68 and it's on page 36 you highlight...[intervenes].

**CHAIRPERSON:** You say page 36?

**ADV FRANKLIN SC:** Page 36 paragraph 68 Chair. You have highlighted what you call, unusual activities for a Management Consulting firm. I am going to ask you to just highlight two of these, paragraph 68.1,

20 "Unusual payments in the normal course of business",

Can you explain to the Chair, what it is that you established was paid for as part of the Ambrobrite arrangement?

**MR WILLIAMS:** Chair, it appears – so just the evidence

that I have – I’ve seen is, Mr KaNozulu from Ambrobrite sends an email to Mr Massone with attachments and he says, attached to the invoice for the party and Mr Massone replies saying, he’ll take care of the payment and then later on Mr Massone says, proof of payment attached, indicating that Mr Massone or Bain had paid this amount. So, it’s R50 000 for a party that Bain is paying for and in the email, Mr KaNozulu invites Mr Massone to the party, but Mr Massone says he can’t make it but can you – Mr  
10 Massone writing,

“It would be great to greet the person, a new Youth League head, when he’s in Joburg”,

And this – I’ve got no further fact on this, but we suspect who the Youth League might be around the same time the ANC Youth League had appointed a new President and so, for me, just – Bain is normally so careful about being accountable and transparent with how money is spent. So, this had nothing to do with client work this was a party that Bain had obviously agreed they were going to  
20 pay, Mr KaNozulu offers an explanation other than, oh here’s the invoice which Mr Massone happily pays.

**CHAIRPERSON:** The R50 000 that couldn’t be for the – all 350 or was it for all 350 guests?

**MR WILLIAMS:** I’m sorry Chair, I missed that?

**CHAIRPERSON:** The R50 000, initially I thought you said

that was per person – no that's for the whole party?

**MR WILLIAMS:** For the whole party, yes.

**CHAIRPERSON:** Okay.

**ADV FRANKLIN SC:** Just to clarify that, Chair, would you look at page 260 Annexure AW46.

**CHAIRPERSON:** 260?

**ADV FRANKLIN SC:** Correct, it's an invoice from an entity known as ...[indistinct] Contracting and Trading it's addressed to Mr Mandla Kwezwa who is that?

10 **MR WILLIAMS:** That is another name by which Mr Mandla KaNozulu goes by, I'm not sure which are his legal names, but those names seem to be used interchangeably, Chair.

**ADV FRANKLIN SC:** And that's an amount of R50 000 for venue, catering, decorations, and tables, is that right?

**MR WILLIAMS:** That's correct, Chair. So, this is the invoice that is attached to that email from Mr KaNozulu to Mr Massone.

**ADV FRANKLIN SC:** Alright, then looking at your statement again – affidavit, 68.2 page 36, the second of  
20 the unusual activities that you have identified is, facilitating international government meeting and you talk of an email chain from 7 to 18 September indicating that Bain was facilitating meetings between South African and Italian Senior Police Officials, including Interpol. Would you explain to the Chair what you found in that regard?

**MR WILLIAMS:** So, Chair, this to me was very bazaar, again...[intervenes].

**CHAIRPERSON:** Before you do that, I'm still trying to understand the point you make about the payment of R50 000 being an unusual payment. What's the basis for saying, it was an unusual payment?

**MR WILLIAMS:** It's – Bain provides advisory services to clients, clients pay Bain for those services, Bains expenses are normally staff and then the normal running of  
10 the business. They were obviously paying for Ambrobrite's fees so that would be a payment. Why Bain would be paying for what might ostensibly be an ANC Youth League party, I can't see what circumstance in Bain's normal business would require them to pay for a party for the ANC Youth League, if indeed, this is a Youth League party.

**CHAIRPERSON:** So, all you are saying is, why was Bain spending R50 000 on something that appeared to fall outside their contractual arrangement with Ambrobrite?

**MR WILLIAMS:** That's correct Chair, and then the added  
20 concern, if it's a political party, the payment to a political party.

**CHAIRPERSON:** Ja, okay, alright.

**ADV FRANKLIN SC:** Right, if I could then just ask you to confirm certain propositions that you have made in your affidavit regarding the Ambrobrite relationship. Please turn

to paragraph 47 pages 27...[intervenes].

**CHAIRPERSON:** I'm sorry, I think I interrupted him before he could respond to your earlier question.

**ADV FRANKLIN SC:** I'm sorry.

**CHAIRPERSON:** Yes, he...[intervenes].

**ADV FRANKLIN SC:** I'm sorry you hadn't answered, please answer...[intervenes].

**CHAIRPERSON:** Ja, he had not answered yet, ja, do you still remember it?

10 **MR WILLIAMS:** I do, yes paragraph 68.2 of my affidavit which I've labelled, "facilitating international government meetings', now, again I'm making this assessment that it's unusual against what you normally would see a Management Consulting firm doing which is offering advice to its clients. It's very possible, Chair, that a Management Consultant would arrange meetings in the context of the work it's doing with its client. I've done that, where I've said to a client, we can have an off-site meeting, my team will arrange the meeting we'll see you there but what  
20 appears here, from this email chain is, Bain is arranging a meeting between Senior South African Police Officials, so including Generals and – there's General Zuma, the head of Special Projects within SAPS, General Naidoo the head of Interpol within SAPS and Senior Police Officials in the Italian Police Service. So that just struck me as strange

that Bain would be doing that and Mr Massone gives the instruction to his assistant to say, call these people to set these things up but they're using us to arrange the meeting. So, you can go through any website of Bain, look at any of Bain's normal operations, what it does, it does not arrange international meetings between different governments and police departments. I think, actually, our government has Dirco to arrange international meetings and, in fact, within SAPS they've got international  
 10 cooperation capability. So, why would they then ask Bain to do this and there's been some interesting connections here because Mr Mandla KaNozulu, we learn, not only is he part of Ambrobrite, according to his own profile, is also an advisor to the Minister of Police. So, again, I can't speculate how this came about but I just looked at that happening, I thought that is very odd behaviour what I understand Management Consultants do.

**ADV FRANKLIN SC:** Thank you Chair I had then prematurely asked you to go to paragraph 47 on page 27 of  
 20 your affidavit for your including submissions on the Ambrobrite relationship and there you say,

“By Bain's own account Ambrobrite had no trading history, was unregistered and appeared to be non-tax compliant with SARS, their tax clearance certificate was suspended by SARS as being

fraudulent, and then I think the follow-up is, nonetheless they contacted with this entity”,

From your experience with Bain, would that be a normal business event?

**MR WILLIAMS:** Mr Chair, there obviously was, undoubtedly any organisation there are different viewpoints right, so I think that’s to be expected. I look at this, that when the head of finance or the senior finance person raises very real concerns, about this company that doesn’t  
10 exist virtually. The head of marketing raises concern, the head of legal globally raises a concern, they all seem to raise these concerns which in my mind says, well this contract shouldn’t have gone ahead but the fact it did go ahead meant, there was some debate somewhere, where some person more senior than the head of marketing global and the head of legal global overrode those concerns and for me that – the fact that someone senior overrides junior people, that does not concern me that might happen, just the nature of these concerns. So, the fact that they entered  
20 a contact despite these concerns, for me is extremely unusual.

**ADV FRANKLIN SC:** Right, then if you would look please to paragraph 51 on page 29, here you’ve made some observations about the way in which the contract was written and you have essentially said that this is not the



type of wording or attention to detail that would normally be found in a Bain contract, is that correct?

**MR WILLIAMS:** That's correct, Chair, there's something, a phrase called Bain standard, is this Bain standard and as a junior consultant I had many managers throw documents at me saying, this is not Bain standard. For me, this contract is not Bain standard, it just – I just wouldn't recognise this document that Bain would, firstly, produce let alone sign.

10 **ADV FRANKLIN SC:** Then please look at paragraph 52 also on page 29 and there you said that Bain were already working at Telkom where they expected in excess of R200million in fees for 2014 as Massone wrote to Meehan on 14 January 2014 and if I could ask you then to go to that Exhibit or Annexure rather, that's at page 219, that's an email from Mr Massone to Paul Meehan dated 18 January 2014, I'm not sure if you've identified Mr Meehan before?

**MR WILLIAMS:** Chair, Mr Paul Meehan was Mr Massone's  
20 boss at the time, he's also the person I wrote to right at the beginning when I expressed concern to Bain about what was happening at SARS, it was the same Paul Meehan.

**ADV FRANKLIN SC:** Right, if I could ask you then to look at paragraph 2 and paragraph 3 and 4 it appears that what

Mr Massone is saying is that this is an important strategic initiative it's not just about selling a couple of companies,

10        "The decision with – the discussion with Boomer and the target SEO's is consequent to a broader discussion on the country vision and strategy we had with the President which sees some of the SOE's as keys to achieve change and economic development in the Country. Zuma's idea is to create a concrete legacy during his second mandate which will start in June this year. The Phoenix project was the first piece of this plan and where we were tested. There are other fundamental pieces of that legacy which will involve the revenue service of SARS, the power company Eskom, and others. There are also other components of that legacy, policies, laws but we are clearly, much less involved on that. Bain is key in the industrial component',

20        Can you summarise your understanding of what is being observed by Mr Massone?

**MR WILLIAMS:** So, Chair, for me again a very concerning paragraph. It seems to me that Bain had become President Zuma's consultants of choice because Bain seems to have this assurance that they are key to whatever the President's vision for the country is and his legacy. Just to

touch on some of the specifics there, there's reference to project Phoenix and there are documents in my evidence relating to project Phoenix. Project Phoenix, at the core of it, was Telkom. So, I mentioned earlier that Bain was involved in what was happening at Telkom. So, Mr Massone is saying to his boss, you know, we need this arrangement it's part of our strategy we did this work with Telkom and the President when we were tested. Now, again, I doubt the President was testing Bain's technical skills, but we  
10 were tested, and we got the check mark for the work we did at Phoenix, at Telkom and now we've got to target these other companies and enlist them, including SARS.

**ADV FRANKLIN SC:** In paragraph 3 of the same letter, he gives some figures which are attached to certain of the State owned enterprises. Can you tell the Chair what those figures are and what you understand them to represent?

**MR WILLIAMS:** So, Chair, these figures would have been Mr Massone's estimate of what fees Bain could earn from  
20 the work they could do at these State owned enterprises. So, for example, you know, his expectation is that Bain could earn \$10million a year at the Post Office, \$3million a year at SARS. So, this would be – I don't know how much rigour went into these numbers, it could have been based on actual discussions or it could be just his rough estimate

of what they are but it's clear that they had a plan to target these particular entities.

**ADV FRANKLIN SC:** Then would you look at 53 of your affidavit page 30, there you've dealt with an issue of a relationship between the consulting company and the President of a country. What is your experience of that and what is your comment in relation to the relationship that apparently existed between Bain and the President of South Africa at the time?

10 **MR WILLIAMS:** Chair, in essence, my comment is, that it is highly unusual for a Management Consultant to be meeting with the President of any country it's just not the work that management consultants do. We typically work with Executives of companies and then we would work with State entities but on operational issues. Meeting with a Politician would be very unusual but no problem meeting with a President of a country, I'd love to advise the President of our country on some strategic issues but there would be no obvious gain for a Management Consultant to

20 have a relationship with the President. The relationship would be with DG's as I said earlier or with the CEOs of State owned enterprises. So, firstly, very strange meeting with the President. Meeting with the President at least 12 times which is what happened, and I estimate it's much higher than 12 times because Bain says its 12 times

between 2012 and 2014 but they also say, there were meeting that went up to 2016. So, why would this unusual meetings be happening in that frequency all afterhours and behind closed doors or at the President's official residence. Again, I come to later where I express my guess at what might be happening but that, on the face of it just must raise our antennae of something very unusual going on.

**ADV FRANKLIN SC:** Right and then could I ask you, are  
 10 you aware of any contract – consultancy contract between Bain and the former President or Bain and the South African Government in relation to the former President, was there any contract?

**MR WILLIAMS:** No, Chair, I know of nothing formally between Bain and the former President.

**ADV FRANKLIN SC:** Please then look at 57 on page 31 of the affidavit there you've said,

20 "Through Ambrobrite's "intelligence", Bain understood that information regarding imminent leadership and strategic changes at SOE's and Government Agencies would be shared with them. One example of Ambrobrite deploying their intelligence on imminent leadership changes was their introduction to Bain of Mr Tom Moyane in October 2013. The relationship had led to the

supposed CEO coaching engagement that Bain had with Moyane for the year leading up to his appointment as Commissioner of SARS”.

Now, I'll flag that, we'll get back to that in greater detail and then paragraph 58, is that essentially your conclusion on the Ambrobrite contract and what its real purpose was and if so, would you elucidate that for the Chair?

**MR WILLIAMS:** Chair, if I just synthesise and it's an  
 10 obvious synthesis it appears to me that the real intent of that contract between Bain and Ambrobrite was really to take advantage of Mr Ndlovu and Mr KaNozulu's proximity to President Zuma and other senior Politicians and to use that to their advantage to gain non-public information to use to their commercial advantage and to gain access to, I think, consulting opportunities that took advantage of those relationships.

**ADV FRANKLIN SC:** Right, earlier we looked at a release which was sent to all of the Bain team members, I also said  
 20 that there were certain public statements that went out and I'd like to take you to one of those which is AW45 on page 252 right and in that press statement, Bain says a number of things but one of them is that Mr Massone showed poor judgement in drawing us into the SARS assignment. Now, could I ask you, in the light of the documentation that you

have analysed, what your comment on that assertion is. Is it you're understanding that Bain was drawn into the SARS assignment by Massone?

**MR WILLIAMS:** The first part I would agree with that Mr Massone did, Chair, show poor judgement, I think many people in Bain showed poor judgement, not just Mr Massone. So, the second part of that statement I absolutely disagree with, it creates the impression that Bain, globally had no idea what was happening in South  
10 Africa and this lone rogue showed poor judgement to go and contract with SARS get involved with Ambrobrite, get involved with President Zuma and had drawn us into this terrible situation, where I think emails and the documents so far we've discussed shows, that senior people at Bain's, top leadership, knew what was happening, knew what Mr Massone was doing, they might not have known to the end detail that's not required but they knew about the intent of this relationship, they knew what the relationship was meant to achieve. So, this idea that they are shocked by  
20 what Mr Massone did seems – there's no basis for that claim.

**ADV FRANKLIN SC:** Right if I could then take you to the issue of the planning and the interactions between the Bain representatives and former President Zuma and also Bain and SARS prior to the appointment of, either Mr Moyane or

Bain. Just to orientate you, you know that SARS issued a request for proposal on the 12<sup>th</sup> of December 2014 and that followed on Mr Moyane being appointed as Commissioner on the 23<sup>rd</sup> of September 2014 and Bain was awarded its first contract in January of 2015. What I want to do is to take you to events prior to any of those key features in the chronology. Firstly, meetings between Bain and the former President, you've already alluded to that and the number that took place. Could I ask you to turn to AW52 at page 10 306? Now, that is a document headed, "tracker table" meetings with former President Jacob Zuma where Vittoria Massone was present, you're familiar with this document I take it?

**MR WILLIAMS:** I am Chair.

**ADV FRANKLIN SC:** Can you explain to the Chair how – sorry who it was compiled by and on the basis of what information?

**MR WILLIAMS:** So, Chair, this document was compiled by Bain's legal team including Mr Chris Kennedy was the 20 Senior Counsel or is the Senior Counsel for Bain as well as representatives from Baker McKenzie. So, these were the people who compiled this document, the context for this document was, after Mr Massone had testified before the Nugent Commission the Nugent Commission had sent Bain a number of questions and one was for asking for the



details of Mr Massone's meetings with President Zuma. So, this was an attempt by Bain and Baker McKenzie to answer that question, to get an understanding of the frequency and the context for the meetings between Bain and Baker – between Bain and President Zuma. This document is compiled using Mr Massone's memory, using Mr Massone's diary, I think they might have accessed Mr Massone's personal assistant as well, but it was an internal document to try and create this tabular form of when these meetings  
 10 happened, who else was in those meetings, what was discussed at those meetings.

**ADV FRANKLIN SC:** So, this is a work product of an investigation by Bain and/or its attorneys into the question whether Mr Massone met with former President Zuma and if so, on what dates and how many occasions?

**MR WILLIAMS:** That's correct Chair, I'm not sure, I'm referring to Baker McKenzie as Bain's attorneys I'm unsure about, I saw them as Bain's investigators, investigating their work at SARS.

20 **ADV FRANKLIN SC:** Yet I think it is common cause that they did carry out an assignment on behalf of Bain which was investigated, what happened at SARS. By my account there are 17 odd meetings over the period 11 August 2012 to July 2014 I think there – one has to read the commentary to see whether the degree of confidence at

those meetings went ahead or not but take that as an approximate figure, 17 meetings over that period. Do you know what the explanation was by Bain for so many meetings between its Senior South African representative and the former President?

**MR WILLIAMS:** Chair, Bain's explanation, starting with what Mr Massone has said in his affidavit was that these meetings were basically marketing meetings where Bain was seeking to display their capabilities to the President of  
10 South Africa. So, this was not an intent to gain any consulting work but merely to – as part of their strategy into the public sector to have the President aware of their capabilities.

**ADV FRANKLIN SC:** And what's your comment on the suggestion that it would take 17 odd meetings to market Bain to the former President?

**MR WILLIAMS:** Other than sort of laughing really loud and rolling on the ground, for me it's absurd, it's an absurd statement that, again, the reason why you want to be  
20 marketing your services to the President of the country makes no sense. Then taking 12 to 17 meetings to do that makes absolutely no sense. The content of these meetings Chair, I've included some of the materials, the documents that were discussed suggest to me that these were not designed as marketing materials of their capabilities.

Another thing that strikes me as very odd is that they have removed their corporate identity from all of these documents. Again, if I'm trying to market myself to your business for you to tell your friends about it, I'm going to put my logo and my content details, huge on this document but here again, very unusually Bain has removed all of their logos and names from these documents. So, to me this strikes me as not, merely, marketing meetings to the President.

10 **ADV FRANKLIN SC:** Right, then if I could ask you to look at AW83 page 464 which is an email from Mr Massone who ...[intervenes].

**CHAIRPERSON:** I'm sorry Mr Franklin can we just have – I want to say 5 minutes to 10 minutes, but 5 minutes is too short. So, let's just make it 10 and then we resume, we adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay, continue.

20 **ADV FRANKLIN SC:** Thank you Chair.

**CHAIRPERSON:** Okay.

**ADV FRANKLIN SC:** Mr Williams I had been asking you about the meetings that had been taking place between former President Zuma and Mr Massone, as displayed in the tracker table. I want to take you to an annexure which

is AW83, page 464.

That is an email from Mr Massone to Franson, Dutiro so Franson and Dutiro and to Nkano, all of Bain. So if I could take them in turn, Mr Franson?

**MR WILLIAMS:** So Fabrice Franson is a partner at Bain. In fact he led the day to day operations of the Bain project at SARS.

**ADV FRANKLIN SC:** Mr Dutiro, for the record DUTIRO?

**MR WILLIAMS:** Chair, Mr Dutiro at the time was a partner  
10 at Bain but he has subsequently left Bain.

**ADV FRANKLIN SC:** And is it Ms Stefani Timpano, TIMPANO?

**MR WILLIAMS:** It is mister. Mr Stefan Timpano is also a partner at Bain, was in Johannesburg and Lagos.

**ADV FRANKLIN SC:** Right. That was an email dated the 26<sup>th</sup> of February 2014, the subject is:

“Quick note, please keep confidential.”

And Mr Massone says:

“Guys, met president yesterday night in CT.”

20 I presume that is Cape Town?

**MR WILLIAMS:** That is correct Chair.

**ADV FRANKLIN SC:** “All good. There was also a Tom (a guy we met via SARS) and it really seems he is getting that job after election. He was very friendly with me and seems a smart guy to

work with.”

This appears to be evidence of the meeting in Cape Town between Mr Massone and the former president but why I highlighted it is that it appears that Bain were given information at this point that Mr Moyane is likely to get the SARS appointment.

Is that how you saw it?

**MR WILLIAMS:** That is correct Chair. So this meeting in Cape Town was between Mr Massone and the president.  
10 That ties up with the tracker table, that date and of course Bain had met ... and of course Bain had met Mr Moyane in October 2013 already.

So a few months before this meeting and that is why he is making reference to the guy RE SARS, but my understanding of this email is that Mr Massone was given some assurance or indication that Mr Moyane was going to get the SARS job, which is seven months before he is actually appointed.

**CHAIRPERSON:** Well, clearly in that second or third, the  
20 second line of the email refers to the person referred to as Tom, as the guy they had met about SARS. So they had met this Tom prior to this and probably prior to the meeting with the president, and they had met Tom about SARS, and then he says:

“It really seems he is getting that job after

elections.”

And they were going to elections in 2014.

**MR WILLIAMS**: That is correct Chair.

**CHAIRPERSON**: In South Africa, and Mr Tom Moyane was appointed in the second half of 2014 if I recall correctly?

**MR WILLIAMS**: September Chair.

**CHAIRPERSON**: Yes, and Mr Pravin Gordon in his statement in evidence before the commission, said that as Minister of Finance between 2009 and 2014, he had or his  
10 department, national treasury had invited applications for the position of Commissioner of SARS, and they had received the quite a high number of applications and he had then suggested to President Zuma that President Zuma since he was the one who had the power to appoint I think the Commissioner of SARS, that Zuma could consider following a transparent process for the appointment of the Commissioner of SARS and there was a shortlist of candidates that applied, but his evidence was that President Zuma had not followed that process.

20 So it is just interesting that here, a number of months before the appointment, Bain says they had met somebody they refer to as Tom and that they had met him with regard to SARS and they say it really seems as if he was going to get that job.

Okay, we can proceed Mr Franklin.

**ADV FRANKLIN SC:** Thank you Chair. Then please turn to paragraph 73, page 40 of your affidavit. There you say that:

“Between 2012 and 2015 Bain created a series of document, containing far reaching plans.”

Do you have it Mr Williams?

**MR WILLIAMS:** I do Chair, thank you.

**ADV FRANKLIN SC:** “Far reaching plans to not only restructure certain government agencies and state owned enterprises but also to restructure entire sectors of the South African economy, whilst claiming that such restructuring would offer economic benefits and service improvements to South African society, the consistent theme is that of restructuring, which in my view was aimed at bringing as many organisations and as many financial resources under more concentrated control which would greatly facilitate State Capture.”

Now we will get to the plans now, but that is a far reaching allegation to make. On the strength of what do you make it?

**MR WILLIAMS:** Chair, I make that on or firstly I think it is apparent that I was not at any of these meetings. I was not at Bain at the time and neither was I at any of these

meetings. What I did was took these documents that I had, that I had obtained in the cause of my oversight and began sort of stepping back and saying let me read through these documents one by one and just see what they tell me.

It is using my management consulting expertise, using my business expertise, what themed jumped out to me and one immediately that jumps out, is that all of them talk about restructuring. No matter what the question was, the answer always seem to be restructuring.

10           The documents were not only talking about restructuring organisations, in fact there are two occasions I recall, where they talked about restructuring entire industries. So under this label that Bain used of reshaping the South African economy, again I would argue Chair not expertise and management consultants typically would have.

          You would expect an economist or policy advisor to be doing this, but the title on these documents were reshaping the South African economy. Under that title,  
20 they talked about restructuring the entire IT and ICT industry.

          So they were going to in their proposals, in documents, lump together restructure Telkom with SABC, with South African Post Office, with SENTEC. Smash all of these together and their documents say one of the benefits



of this is you centralise procurement and infrastructure spent.

Another industry that proposed restructuring is the energy sector within South Africa. So the proposal is take Eskom, Petro SA, talk about nuclear, travel gas. Again, lump all of this together. In the documents it says we replace the board of Eskom, you get a new executive, restructure it and so we can get everything more concentrated in my interpretation.

10           So these two themes Chair, just seemed very strange again to me. One is everything was about restructuring and of course we know what happened at SARS was restructuring. Now Chair, I do not know if this is the right point to mention this.

          As a management consultant and as anyone with common sense, restructuring an organisation is something you do with utmost care. In fact, that is your last thing you want to do in an organisation, because any organisation like Eskom, like Telkom, like SARS they have been  
20   operating for decades.

          The amount of institutional memory and knowledge that is imbedded in not documents, but in people's minds and how they work together, how the organisation is structured, how it functions, that is how it works. When you restructure an organisation, you break all of that.

You break those bonds, you break those relationships, you destroy the institutional memory. So there are definite occasions where you want to structure an organisation but it is absolutely a last resort. You always want to find other ways of improving before you get to restructuring.

At the outset here, these proposals are all around state held enterprises and restructuring sectors. On that basis I make this allegation that it appears to me that this  
10 was an attempt to restructure, I mean Bain calls it reshaping the South African economy through restructuring organisations and sectors.

**ADV FRANKLIN SC:** Thank you. These various plans that you have identified in paragraph 73.1 and 73.8, you have said at the beginning that Bain created these documents, is that correct?

**MR WILLIAMS:** That is correct Chair.

**ADV FRANKLIN SC:** Can I take you to the first of these, which is AW55, starting at page 318. That is headed:

20 “Sizikelo reshaping South African economy.”

Can you tell the Chair what that name is?

**MR WILLIAMS:** So Chair, this was precursor name to Project Phoenix, so this was later called Phoenix, which was this focus around reshaping the economy focussed on ICT.

**ADV FRANKLIN SC:** This is dated 11 August of 2012 and it contains a lot of detail but are you able for the benefit of the Chair to highlight specific parts of it, which are evidence of the conclusion which you draw and articulated to the Chair a few moments ago?

**MR WILLIAMS:** Chair, the documents contains a lot of sensible analysis. There are no doubt there are efficiencies to be gained from consolidating and it is pointed out in this document. It is also pointed out in this  
10 document that bringing together some synergies across these different entities would enable South Africa to leapfrog from a technology stand point, get through digital quicker and deploy broad band much quicker.

All of those make sense but what is interesting, is the sort of lumping together of these different organisations. Your bank says out of lumping these together we will get a people's bank and we have heard, the Chair is laughing.

I am trying to be serious. We heard recently  
20 politicians talk about a state owned bank. So it is, you know these questions of where these plans went to I do not know, but take Telkom, Post Office, SADC, SETA, the state IT agency, SENTEC, put them together and you get out of that some technology company and some people's bank and this is going to be better for South Africa.

There is just no cogent argument for that. there is an argument for the cost saving, there is an argument for the technology lead frog, but this idea of lumping entities together for me it makes no sense, and then Bain sort of does, I think this is the presentation where they pulled some global benchmarks, this might not be it, and again it might have been relevant for some other countries to have done this and [indistinct – 00:14:06] benefits, but these things have got to be very contextual.

10 If you must take a solution from elsewhere and drop it here, and here specifically they talk about a bank of the people. Everyone receiving the same treatment and conditions. Everything guaranteed by the state. Chair, this does not sound like us developing and restructuring these sectors for the purpose and the benefit of South Africa.

**ADV FRANKLIN SC:** Right, then can I ask you to look at the next plan in chronological order, which is AW56, starting at page 322 ...[intervenes]

20 **CHAIRPERSON:** I am sorry Mr Franklin. Mr Williams, the name Sizikelo, did you understand whether that was the name of the project or what was that?

**MR WILLIAMS:** That was the name of the project Chair.

**CHAIRPERSON:** Oh.

**MR WILLIAMS:** That later became Project Phoenix.

**CHAIRPERSON:** Okay, okay.

**MR WILLIAMS:** I do not know what the word means.

**CHAIRPERSON:** Well, I think it is a Zulu word, which means foundation. Ja, okay let us continue.

**ADV FRANKLIN SC:** Thank you Chair, the next of the plans is AW56. If you could look at page 323. This one is headed:

“Project Phoenix reshaping South African economy.”

10           And it is dated 23 August 2012. Do you have any particular comment on this and does it take the previous plan forward? Is it more of the same, or what is your analysis of it?

**MR WILLIAMS:** Chair, just two comments. The one is as evidence suggests, this is taking the plan a bit forward. A bit more analysis, a bit more numbers added to it. Importantly again Mr Maseko would have been part of these discussions.

20           So this was Bain along with Mr Maseko developing these materials and presenting to the president.

**CHAIRPERSON:** I see that now it is called Project Phoenix?

**MR WILLIAMS:** That is correct.

**CHAIRPERSON:** Ja, and you still say it is reshaping South African economy, so it looks like it is just a name that has

changed?

**MR WILLIAMS**: That is correct Chair.

**CHAIRPERSON**: Okay.

**ADV FRANKLIN SC**: And perhaps if we could look on page 323, the question is why Phoenix and it is said underneath:

“Giving birth to a rational and regional ICT champion.”

Then there are a number of bullet points, and underneath that:

10                   “Leapfrogging economic development and transformation in urban / rural areas for citizens and SCME’s.”

The next is:

“Creating a world class generation of professionals, engineers, technicians and world class infrastructure serving the businesses.”

And fourthly:

20                   “Obtaining full potential, maximum synergies, efficiencies and economies of scale in the businesses and investments operated by the government.”

Do you care to comment on those objectives?

**MR WILLIAMS**: Chair, I think those objectives which I mentioned earlier, again one reads those and they make

sense. There is, on the face of it well Chair those are all the good things if we could achieve them. I guess you know, economist, developing economists and policy people I speak to say they are restructuring and lumping everything together is not the way you achieve those, but those will be great objectives for our country.

**ADV FRANKLIN SC:** Right. The next one is AW57 at page 335 and at page 336. Once again it is Project Phoenix, reshaping South African economy. This time it is dated  
 10 September of 2012. I imagine this is a further iteration of the previous plans, but are there once again any particular features that you wish to highlight for the Chair?

**MR WILLIAMS:** I think Chair, perhaps it is two pictures. The one is in the bottom left of page 336, the one titled overall Phoenix operating model, and that is where we begin to see the vision of how these five or six different state owned entities are imagined to be sort of broken to pieces and reassembled like a puzzle into this operating model and I do not understand all of the intents of these  
 20 blocks, but one gets the sense that this is how they imagined breaking them up and putting them back together again.

In one of these documents, I think it is this one where again, they identify one of the opportunities is to centralise procurement. So again, given the large

infrastructure spent across these entities, your efficiencies will come from better procurement effectively.

So procurement seems to have been a big focus of these, the second picture is on the page over, on page 337, titled Phoenix players overview. Which is just showing the six companies, the six state owned companies and Telkom is a partly state owned, but just overview again of those six companies.

Those are the six we were looking at, and looking at  
10 consolidating.

**ADV FRANKLIN SC:** Are those the same six that you identified earlier?

**MR WILLIAMS:** That is correct Chair. So if I may Chair, I spoke earlier about just the common wisdom in management strategy circles, around restructuring. I mentioned earlier just the way we would typically think about it.

With regard to putting different businesses together, again the common wisdom is there has got to be real  
20 strategic synergies and so I look at the post office and an SABC. For me those are very different businesses. They do very different things.

Yes, they have got a technology element, but that is ... they are different audiences, different businesses, different pricing models. So just the idea of lumping them



together because you can get some efficiencies, for me as a management consultant that did not seem like it stat like the justification for lumping them together.

**ADV FRANKLIN SC:** Moving forward in the chronology, AW58, page 346 is a plan dated the 25<sup>th</sup> of April 2013 headed:

“Infrastructure development in South Africa.  
Holistic approach to infrastructure  
development, initial considerations.”

10           Again, is this a further iteration of the same ideas, targeting the same companies?

**MR WILLIAMS:** Chair, so this is a different plan altogether. So this is no longer linked to ICT. This is looking at the broader spectrum of infrastructure in the country and how we could improve delivery of infrastructure in the country, linked to things like railways and ports, aviation, energy etcetera, but I have got nothing more to add to this, other than it was yet another plan.

          You will see it is another plan, this sort of wild  
20 pictures everywhere that to me are sensible in some sense, but do not lead to a conclusion that says we must go and restructure our entire infrastructure sector.

**CHAIRPERSON:** In terms of the chronology, I see that at page 346 that is dated 25 April 2013. Do you recall whether by that time Bain had had quite a few meetings

with President Zuma, or you might not recall?

**MR WILLIAMS:** Chair, so all of these documents were presented to President Zuma.

**CHAIRPERSON:** Yes, before ... afterwards or before that date? I am trying to look at it ...[intervenes]

**MR WILLIAMS:** These documents were presented to President Zuma in the meeting.

**CHAIRPERSON:** Oh, and the meeting is said to have been in April 2013?

10 **MR WILLIAMS:** Ja, ja.

**CHAIRPERSON:** Okay.

**MR WILLIAMS:** Ja, so this indicates, that was the date of the meeting.

**CHAIRPERSON:** Okay, okay.

**ADV FRANKLIN SC:** Perhaps I could just for the Chair's benefit go back to the tracker table at page 306. There ...[intervenes]

**CHAIRPERSON:** Yes.

20 **ADV FRANKLIN SC:** Chair, you will see the table which has on the left hand side the dates of the meetings and then it has location listed attendees, and further detail and you will see that they begin in August of 2012.

**CHAIRPERSON:** Yes, August 2012. Official resident of the president, ja. Massone, Zuma, Zuma, Sipho Maseko. I do not know what the heading is before or above Sizikelo

and then says which became known as Project Phoenix from 2013.

I do not know what the heading is meant to be.

**ADV FRANKLIN SC:** It is on the previous page, Chair.

**CHAIRPERSON:** It talks about what the meeting was about?

**ADV FRANKLIN SC:** Ja.

**CHAIRPERSON:** Is that what he ...[intervenes]

**ADV FRANKLIN SC:** That is right, it is on the previous  
10 page, the headings.

**CHAIRPERSON:** Oh. Okay, okay. So 11 August 2012 and then 17 August, that is like a week later and the 12<sup>th</sup>, meeting involving President Zuma, Gabu Mabuza and 23 August, that is another week later, a meeting at the official residence of the president.

They have got Massone, Zuma, Zuma, Mabuza, Maseko. That was quite a number of meetings at close intervals. Okay, no thank you Mr Franklin. I wanted to check. So that has answered.

20 **ADV FRANKLIN SC:** Yes, thank you.

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** And they run all the way through 2012, 2013.

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** 2014.

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** As you will see on page 308. Alright, then continuing with the next, if I may. AW59, page 358. I am sorry, AW yes 59, page 358. Can you explain what that particular plan is please?

**MR WILLIAMS:** Chair, we see again the same labels. Project Phoenix, reshaping South African economy, but now you have noticed it on a Telkom branded document, and it is again because Telkom is central to Project  
10 Phoenix.

Again if we refer back to the tracker table, either Mr Maseko would have been at this meeting or Mr Jabu Mabuza. So this is Mr Maseko is now in the job. He is appointed as Telkom CEO in April of 2013. This is August 2013, and in the tracker table Mr Massone says this meeting was held to give the president an update.

Now that Mr Maseko was in the job, to give the president an update on Project Phoenix.

**CHAIRPERSON:** I saw that in the meetings that we just  
20 had a look at in August 2012, I think I looked at three which involved Mr Zuma as president, that there seems to have been no minister. There was no minister of public enterprises under which I guess, I do not know whether Telkom will fall under that or under minister of communications, but there seems to have been no minister

in each one of those three meetings.

You have looked at maybe many of them. Do you recall seeing any minister being present?

**MR WILLIAMS:** So Chair, the fact that no minister is listed there, my interpretation is it does not mean there was no minister at this meeting. So this would be Bain and Baker McKenzie putting this document together based on the source I mentioned earlier.

Part of my plea to Bain is to make full disclosure so  
10 they can know who was in the meetings, but beneath this table, this tracker table, there is a list of ministers that Bain did present materials to. So it lists there minister Malusi Gigaba, Minister of Police.

So beneath that table, if you can take us to the table ...[intervenes]

**CHAIRPERSON:** Let me, before you go there, I just want to understand what you are saying. You are saying the fact that in the blocks that we looked at, no minister is mentioned. It does not mean that at those meetings there  
20 was no minister.

So my question would be if you are going to put in the name of the president and you are going to put in the name of the CEO of the relevant SOE like Telkom and Mr Maseko, why are you not going to put in the name of the minister under whom Telkom falls, if the minister was

present?

**MR WILLIAMS:** Ja, as I am saying I cannot definitively say, I say we did not draw the conclusion that because no minister's name was there on this page, there was no minister in the meeting.

**CHAIRPERSON:** No, no, no in principle you may be right. That is if there is a proper explanation to say the only people we have decided to record ...[intervenes]

**MR WILLIAMS:** Ja.

10 **CHAIRPERSON:** Are the following and for this reason you know, but if there is in the absence of any explanation one would imagine that there was no minister since you do not mention the minister, but you mention the president politician.

Why do you not mention another politician? You mention the head of Telkom, CEO. Why do you not mention the minister under whom Telkom falls? But it may well be that somebody can come up and say look, there was a reason why and here is the reason.

20 But you were saying that they mention ministers somewhere, is that right?

**MR WILLIAMS:** That is correct Chair, so I agree with your assessment of that topic. Beneath the tracker table there were a number of minister listed that Bain affirmed that they had had meetings with.

**CHAIRPERSON:** Yes.

**MR WILLIAMS:** Also discussing this.

**CHAIRPERSON:** Yes but where the Ministers are referred to is there suggestion that they were Ministers who were present at the meetings you are talking about?

**MR WILLIAMS:** No.

**CHAIRPERSON:** Or they might have met them separately?

**MR WILLIAMS:** That is correct Chair.

**CHAIRPERSON:** Okay alright.

10 **ADV FRANKLIN SC:** Just to follow on Chair for your benefit if I may take the witness back to the tracker table and in particular to page 308 at the very end of the table there is a note by the author.

20 “Please note we also located a number of documents that we presented to other Ministers as part of Bain’s client development push into the public sector. Mr Massoni was present at these meetings although Zuma was not for the sake of complete transparency a list is included below.”

And there is reference to the Secretary of Defence also Dr Zweli Mkezi and also Minister Jeff Radebe. So there are other Ministers referred to.

**CHAIRPERSON:** Yes. But also – but also I see in the

meetings that are mentioned at page 308 April, May, June, July of 2014 in the relevant columns although they mention 00:01:23 Massone, Zuma, Duma at the top they do say people who were in attendance, Massone cannot recall the identities of the other participants. So – so it goes to the point we making that the – if they did not recall the names of other people it is just that it would be strange if you do not recall the name of the Minister. But maybe they did not you know the focus may have been on the President. Okay.

- 10 **ADV FRANKLIN SC:** Thank you Chair. Then proceeding with the next of these plans AW60 page 370 this one is headed Developing the SNME Sector and it is dated...

**CHAIRPERSON:** What page?

**ADV FRANKLIN SC:** It is 370.

**CHAIRPERSON:** Okay.

**ADV FRANKLIN SC:** That is dated 22 May 2014 this seems to be concentrating on a different sector the first time. What is your take on this particular plan? What was its content and objective?

- 20 **MR WILLIAMS:** Chair nothing jumped out from this particular plan. It is sort of – these are very high level, very sort of obvious things for one to consider in thinking what a SME sector ...

**ADV FRANKLIN SC:** Alright let us not dwell on that one. The next one is AW61 page 374. This one is the – is entitled



Sirius – S-i-r-i-u-s Program reshaping South Africa's energy sector and this is dated June of 2014. And once again this is a new sector that we have not seen before. Is that correct?

**MR WILLIAMS**: That is correct Chair and here they talking about the energy sector transformation. And this is the one I mentioned earlier of putting Eskom and PetroSA and other together. I will try and find that page –

**CHAIRPERSON**: I see that here it says at page 374 Sirius  
10 Program reshaping South Africa's energy sector. Is that like now a sub item under Project Phoenix?

**MR WILLIAMS**: That is not my understanding Chair of...

**CHAIRPERSON**: Oh.

**MR WILLIAMS**: So Project Phoenix was specifically around ICT.

**CHAIRPERSON**: Oh okay.

**MR WILLIAMS**: And then Sirius was energy.

**CHAIRPERSON**: Oh.

**MR WILLIAMS**: As I understood it.

20 **CHAIRPERSON**: So would this be a program on its own? A separate on its own for the energy sector?

**MR WILLIAMS**: Correct Chair as I understand it.

**CHAIRPERSON**: Okay. Alright.

**ADV FRANKLIN SC**: Then we have another Project Phoenix plan AW62 page 386 and the heading on the top left is

Phoenix a fundamental program for a developmental state. As far as you know is that a later iteration of the earlier manifestations of this plan?

**MR WILLIAMS:** That is correct Chair. It is again a further development of the Phoenix Plan. The point we have got to here is projections of the amount – the investment that might be required to make Phoenix happen. So for example on page 387 the bottom left hand picture Bain estimates that we might have to spend R140 billion on broadband infrastructure  
10 R40 – R50 billion on e-government etcetera. Chair if I may and again this is not premature in our conversation your question about Ministers being at these meetings there is – if you looked at these document and some of the emails there is something that Bain calls or refers to as a President Project. Bain describes their work on Project Phoenix and with Telkom as a President's Project or a President's Program and in an internal email Mr Masonne explains to his Bain colleagues what a President's Program is and what a benefit of having any project designated a President's  
20 Project. And his description to his colleagues is that a President's Project allows you to circumvent the Minister and perhaps we will get – and perhaps we will get to that.

**CHAIRPERSON:** Ja okay.

**MR WILLIAMS:** So I can then double speculate – there is a speculation that why Ministers might not have been at these

meeting because these were President's Projects that only require Bain and the relevant CEO at those meetings.

**CHAIRPERSON:** Ja okay.

**ADV FRANKLIN SC:** Yes we will refer you to that at the appropriate time. Then just finishing off on these plans we have a different one AW64 page 400 this one is headed 2014 ANC Manifesto implementation discussion on way forward dated April of 2014. This would appear to be something quite unconnected with the South African economy and to be  
10 focussed rather on a political party in the country. Is that content of the plan?

**MR WILLIAMS:** That is correct Chair. It is again a departure from what Bain normally do, what you would expect Bain normally to be doing also departure from some of it other plans now clearly Bain is working with the ANC a political party to further their objectives.

**ADV FRANKLIN SC:** And there is a – at this juncture if I could refer you to an email which is AAW63 page 398 which is sent from Mr Kampano to Messrs Min and Kennedy.

20 **CHAIRPERSON:** And what page?

**ADV FRANKLIN SC:** It is 398 Chair – 398.

**CHAIRPERSON:** Okay. Yes.

**ADV FRANKLIN SC:** And the subject is ANC Manifesto documents and then it says:

“This Stuart Chris attached the ANC documents prepared by

Bain 2014 period at the time VM was helping some ANC officials which I do not know the name to reorganise their “agenda” and clarify ANC priorities. Again not my work had access to them because asked about my opinion about it. The two persons working on it were Alexis and Mondi both left.”

So this is Stephan Kampano writing to Stuart and Chris, is that right?

**MR WILLIAMS**: That is correct Chair. And Stuart and Chris  
10 are Bain’s legal executives.

**ADV FRANKLIN SC**: Right we have dealt with AW64 then 65 is another ANC manifesto plan AW65 page 408. This one is now dated the 23<sup>rd</sup> of May 2014. So it would appear to be the same topic just a later version of that plan. Is that correct?

**MR WILLIAMS**: That is correct Chair.

**ADV FRANKLIN SC**: And then AW66 ..

**MR WILLIAMS**: Mr 00:09:14 just – yes he would have...

**ADV FRANKLIN SC**: Just a second.

20 **MR WILLIAMS**: Apology Chair.

**ADV FRANKLIN SC**: Yes please do.

**MR WILLIAMS**: If I could go to page 406 of this ANC manifesto document at the bottom right – the picture on the bottom right it says:

“A delivery agency could be set up to overcome execution

roadblocks.”

And my understanding of what is conceived with this special delivery agency is that it sits outside of the executive as described here and reports direct – gets its authority from the President and so remember this is the ANC manifesto implementation. The idea is that the President sets up the special delivery agency filled with people who can then deal with execution roadblocks as they describe and some of their powers are that they can approve projects, they can  
10 supervise project budgets, they can potentially has the powers to intervene in cases of failure and even take over execution within Ministries of these projects.

**ADV FRANKLIN SC:** Can you identify for the Chair where you are reading from?

**MR WILLIAMS:** It is page 406 the picture on the...

**CHAIRPERSON:** Bottom left.

**MR WILLIAMS:** Bottom right.

**CHAIRPERSON:** Oh bottom right.

**MR WILLIAMS:** Titled A Delivery Agency could be set up to  
20 overcome execution roadblocks. Now again I do not know if this delivery agency was actually set up Chair this is a plan and a proposal but it tells us how some of the thinking around what was intended.

**CHAIRPERSON:** You see that – that reflects a direct line from the President to the CEO of – or from the CEO to the

President without intervention of a Minister so which seems to suggest that they would be that direct link. It is like the CEO would report to the President.

**MR WILLIAMS:** That is correct.

**CHAIRPERSON:** Ja. Okay.

**ADV FRANKLIN SC:** Alright and then the last of this set of plans I would ask you to look at AW65 at page 408. Do you have that?

**MR WILLIAMS:** I do.

10 **ADV FRANKLIN SC:** This is reshaping South African economy and this is March of 2014. It would appear that this is a later iteration of earlier documents of the same theme, is that right?

**MR WILLIAMS:** The ANC Manifesto?

**ADV FRANKLIN SC:** No I am talking about the Reshaping South African Economy page 415.

**MR WILLIAMS:** 415. That is correct Chair. So we back to this sort of broad talking about reshaping the South African Economy but importantly and in my opinion more disturbingly  
20 the proposal is to discuss a central procurement capability within government. And I can add more thought to that.

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** And where do you see that? Where do you identify that?

**MR WILLIAMS:** It is right below the title Reshaping South

African Economy on page 415. There is a sub title.

**CHAIRPERSON:** Then those words Reshaping South African Economy were they not the same words that came after Sisecelo and after Phoenix earlier in earlier documents?

**MR WILLIAMS:** That is correct Chair.

**CHAIRPERSON:** Yes so they are now without either Phoenix or Sisecelo but the same matter – issue?

**MR WILLIAMS:** Correct Chair.

**CHAIRPERSON:** Subject.

10 **MR WILLIAMS:** Correct Chair.

**CHAIRPERSON:** Ja okay. But it seems that the focus is on procurement.

**MR WILLIAMS:** Correct Chair.

**CHAIRPERSON:** Ja.

**MR WILLIAMS:** Procurement across government.

**CHAIRPERSON:** Yes, ja. It should be centralised.

**MR WILLIAMS:** Correct.

20 **ADV FRANKLIN SC:** And you wanted to make observations about the idea of a central procurement service what are those observations?

**MR WILLIAMS:** Chair again there are – there are cases where as I have said before centralising consolidated makes sense. There might even be countries although therefore very few countries with centralised entire national government spend across their ministries in one place. I

mean it goes against all governance and...

**CHAIRPERSON:** Just sounds so foreign to me.

**MR WILLIAMS:** Well.

**CHAIRPERSON:** If you look at all government departments, nationally, provincially, local government everything being centralised in terms of procurement.

**MR WILLIAMS:** I think the USSR did it.

**CHAIRPERSON:** Yes.

**MR WILLIAMS:** But again this sort of level of absurdity of  
10 centralising in one place especially in the context again of  
state capture where you say how easy would this have been,  
now it is so hard to go to Eskom and Transnet and everyone  
else let us just put it all in one place.

**CHAIRPERSON:** Ja I know it might be easy for whoever  
wants to put in bids for tenders to say we will go to one  
place maybe if we get the tender we get the tender for the  
entire procurement in the country. But in terms of actual  
service delivery it must be – it could lead to serious delays  
and blockages I would think and inefficiencies. Okay alright  
20 yes.

**ADV FRANKLIN SC:** Alright could I ask you to draw certain  
conclusions from the plans which we have been through with  
reference to your affidavit firstly at paragraph 75 page 42?  
Para 75 page 42.

**MR WILLIAMS:** Sorry.



**ADV FRANKLIN SC:** And there what you say Mr Williams is:

“Judging by the content of these eleven documents that I have reviewed and attached it appears that Bain represented by Massone met with Zuma to discuss, develop and strategize the execution of these plans to reshape our economy and elements of our government.”

So that is a conclusion which you reached. And then if we  
10 could jump down the paragraph about ten lines from the bottom you say

“The identical approach was followed with Moyane and SARS. Bain developed the SARS restructuring plan with Moyane which Moyane presented to the President most likely with Bain in attendance.”

And then you have referred to Mr Massone’s partner – I am sorry yes partner self-assessment form which is AW67 and I would like to turn to AW67 please which is at page 420.  
20 While you looking can you confirm that this is a procedure which Bain has in place i.e. assessment no doubt annually or perhaps more frequently of partners and as part of that a partner would do a self-assessment?

**MR WILLIAMS:** That is correct Chair. So there is annual process where the first step of your assessment is you

yourself assess your performance. Each partner has a set of targets and goals for the year so effectively you just assess yourself against those targets then others will comment and refine that assessment.

**ADV FRANKLIN SC:** So let us look at Mr Masonne's assessment for December of 2013 and over the page on page 421 the second paragraph it says the following:

"As"

**CHAIRPERSON:** Did you say page 421?

10 **ADV FRANKLIN SC:** That is correct 421 second paragraph starting as a halo effect.

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** He says:

20 "As a "halo effect" of the relationship with Siphon and the role we played in the Phoenix Project we have been involved in preparing a high level outline in "strategic turnaround" document on the SA Revenue Services SARS. The person we prepared the document with and who pitched it to the SA President is most likely going to be appointed as Commissioner in the next few weeks/months and Bain will be assisting him should he get the job. SARS is one of the largest and highly estimated government

agencies and a large Bain client in the previous dispensation (the '90's)."

Can you please just elucidate for the Chair what you understand Mr Massone to be confirming at that point in time December of 2013?

**MR WILLIAMS:** So Chair my understanding of the reference to Sipho firstly that is Mr Sipho Maseko just in the context of Phoenix obviously and Mr Massone's saying to his bosses the benefit of us having built this great relationship with Mr  
10 Maseko and having implemented Project Phoenix was that it led us to this other new relationship with SARS. And Chair importantly here and I know we will discuss the relationship between Bain and Mr Moyane later. Mr Massone is not describing to his bosses that he offered coaching to Mr Moyane. No point does he actually make reference to coaching here. He is saying we developed a strategic turnaround document for the South African Revenue Service. He also say this was developed with Mr Massone – Mr Moyane and that Mr Moyane pitched this document to the  
20 President presumably to get the job. And so in my mind this talks about one the relationship with Mr Maseko and the benefit Bain saw that into SOE's and state organs but also this relationship with Mr Moyane was one where Bain had developed a strategic turnaround document for SARS before either Mr Moyane or Bain were at SARS.

**CHAIRPERSON:** Now this what he is saying here at page 421 is that – is he saying that in effect on the 6<sup>th</sup> of December 2013 which is about what nine months, ten months before Mr Moyane was appointed Commissioner of SARS so he is already saying at that time 6 December 2013 Mr Moyane had already pitched the document to the President, is that right?

**MR WILLIAMS:** That is correct Chair. So this is even earlier the email you read earlier.

10 **CHAIRPERSON:** Yes.

**MR WILLIAMS:** That is in February 2014.

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** Bain had some indication.

**CHAIRPERSON:** Yes.

**MR WILLIAMS:** That Mr Moyane was going to be commissioner.

**CHAIRPERSON:** Yes.

**MR WILLIAMS:** This is even earlier.

**CHAIRPERSON:** Ja this is even earlier. Okay.

20 **ADV FRANKLIN SC:** Thank you Chair.

**CHAIRPERSON:** And this is – this is while Mr Gordhan was still Minister of Finance 2013 – ja okay.

**ADV FRANKLIN SC:** Then I wish to take you to another paragraph in which you have drawn conclusions and that is para 82 on page 45. 82 page 45. There you say:

“Though interspersed with some sensible analysis what emerges from a closer review of the eleven strategic planning documents described above is a strategy to enable grand scale state capture a pattern now well known to South Africa.”

Is that a conclusion to which you ascribe and stand?

**MR WILLIAMS:** Chair I do. On my reading of those documents and those plans as I described earlier the  
10 commission had asked me to offer and this is my opinion. This is my opinion on reading those documents it appears to me that this was not just marketing between Bain and the President that there was some planning going on – what planning was going on it was not planning to improve service delivery at a grassroots level it was planning around restructuring sectors and state enterprises.

**ADV FRANKLIN SC:** What you then do is to set out your understanding of the strategy we need not go through it if – but I wish to just highlight the various stages that you have  
20 identified. You say Stage A is create a new macro structure in the target sector and then you have various steps underneath that. Stage B restructure individual organisations within the macro structure and Stage C exert control of the reshaped economy through control of those repurposed organisations and pursue private, financial

enrichment through corrupt procurement or other means.

Now did you see in the plans that we have identified for the Chair and which you have been through do you see elements of these stages and if so can you expand?

**MR WILLIAMS:** Chair I absolutely do. So I firstly developed obviously there is no document that states this plan I synthesize it from reading the documents and plans but then I went back to the documents again and said can I justify my assessment of the plans? And you look at it you – if I go to  
 10 page 47 paragraph 85 of my document I look at Project Phoenix for example but can we see this three stage plan in Project Phoenix? Well Project Phoenix is about restructuring the entire ICT sector well to me that Stage A of my plan. My plan says or my assessment of the plan says restructure the entire sector first. Well Bain is proposing restructure the entire ICT sector. Stage B of my plan says restructure entities within the macro structure. Well Project Phoenix again Bain talks about creating a bank of the people a separate TV company or radio company. That is within the  
 20 macro structure restructure then. Then Bain talks about appointing a new CEO and Chair of those companies and again we look at the appointment of the new CEO and Chair of Telkom. So in my mind it is not perfect – a perfect match but you can see elements of this plan at play in both Project Phoenix particularly around Telkom and then the energy plan

which was again lump everything together, restructure Eskom. The proposal is new chairman, new CEO and Chairman of Eskom. So again put in a line management and then we look at the same plan at SARS.

**ADV FRANKLIN SC:** Thank you then paragraph 87 on page 47 you have expressed a further view which really takes us to what the Chair what had asked you and it is this.

10            “If Bain was genuinely developing ideas to improve certain SOE’s or sectors of our economy I would expect that they would present such plans to the DG of the appropriate ministry or the minister not to the president.”

But just pausing there it appears that what the Chair had raised with you earlier is the sentiment that you have recorded here.

**MR WILLIAMS:** That is correct Chair.

**ADV FRANKLIN SC:** And then carrying on with para 87.

20            “But there seems to have been a very specific beneficial reason for presenting these to the President that one might not ordinarily expect. It is suggested in the Phoenix document and the energy sector strategy document that these projects be designated a President’s Program.”

Again that is a concept which you referred to earlier they are referred to in those documents and then you continue.

“The significance of designating a project in this way is gleaned from an email that Masonne sent on 18 May 2014 to a group of global Bain partners after his meeting with Monwabisi Kalawe then CEO of SAA.”

And then you have quoted from Annexure AW76. Right I think that is self-explanatory but would you perhaps just  
10 elucidate for the Chair you have referred earlier to the significance of designated a project as a President’s Project but in a word what is the benefit of it?

**MR WILLIAMS:** I think essentially it just – it removes governance and oversight. It allows SOE’s or state organs to go direct to the President bypassing what Mr Masonne describes as the Ministers discretionary power to eliminate that deal directly with the President.

**ADV FRANKLIN SC:** Let us go to AW76 page 447. That is the email which is sent by Masonne to various addressees  
20 the subject is SAA and the date is 18 May 2014. Please look at the last paragraph on page 447.

“The immediate concern for him which will maybe slow down the process in the next couple of weeks is the whole government issue – sorry governance issue. Both his board (change/add members modified



DOA) and even before that his reporting minister (Public Enterprises). I am told there is going to be a change and that they will try to make this a “President’s Project” like Telkom so as to eliminate the Ministers discretionary power.”

That is what you referring to?

**MR WILLIAMS**: That is exactly Chair. So the context of this email was that Bain had met with the SAA CEO to do some work there. The SAA CEO had raised concerns and Mr  
10 Masonne is reporting back to his colleagues saying but we will - they are working on it – I do not know who the they is but they are working on making SAA project a President’s Project and as you know from our Telkom experience once the President’s Project we can circumvent the Ministers discretionary power. So this was an effort - they were not going to do this at SAA. It is also present in those documents we discussed earlier.

**CHAIRPERSON**: Of course, one continuous to wonder why they had identified there to be a need to dispense with  
20 the ministers. Why it was important to them that it should be a President’s programme without a minister because I would imagine it could be a President’s programme with the minister. Ja, I guess you might not be able to say anything about it.

**MR WILLIAMS**: I think it is... Chair, answer that... so as

to eliminate the minister's discretion...

**CHAIRPERSON:** Yes, that is what I am talking about.

Why it was ...[intervenes]

**MR WILLIAMS:** Why ...[intervenes]

**CHAIRPERSON:** Why it was important that the minister's power be eliminated. Ja.

**ADV FRANKLIN SC:** Why would you ...[intervenes]

**CHAIRPERSON:** Ja.

**ADV FRANKLIN SC:** Why would you that might be

10 Mr Williams?

**CHAIRPERSON:** H'm?

**MR WILLIAMS:** I got no idea Chair.

**CHAIRPERSON:** [laughs]

**MR WILLIAMS:** A lot of... I have expressed a lot of opinion which a lot of people have said makes me a very bad person already. So I am not going to... on that.

**CHAIRPERSON:** Ja.

**MR WILLIAMS:** ...a thing.

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

20 **ADV FRANKLIN SC:** Could I take you out of the SARS Bundle 01 just for a moment? Chair, I understand you would have the Bain application before you which is SEQ-44/2020.

**CHAIRPERSON:** Somebody must make sure you have got the bundle. Somebody must make sure Mr Williams, the

witness, has got the relevant bundle. They are normally put behind the witness. I think Mr Williams has seen other witnesses doing that. [laughs] Look at the back.

**MR WILLIAMS**: They are discriminating Chair.

**CHAIRPERSON**: Ja... But you see, if you put them far from him, it is going to take longer and delay us whereas if they are all close to him it is going to be easy. They will bring it to you Mr Williams.

**MR WILLIAMS**: [No audible reply]

10 **ADV FRANKLIN SC**: Thank you, Chair. I think I sprung those on the team, I am afraid.

**CHAIRPERSON**: No, that is fine. What page is it?

**ADV FRANKLIN SC**: So the affidavit that I wish to refer to is the affidavit of Mr Min which starts at SEQ-44/2020, page 10. That is the beginning of the affidavit.

**CHAIRPERSON**: Okay. So ...[intervenes]

**ADV FRANKLIN SC**: And I wanted to take ...[intervenes]

**CHAIRPERSON**: Page 10?

**ADV FRANKLIN SC**: I wish to take the witness to page  
20 50. You will see at the top of the page.

**CHAIRPERSON**: Just hang on one second Mr Franklin.

**ADV FRANKLIN SC**: [No audible reply]

**CHAIRPERSON**: Looking at the red numbers here, is that right?

**ADV FRANKLIN SC**: That is correct. Top right-hand side.

**CHAIRPERSON:** Ja. And this would be page 50?

**ADV FRANKLIN SC:** That is correct.

**CHAIRPERSON:** Which is page 41 of the affidavit.

**ADV FRANKLIN SC:** That is correct.

**CHAIRPERSON:** Ja, okay alright.

**ADV FRANKLIN SC:** I just wish to direct the witness's attention to what Bain have said in their application to cross-examine...

**CHAIRPERSON:** H'm?

10 **ADV FRANKLIN SC:** At 89, they say:

“It became clear that Mr Massone had met with Mr Zuma on multiple occasions.

Although Bain was aware that Mr Massone had met Mr Zuma, we did not know the number or extent of those meetings...”

And then in 90:

“Mr Williams is right that Mr Massone pitched a number of ideas to the former President, Mr Zuma...”

20 And the he says:

“When I first found these documents in September 2018, I described in a letter to the Nugent Commission as ideas for improving the well-being of the people of South Africa whereas Mr Williams describes a more sinister

purpose to them...”

And then over the page, still in paragraph 90,  
what Mr Min says:

“Certainly, there is nothing in the documents themselves that suggests that they were intended for any criminal or unlawful purpose.

Mr Williams identifies the proposal for centralised procurement agency in particular as evidence of attempts to help repurpose public entities and to enable state capture (the so-called Big Scheme).

As Mr Massone explains that the central procurement agency was based on a model operative in Italy where governance supply chains are centralised to take advantage of economies of scale and thereby derived on prices.

This explanation is far removed from the intentions that Mr Williams attributes to the idea but I accept that only Mr Massone can speak to this directly...”

Just to pause there. If I could get your response. Essentially, I understand Bain through Mr Min to be saying nothing untoward at all about the series of meetings between Mr Massone and the former President.

And there is nothing untoward about the content of any of the plans and indeed the one particular relating to the central procurement agency is simply based on a model which is operated in Italy.

So a benign stance is put on it or benign stance is put forward. What is your response to that?

**MR WILLIAMS:** Chair, it seems or firstly, as I have said, mine is an interpretation of what I observed with no given intent other than what I observed. I – the fact that this  
10 happens in Italy, for me, is irrelevant in this context. I am not even sure what really happens in Italy from what I can tell. But the fact that it is Italy, for me, it is completely irrelevant about whether it would work here. It is – the context in which it is happening.

One. Who we were discussing this with. Two. The fact that this is a set of discussions that are happening with our President after hours, behind closed door. That means, it is not in Mr Massone's diary even labelled "meeting with the President". It is *ubaba* or...  
20 That sort of – what is in his diary.

That is why no one can tell exactly whether these things happened or not. It shows a level of familiarity. The context of these meetings, the frequency of them, the nature of them, for me says, you cannot just denying explanation on them.

A central procurement agency... they offer Italy as an example. I think some people might describe Italy as quite a corrupt country. So it is strange that that will be the example they used. The fact is, there are very few countries in the world that centralise their procurement across government. It makes no sense to me at all.

So I would reject this benign explanation of it because the way it is described, what is trying to achieve in terms of restructuring and consolidation, the fact that it  
10 has been presented to the President, to me, it is not benign at all.

**ADV FRANKLIN SC:** Yes, thank you. If we could go... You could perhaps put that file to one side and go back to SARS 1, Bundle 1. And I am now going to take you to various plans which relates to SARS specifically.

And if I could start that process by directing your attention to AW-68, page 423 which is an email from Mr Duma Ndlovu to Mandla KaNozulu and Massone, dated the 22<sup>nd</sup> of May 2014. The subject is, Meeting with the  
20 Principal. I would like to look at the second paragraph, please.

**MR WILLIAMS:** [No audible reply]

**ADV FRANKLIN SC:** Following...

“You should also have the new 100-days document (The final version that was

discussed with Glen.) (The one that is ready to be presented next week. We should also present whatever questions we still have...”

Do you know what that is a reference to?

**MR WILLIAMS**: Chairman, I think but I am not a hundred percent certain. There definitely was 100-days document prepared for Mr Tom Moyane and that was labelled TM 100-days but there were also other documents labelled 100-days.

10 **ADV FRANKLIN SC**: Alright. Well, then let me rather take you to the plan itself.

**MR WILLIAMS**: Okay.

**ADV FRANKLIN SC**: Please turn to AW-92, page 492. That is indeed a document headed TM first 100-days, May 2014. And I would like to pause on it, please. As you probably know, it featured in the Nugent Commission hearing and I think it deserves some attention.

So please would you explain to the Chair your understanding of what the purpose of this plan was and  
20 then I will direct your attention to certain parts of it.

**MR WILLIAMS**: So Chair, it is fairly standard for a new – when Bain works for the new executive, new CEO and using executives at a business to develop, what is called a first 100-days plan. I think President also had a first 100-days plan.



But it is the idea of preparing to the extent you can from the outside what to expect in broad terms when you get there and some of the things you might not do. It is effectively your agenda. You attend this new job, you can expect the following things. Based on Bain's years and years of experience, typically, these are things new executive encounter.

So it is sensitising you to what you might expect when you get there. So that would be typically what the  
10 first 100-days document would be. Chair, you typically only present this to an executive when you know he or she has got the job. Because why else would you present this 100-days plan for somebody who has got the new job?

So again... on the 26<sup>th</sup> of May 2014. Again, months before Mr Moyane is appointed as the Commissioner of SARS. So again raising that question around when did they know and when did Mr Moyane know that he has this job? Just the – that is the one that sort of red flag, it jumps up is. Why would you invest significant  
20 time with someone, presumable, when you have no assurance that he was going to get that job?

The second comment just on this document, that some of it got some fairly standard stuff that you will expect that Bain would share. But what surprised me is that in some places the level of specific guidance suggest

that this was not just purely based on the outside in – looking from the outside in.

It suggests – and we can talk about what those might be. That there might have been some insight information coming from inside SARS out. And even then, Chair, as an outside being a consultant, as I have said, these documents typically would be to marry because it is based on what you might know.

Now the more specific as you get as a consultant  
10 would depend on how well I know the organisation you are going to. So if I say I had been working as a consultant, advising SARS for ten years, I know SARS.

So let me tell you Mr New Commissioner what you can expect because I know, I have been there for ten years. No one at the Bain team had been in SARS.

In fact, across Africa Bain had no tax authority experience. So on what grounds Bain would develop this outside in expertise to begin to develop these specific types of recommendations, again for me, raise another red  
20 flag.

**ADV FRANKLIN SC:** Please look at page 493 at the bottom of the page on the right-hand side. This is under the heading, Key Immediate Actions for Discussion, on the left-hand side and there are three steps.

1. Keep the ball rolling.

2. Gain the higher ground.

3. Take control.

And then on the right-hand side of the page in the middle:

“Build a healthy sponsorship spine to accelerate change and identify individuals to neutralise...”

Then on the right-hand side, the second... I am sorry. The... Yes, second bullet point:

10 “Leverage external influences...”

And the third one:

“Identify individuals that could hamper change – watch outs – to neutralise...”

Now that is cryptic but your understanding of what the sentiment behind this is?

**MR WILLIAMS**: So Chair, if I can talk to the slide at the bottom left first, the one that has titled: Key Immediate Actions. That third column that says: Take Control.

**CHAIRPERSON**: So are we still at 493?

20 **MR WILLIAMS**: That is correct Chair. Bottom left.

**CHAIRPERSON**: Bottom left. I see, keep the ball rolling...

**MR WILLIAMS**: Gain higher ground and take control.

**CHAIRPERSON**: Oh, ja. Gain the high ground. And then three, take control. Yes.

**MR WILLIAMS:** I just want to point out just a few items there under, Take Control. Again, this is in May 2015, many months before Mr Moyane ...[intervenes]

**CHAIRPERSON:** [Indistinct]

**MR WILLIAMS:** Sorry?

**CHAIRPERSON:** 2014, is it not?

**MR WILLIAMS:** Ja.

**CHAIRPERSON:** It is May 2014?

**MR WILLIAMS:** May 2014.

10 **CHAIRPERSON:** Slash 2015.

**MR WILLIAMS:** Apologies.

**CHAIRPERSON:** H'm, h'm.

**MR WILLIAMS:** It is May 2014, many months before Mr Moyane is meant, even to be announced, to be the Commissioner. From the outside, supposedly, Bain is able to tell Mr Moyane the very last point:

“Hi, your new assistant...”

If you from the outside – from the outside looking in, how would he even possible think of doing that, suggesting that? The point above that:

20

“Set up a Transformation Programme office...”

Four months before he even got the job... you do not even know you are going to get the job but we think he should be setting up a Transformation Programme office. This talks about intent of already having a Transformation

and Restructuring Programme. The point above that:

“Assess key roles to introduce new people...”

I think that is a sensible point. Two point above that:

“Launch a forensic investigation...”

Again, Chair, Bain would claim that they developed these documents from public information. On what grounds... in May 2014 do you tell the new Commissioner or the supposedly Commissioner to launch a  
10 forensic investigation?

**CHAIRPERSON:** What is your understanding of who they are referring to when they say: Hire a new assistant. They cannot be really talking about a PA here.

**MR WILLIAMS:** It might be a PA, Chair. It might be... Well ...[intervenes]

**CHAIRPERSON:** Why would they be bothering about [laughs] who the PA – what PA he would have? That is why I am just asking but it may well emphasise the point you make, the kind of detail they might have had about things  
20 that are – one would expect only people inside SARS to know. But if they were talking about hire a new Assistant Commissioner, I could kind of understand.

**MR WILLIAMS:** Ja.

**CHAIRPERSON:** To say: We think you do not have in this structure, in the organisation. Maybe there is no provision

for an Assistant Commissioner, Deputy Commissioner.

**MR WILLIAMS**: Yes.

**CHAIRPERSON**: You will need to have a deputy for assistant. Then I would understand but if they are talking about a PA, this seems...

**MR WILLIAMS**: I think they are talking about a PA, Chair.

**CHAIRPERSON**: [laughs]

**MR WILLIAMS**: I really think they are talking about a PA. And I think... question to ask Bain when they do come and  
10 testify. The – and we will probably get to it later but it is obvious I am pointing out the fact that it is absurd that from the outset you could know these things which must prove that they had someone inside SARS feeding them information.

**CHAIRPERSON**: Ja. I mean, if they are talking about a PA, it just seems that they were really going to – lots of details. Mr Franklin.

**ADV FRANKLIN SC**: Yes, thank you. If I could just direct your attention to the right-hand side where, as I have  
20 shown you, the plan says:

“Identify individuals to neutralise...”

Could I ask you? Is that a term that you are familiar with in management consulting when entering a new organisation that you target individuals to neutralise?

**MR WILLIAMS**: Chair, it is a term I have never – I would

never use. I have never had used in business or in consulting the idea of neutralising someone. I have seen Bain's explanation for this which is the idea of taking people who are detractors, people who might not support your plan and turn them into people who might not support you but they are neutral towards you.

**CHAIRPERSON**: [laughs] Ja. Okay.

**MR WILLIAMS**: But this is a language that in all my years at Bain, all my years of consulting, all my years for using  
10 these approaches to thinking about your team. I have never used... to neutralise someone.

**CHAIRPERSON**: What else ...[intervenes]

**MR WILLIAMS**: Similar ...[intervenes]

**CHAIRPERSON**: ... that people to keep your eye – keep your eyes on or what? To say, watch them out. Identify those at you must watch out. Identify those that you must neutralise. Is that your sense of what it is?

**MR WILLIAMS**: Exactly, Chair.

**CHAIRPERSON**: Ja, okay.

20 **MR WILLIAMS**: So, again, as a Management Consultant, going into an organisation and to bring about change is often hard and there is resistance. And so this is to be a kind of conversation I would have with the CEO for saying: Look, there are going to be some people who is going to resist this change.

You might just want to keep this in mind and then we talk how we can deal with that resistance. It is the language that for me is so aggressive because I would never say we should find those people and neutralise them. I understand what their reaction or their resistance might be and find ways of then addressing them.

**CHAIRPERSON:** Okay.

**ADV FRANKLIN SC:** I would like you then – the next plan I wish to identify is AW-100, page 154. That is known as  
10 SARS-2.0 and it is dated August of 2014. I take it that you had occasion to consider this plan? And could I ask you to describe what it is and what it says?

**MR WILLIAMS:** So Chair, this I read as a level lower in terms of detail now. Now we are saying: Okay, you got this job. What you have to go and do when you get in there? What is the real agenda? And if we turn the page to page 535, the Executive Summary, the third point. It says:

“In order to transform SARS...”

20 And already as if that is a foregone conclusion but:

“In order to transform SARS into this elevated revenue and customs agency, the government will have to run a profound strategy refresh and focus on execution to reach SARS’ full



potential...”

And Chair, that language of profound strategy refresh is again language I would never use with regard to a business. A profound strategy refresh suggests that the company is so dysfunctional or the organisation is so dysfunctional, you need to profound the redo everything from top to bottom.

And Chair there can be no one who would describe SARS in that as a dysfunctional organisation  
10 needing a profound strategy refresh. And so the premise from this document is: Okay, we have got to transform SARS.

That is what is decided already. It is already talking about set up a transformation office, you know, transform SARS and this profound strategy refresh. It is again even before Mr Moyane even gets to SARS.

**ADV FRANKLIN SC:** Yes. And just for completeness. I think that that is the point you have made in paragraph 116, page 59 of your affidavit where you said, the 2.0 in  
20 the title SARS-2.0 talks to the introduction of new technology products where ...[intervenes]

**CHAIRPERSON:** I missed the page Mr Franklin.

**ADV FRANKLIN SC:** Sorry, Chair. It is para 116, page 59.

**CHAIRPERSON:** Okay. Thank you.

**ADV FRANKLIN SC:** And perhaps I can take you to the second sentence.

“The... was clear even before Moyane and Bain arrived at SARS that they would not... merely updating the world class organisation that existed but creating something different. That is exactly why Bain would call for a “profound strategy refresh” which in the SARS-2.0 what has to be done document.

10 Words I have never seen a management consulting firm used because of its far reaching implications.

Recommending a “profound strategy refresh” to any organisation suggests that it is completely dysfunctional and needs a complete overhaul of vision, mission, strategic plans and operations including organisation structure.

20 One would be hard pressed to find any knowledgably person who can justify the claim that this is what SARS needed, yet this is exactly what Bain set out to do as reflected in the SARS-2.0 document...”

I take it you confirm that that...

**MR WILLIAMS:** That is correct Chair. And this *false*

sense(?) of urgency that the stuff must be done.

**ADV FRANKLIN SC:** Then the – I hope the last plan or model that I have to show you is AW-97 at page 511. There is a covering email at page 512 dated the 30<sup>th</sup> of October 2018. This seems to suggest that the document was produced during the Bain Investigation. Is that correct?

**MR WILLIAMS:** That is correct Chair.

**ADV FRANKLIN SC:** And please look at page 513. This  
10 is dated August of 2014 and it is a review of SARS Operating Model and Structure. Alright. Could I then take you to the proposition which you have eluded to before that the version put up by Bain and others is that: Yes, Mr Moyane was engaged with Bain to a greater or lesser extent before he was appointed as SARS Commissioner but this was simply CEO coaching as Bain normally offers to people in his position. In your experience what we have seen, is this typical of CEO coaching which Bain offers to people?

20 **MR WILLIAMS:** Chair, I think this – what actually happen, in a way, represents what typically happens at CEO coaching. I think the level of detail that is presented in these plans, who these plans were presented to i.e. the President. Even the fact that Mr Massone never describes them in his internal emails or in his assessment. He never

describes the CEO coaching. He describes his interaction as developing a high-level strategic plan. So for me this departs quite significantly from what I would expect to see from CEO coaching.

**ADV FRANKLIN SC:** Could I take you to your affidavit at page 55?

**MR WILLIAMS:** Sorry to interrupt you. We did not mention how Bain got this document. Perhaps ...[intervenes]

10 **ADV FRANKLIN SC:** You want to go back to which document?

**MR WILLIAMS:** So ...[intervenes]

**CHAIRPERSON:** Is it page 514?

**ADV FRANKLIN SC:** Page ...[intervenes]

**CHAIRPERSON:** Page 513?

**ADV FRANKLIN SC:** That is correct Chair.

**CHAIRPERSON:** Okay.

**MR WILLIAMS:** [Indistinct]

20 **ADV FRANKLIN SC:** Yes, please go back to it and explain.

**MR WILLIAMS:** So the email on page 512 is an email that emanates from the Bain's investigation and it explains how – it explains the author of this document and it explains that the author of this document is Jonas Makwakwa who is a Senior Executive at SARS.

So again, this thesis of pre-empting restructuring of SARS, this is Mr Makwakwa bringing a document to Bain before Mr Moyane is the Commissioner and the document is discussing SARS Operating and Modelling Structure.

Again, in my view Chair, it is addressing that what was happening was not just this outside in that Bain was producing. It was getting information from Mr Makwakwa and perhaps others informing this plan and that is possible why you might identify the PA needed to be  
10 replaced.

**ADV FRANKLIN SC:** Yes, thank you. Alright. So the final conclusions which you make in your affidavit on the notion that this was CEO coaching are in paragraphs 107 to 111 on pages 55 to 57 of the affidavit. In para 107, you explain what would typically be CEO coaching. Is that correct?

**MR WILLIAMS:** That is correct Chair. And I make a point there that CEO coaching is a big investment on the management consultant's part. Typically this – logically you would say you would make that level of investment if it  
20 is a relationship you already have, but Bain did not have a relationship with Mr Moyane or it is where you have got expertise about the company they are going to or Bain did not have that expertise or it is when you have got assurance that the person you are providing the CEO coaching to is actually going to get that job again pointing

to this fact that there seemed to have been common knowledge amongst some at Bain that Mr Moyane was going to get the Commissioner job at SARS.

**ADV FRANKLIN SC:** And then in paragraph 108 you say the following:

“The first indication that what Bain was doing with Mr Moyane was not mere coaching stems from an email Massone sends to superior [indistinct] 00.45 on 18 January 2014 about how they intend using coaching in South Africa.”

That is AW90. You say:

“What Massone writes is not a description of coaching at all but developing a high level strategy plan with the expectation that if this plan is approved and the senior executive gets the job Bain will most likely be hired to work with the CEO in its detailing and implementation.”

Is that correct?

**MR WILLIAMS:** That is correct, Chair. And I think this reference was sort of – it was not – it was a broader reference of Mr Massone explaining his strategy to his boss, he was saying I am going to go and engage with people under this umbrella of CEO coaching but really it is going to be about developing a high level strategy plan and so we help him get this job and so he will hire us – we talk

about public sector again, it is not how procurement should be working.

**ADV FRANKLIN SC:** Right, could I please just refer you to a couple of emails which relate to the question of whether Bain was aware that Moyane would be appointed before this announcement was made. Could I think ask you please to look at AW67.

**ADV MPOFU SC:** Chair...

**ADV FRANKLIN SC:** I see my learned friend Mr Mpofu is  
10 here.

**CHAIRPERSON:** Ja, no – oh, Mr Mpofu, do you want to interrupt?

**ADV MPOFU SC:** Chairperson, yes, I wanted to object to something that was put to the witness.

**CHAIRPERSON:** What is that?

**ADV MPOFU SC:** It is the proposal that my client, Mr Moyane's CEO – rather that the versions that were put were only that he underwent CEO coaching because last week we put a different version which has not been put to  
20 the witness.

**CHAIRPERSON:** Oh, I think he is talking about what Bain is saying.

**ADV MPOFU SC:** No, he said what was put by other people.

**CHAIRPERSON:** Oh.

**ADV MPOFU SC:** Yes, that is what he said.

**CHAIRPERSON:** Okay, Mr Franklin?

**ADV FRANKLIN SC:** I am not sure I said that.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** Well, we can play the record, that is exactly what he said. I came from the back because of that.

**CHAIRPERSON:** Well, he can mention what he intended to say if that is not what he intended to say.

10 **ADV FRANKLIN SC:** Yes. What I intended to say to the witness was that the version that has been put up Bain is that the interactions between Mr Moyane and Bain were an example of CEO coaching and I asked the witness to deal with that.

**ADV MPOFU SC:** Chairperson, that is not ...[intervenes]

**CHAIRPERSON:** It may be that what you say he said is what he said.

**ADV MPOFU SC:** No, it is not maybe, it is. I heard it, Chair.

20 **CHAIRPERSON:** Yes, ja.

**ADV MPOFU SC:** You can play the record if there is a dispute, ja.

**CHAIRPERSON:** No, no – yes, but if you did not intend to say that, he has now put it on record to say that is not what he intended to say.



**ADV MPOFU SC:** No, but Chairperson, I do not think that should be allowed. You cannot ...[intervenes]

**CHAIRPERSON:** No, no, when you speak sometimes you think you have said a certain thing but you have said something else and people who are listening hear that you said something else.

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** And then when somebody draws that to your attention you say oh no, I meant to say this. So I  
10 would think that if somebody says look, I am sorry, this is what I meant to say, that should correct it.

**ADV MPOFU SC:** No, Chair, if we were not here to hear that Mr Moyane's version is being misrepresented then what would happen?

**CHAIRPERSON:** Ja ...[intervenes]

**ADV MPOFU SC:** Obviously we respect to what it is that was said, not what you thought he was saying.

**CHAIRPERSON:** Ja. No, no, no, I think we should leave it as this because Mr Franklin says he did not intend to say  
20 that, he intended to say something else but if you would like to place on something on record in regard to that ...[intervenes]

**ADV MPOFU SC:** I would.

**CHAIRPERSON:** Ja, we can – maybe if we can do – you can do so when we start – no, no, maybe you should do it

now.

**ADV MPOFU SC:** I can do it now.

**CHAIRPERSON:** Because that other matter will be another matter. Okay, just place on record what you want to place on record. If you able to do it from there, that might be more convenient.

**ADV MPOFU SC:** Yes, I can, Chair.

**CHAIRPERSON:** Ja, ja.

**ADV MPOFU SC:** Chairperson, I want to place on record  
10 that contrary to what was put to the witness on...

**CHAIRPERSON:** For the record I just say because I do not think you were here when we started, that Mr Mpofu is counsel for Mr Moyane. Okay.

**ADV MPOFU SC:** That is correct, Chair. On the 3 March 2021 we submitted to this Commission and affidavit of Mr Moyane which was a reaction to statements made by various persons listed at 4.1 of that affidavit as Mr Pravin Gordhan, Mr Vlok Symington, Mr Johann van Loggerenberg and Mr Athol Williams which are the affidavits that – so I  
20 will not deal with the other people.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** That part that is from page 18, it deals with the evidence of Athol Williams. Then I will jump a lot of what is said. We say in paragraph 65 that – we summarise the version, that you know, Chair, then we say:

“It is not clear how all of the above, if true, translates into my personal involvement in or knowledge of state capture or even the capture of SARS and if so, for what unlawful purpose.”

And then the specific passage, Chair, which deals with ...[intervenes]

**CHAIRPERSON:** With coaching.

**ADV MPOFU SC:** CEO coaching, yes.

**CHAIRPERSON:** Ja.

10 **ADV MPOFU SC:** You will find that at paragraphs – okay, there is a bit of history which I do not need to go through.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** Which is paragraph 66, 67. I think I will start at 66.6, Chair, I will not be long.

**CHAIRPERSON:** Ja, okay.

**ADV MPOFU SC:** It says that:

“During a follow up visit to the President to discuss the matter I happened to find him...”

Mr Massone.

20 “...in a matter with the Chairman and CEO of Telkom in the presence of the managing director of Bain who introduced himself as a Mr Massone. He informed me that he was assisting Telkom in strategy with great results. I took his business card or we exchanged telephone numbers. All this

happened in the waiting area while I was waiting my turn to go inside. On a subsequent date and after doing my own research on his company I contacted the gentleman and informed him confidentially that I was earmarked to potentially take up the position of SARS Commissioner if the President was to serve a second term, as explained above. He in turn informed me that ...[intervenes]

**CHAIRPERSON:** I thought, Mr Mpofu, you were going to  
10 say something like you want to place on record that for example your client was not given CEO coaching or something like that.

**ADV MPOFU SC:** Yes, that is exactly where I am, Mr Chair.

**CHAIRPERSON:** Yes, ja.

**ADV MPOFU SC:** Sorry, maybe I gave you too much background.

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** But that is where I am going, Chair.

20 **CHAIRPERSON:** Yes, ja.

**ADV MPOFU SC:** It says, okay:

“He in turn informed me about a programme of CEO coaching...”

Which is what the Chair is talking about.

“...in which I expressed an interest to undergo as I

was in any event doing extensive research on the workings of SARS, like some of the previous appointees, including Mr Gordhan and although I felt well-qualified for the position, I did not have any experience in taxation but I was a generalist manager or a senior executive in the public sector.”

This is the important part, Chair:

“Indeed we embarked on the agree low key preparation and coaching covering general CEO or leadership training but also obviously targeted towards my forthcoming potential posting at SARS.”

That is the point I am making, Chair. So there is a version before this Commission that explains that the CEO coaching went further than normal CEO coaching ,let us assume there is such a thing and also included the fact that there was a potential of Mr Moyane going to SARS.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** And I think it is unfair to put the contrary.

20 **CHAIRPERSON:** Okay. Mr Franklin, I do not know if you want to say anything or just proceed.

**ADV FRANKLIN SC:** No, I am slightly mystified by the ambit of the objection.

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** I was dealing with Bain and what

Bain had said.

**CHAIRPERSON:** Ja. Okay, not that ...[intervenes]

**ADV FRANKLIN SC:** I do not recall trying to put a version but if I did, I was not intending to and I will clarify that.

**CHAIRPERSON:** Okay, alright.

**ADV FRANKLIN SC:** The version that Mr Moyane puts up is clearly in his affidavit and in due course, if necessary, I will ask the witness to comment on that.

**CHAIRPERSON:** Ja, okay.

10 **ADV FRANKLIN SC:** So that really is all I need to say.

**CHAIRPERSON:** Okay, I think let us leave it at that, Mr Mpofu.

**ADV MPOFU SC:** Well, Chair, I am sorry, I cannot leave it at that. If Mr Franklin did not say what he said inadvertently then he must say so. If he did then he must retract, he cannot be mystified.

**CHAIRPERSON:** Well, he has said he did not intend to say that, Mr Mpofu.

**ADV MPOFU SC:** Well, then he must retract those words.

20 **CHAIRPERSON:** Mr Franklin?

**ADV FRANKLIN SC:** I think I have made myself clear.

**CHAIRPERSON:** Ja.

**ADV FRANKLIN SC:** My learned friend has arrived, I was not even aware he was here.

**CHAIRPERSON:** Ja.

**ADV FRANKLIN SC:** And he made an objection  
...[intervenes]

**CHAIRPERSON:** Ja, no, we are going to proceed.

**ADV FRANKLIN SC:** Yes, thank you.

**CHAIRPERSON:** Proceed, Mr Franklin.

**ADV FRANKLIN SC:** Thank you. Chair, I see that it is  
now nearly five o'clock and as you know, the programme  
calls for the – a continuation of the cross-examination of  
Minister Gordhan and the parties were put on notice to be  
10 available from four o'clock and that it would start at the  
latest five o'clock. We discussed the issue of how to then  
complete Mr Williams' evidence. The suggestion was made  
from the Chair that it might be possible to complete it after  
the cross-examination has taken place. We have  
discussed the matter and we think it far preferable to  
complete his evidence tomorrow rather than this evening.  
Mr Williams is available to do so and hopefully it will not  
take too long to do that. So with your permission may I  
suggest that we move to that segment of the day's  
20 proceedings which is the continuation of the cross-  
examination.

**CHAIRPERSON:** Yes.

**ADV FRANKLIN SC:** The completion thereof and the re-  
examination of the witness.

**CHAIRPERSON:** Yes. I take it when you say we

discussed you include the legal representatives of the various parties.

**ADV FRANKLIN SC:** Yes, I have discussed informally with the legal representatives of Mr Williams and of Bain.

**CHAIRPERSON:** Ja, okay, alright. Okay, Mr Williams, we are going to postpone your evidence to tomorrow. I think you should be here at half past nine and then we will continue with your evidence then. I will adjourn now for ten minutes or so to enable whatever – what needs to be  
10 done so that we then start with the evening session which will be a continuation of Mr Gordhan's cross-examination by counsel for Mr Moyane and, ja. Okay. We will adjourn for ten minutes. We adjourn.

**ADV FRANKLIN SC:** Thank you, Chair.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Good evening Mr Mpofu, good evening everybody.

**ADV MPOFU SC:** Good evening Chairperson.

20 **CHAIRPERSON:** Good evening Mr Gordhan. His picture is not on the screen. Let me tell you in the meantime what I thought of since you left my chambers, all legal teams. I think it is better that before the cross-examination starts we sort out the issue of the parked issues.



So that when Mr Mpofu starts whatever time I give he knows he has got to – if those issues may be dealt with in cross-examination he has got to put to accommodate them within the time that is given, rather that he first exhausts his time and then we have the discussion.

Good evening Mr Gordhan. Can you hear me?

**MINISTER GORDHAN:** Good evening Chairperson.

**CHAIRPERSON:** Yes, can you hear me or is it ...[intervenes]

10 **MINISTER GORDHAN:** There was a slight interruption, but I can hear you now.

**CHAIRPERSON:** Yes, okay, alright, thank you very much. I have just said to the legal teams that before the cross-examination resumes I would like us to resolve issues which they say we parked aside previously. It seems that we should deal with them so that when I give Mr Mpofu a time within which to complete his cross-examination he knows whether his cross-examination should or should not include those issues, rather than dealing with those issues  
20 after he has finished his cross-examination.

**ADV MPOFU SC:** Thank you Chair.

**CHAIRPERSON:** Yes, let us – or do you want to place on record what you wanted to place on record, I do not think you should take more than five minutes for that, is that fine?

**ADV MPOFU SC:** That is fine Chair.

**CHAIRPERSON:** Yes okay.

**ADV MPOFU SC:** Yes, so what I will say – good evening Chair.

**CHAIRPERSON:** Good evening.

**ADV MPOFU SC:** What I propose to do then Chair is, in this session of just the practical issues, is to deal with that matter where you giving me five minutes.

**CHAIRPERSON:** Ja.

10 **ADV MPOFU SC:** And then I will then take the Chair to, the practical issues.

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** And then we go from there.

**CHAIRPERSON:** That is fine.

**ADV MPOFU SC:** Thank you. Chair, the first issue as we indicated in our letter, was something we were raising in the form of a complaint, I think, and where we needed a ruling, but the Chair does not give a ruling now because of time issues. I will paraphrase it as follows Chair, the – it  
20 is the complaint against the Evidence Leaders or what we call an ill-fated attempt to curtail the ambit of the cross examination.

Chair had given five topics on which we could cross examine originally, I think they were called A, B, C, D, E to save time I will not go through all five. But for shorthand

and say that category one and category two issues and the Evidence Leaders seem to suggest that the category one issues have fallen away, that was the expression that was used.

And that was on the basis Chair that it turned out and it is one of those bizarre things that everyone missed it the Chair, myself, and Mr Gordhans's legal team in Judge Nugent. There was a technicality as to whether the complaint that was laid with the Police by Mr Moyane had  
10 actually included Mr Gordhan by name let me put it that way.

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** It turns out that after all those learned people had looked at it he had not included him by name and I will show when we deal with that, that actually he did say, is laying a charge against A, B, C, D and all other people who might be involved, but admittedly he had not mentioned Mr Gordhan by name.

Now, what then happened is that, on that  
20 technicality, the Evidence Leaders sought to say that cross examination on issues A, B, C should fall away, because a chance formulation had said in so far as Mr Moyane laid charges against Mr Gordhan and in when we were asking, I then questioned Mr Gordhan and he said he stands by everything A to E and this is all on the record, Chair. I do

not have time now to take you there.

And in fairness to my learned friend Ms Le Roux even when she objected at some stage, she also said the cross examination should be on those five issues. So the ruling that we really wanted Chair, is that it is not going to increase the cross examination or attract new questions but it is that the cross examination should be on the five issues that were identified in your ruling, as it were, irrespective of the fact that Mr Gordhan was not one of the  
10 named persons.

**CHAIRPERSON:** I need you to refresh my memory on my ruling and I do not know whether it is in this file.

**ADV MPOFU SC:** Yes, you have got it in front of you Chair, it at page, PFM 771.

**CHAIRPERSON:** 71?

**ADV MPOFU SC:** 761, it will be your second file.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** Chair, that is where it starts at 761.

**CHAIRPERSON:** Yes.

20 **ADV MPOFU SC:** And then - but I want to take the Chair specifically to 772.

**CHAIRPERSON:** Yeah.

**ADV MPOFU SC:** There you will see Chair at 27 you give the reasons and then you say, you said:

“Before this Commission it must rank as the most

serious allegation or statement for it to be said that you performed your official duties in order to advance the objective of State Capture, and speaking generally such a person should be granted leave to cross examine.”

But you can just jump to paragraph 28 Chair.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** You say:

10 “In the result my decision is the following, subject to below.”

And that was just that we had to file an affidavit which was done.

20 “Mr Moyane is hereby granted leave to cross examine Mr Gordhan on A, whether in laying a criminal complaint or charges against Mr Gordhan, Mr Moyane acted maliciously. B, whether in laying a criminal complaint against Mr Gordhan, Mr Moyane was motivated wholly or in part by or he sought to advance the objectives of State Capture. And C, whether in laying the criminal complaint against Mr Gordhan. Mr Moyane was abusing a legal process for his own personal goals that had either nothing or little to do with a legitimate complaint relating to an alleged crime.”

I will not read the other two because there is no

controversy with the other two. Now, as I have explained Chair, the gist really of – and Mr Gordhan again in fairness, I put this question to him. The gist of what he was saying was that in the laying of the charges, whether it is against him or against whoever it was in pursuance of the State Capture motive, and that is the legal gravamen.

The technicalities, like say somebody accusing me of doing something on a Tuesday, and then it turns out that I did this on a Wednesday, I still have a right to challenge  
10 that and...[intervene]

**CHAIRPERSON:** Hang on one second and I do recall that what transpired was that or at least as I understood it, in the complaint that Mr Moyane laid it was understood or at least I understood that it had not included Mr Gordhan. Is that factually correct?

**ADV MPOFU SC:** No, that is factually correct there is no debate about that.

**CHAIRPERSON:** There is no debate about that.

**ADV MPOFU SC:** No, no.

20 **CHAIRPERSON:** So that A, should fall away because if he did not lay a criminal complaint against Mr Gordhan the question of whether he did so maliciously does not arise.

**ADV MPOFU SC:** No, the way - in the, in the cross examination of Mr Gordhan that issue was clarified that in the laying of the charges per say is what was in pursuit of

State Capture.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** And also Mr Gordhan agreed that the laying of those charges is what led to his – not arrest, prosecution. So in other words, the setting in motion, starting with the complaint is really what led to his prosecution, and that is what he was complaining about.

So that is exactly the point I am making Chair, that the technicality...[intervene]

10 **CHAIRPERSON:** The malicious, malicious...[intervene]

**ADV MPOFU SC:** The malicious was considered.

**CHAIRPERSON:** The malicious has fallen away.

**ADV MPOFU SC:** No, he conceded the malicious was there, the motivated wholly or in part...[intervene]

**CHAIRPERSON:** He sought to advance the objectives.

**ADV MPOFU SC:** Yes, he conceded that, and then the...[intervene]

**CHAIRPERSON:** I am sorry, when you say he conceded you mean?

20 **ADV MPOFU SC:** I mean, he personally in his affidavit, he said that was motivated by State Capture motive, and then here, when I put it to him, he said that was part of the, of his complaint or rather part of the so called State Capture motive. And then the third one, you will remember Chair the thing about personnel goals, but that his

personnel goals included State Capture, and that was the thing.

**CHAIRPERSON:** Well every - what is common to A, B and C, is that they are all connected with Mr Moyane laying a certain criminal complaint, is that right?

**ADV MPOFU SC:** Yes, that is the issue. That is the generic issue is the laying of the complaint that it happened.

**CHAIRPERSON:** Yes.

10 **ADV MPOFU SC:** It just so happened that in the list...[intervene]

**CHAIRPERSON:** And you say it is common cause that factually that complaints did not refer to Mr Gordhan.

**ADV MPOFU SC:** That is common cause, Chair.

**CHAIRPERSON:** And that applies to A, B and C.

**ADV MPOFU SC:** Yes, but we are saying that fact is neither here nor there.

**CHAIRPERSON:** No, no I understand I just want to, ja.

**ADV MPOFU SC:** Okay.

20 **CHAIRPERSON:** So, basically, what you may be wanting to do is to say, to the extent that Mr Gordhan says Mr Moyane in laying the criminal complaint, even if it was not against him, his sought to advance the objective of State Capture. You want to say, how did that happen, you want to explore that.



**ADV MPOFU SC:** Yes, as I simply want to say Chair that the ambit of the of cross examination must cover that part, obviously subject to the fact that the is that and Chair just give me one-minute Chair. At page 54 of the record of the transcript after I put this to Mr Gordhan this is what I said:

“Thank you Chair, anyway, the point is that.”

And I was addressing Mr Gordhan:

“You stand by all the sentiments expressed from A to E, except, of course, the technicality that the  
10 charges were not laid directly against you, but it was a complaint that led to the criminal charges.

Are we still together, Mr Gordhan? Yes.”

He stood by his...[intervene]

**CHAIRPERSON:** So your argument is the same for A, B and C?

**ADV MPOFU SC:** Yes, exactly the same

**CHAIRPERSON:** But you say A has a has been sorted out?

**ADV MPOFU SC:** Yes.

20 **CHAIRPERSON:** It is B and C that is...[intervene]

**ADV MPOFU SC:** It is exactly the same, Chair. In other words, all I am saying is that to put it simplistically, in the Chairs ruling, we should all just scratch out the word laid against Mr Gordhan.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** Because we know, factually, that was not...[intervene]

**CHAIRPERSON:** Okay, alright.

**ADV MPOFU SC:** And as I said Chair, Chairperson do not have to give a ruling right now I just wanted to place this on record.

**CHAIRPERSON:** Well, the only thing, of course, is that if you are going to include them in your cross examination, then you should know, when you start your cross  
10 examination.

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** Ja, let me hear what Mr Franklin and Ms Le Roux have to say. I do not know which order they want, who will start.

**ADV MPOFU SC:** Chair, in fairness if Mr Franklin is going to start then that is the ruling part, the complaint part is the fact that we are saying that it was not in the place of the Evidence Leaders to seek to curtail the cross examination in this fashion, and that is because for two  
20 years before the cross examination, these utterances were in the public domain.

And, you know, vilifying Mr Moyane for malice and the State Capture motive and so on, and to now seek, to settle him from exploring those issues is not something that should be done, by, particularly by neutral observers.

Maybe it could be done by Ms le Roux but not by Evidence Leaders. I do not know what the job of Evidence Leaders is, but it certainly cannot be to suppress the truth.

**CHAIRPERSON:** Yeah, well, I do not think they would have been seeking to suppress the truth. I think they would have been concerned about time constraints for the Commission and to say, the Commission should only focus on issues that are still alive and so on, I think that would be my...[intervene]

10 **ADV MPOFU SC:** Yes, Chair in fairness I accept that, I accept that there is no ulterior motive.

**CHAIRPERSON:** No, ulterior motive, ja.

**ADV MPOFU SC:** All I am saying is that the impact of that should not be to suppress Mr Moyane's rights.

**CHAIRPERSON:** Okay, no that is fine. Mr Franklin and Ms Le Roux, have you sorted out who will speak first?

**ADV FRANKLIN SC:** May I just – there is certain things on record and deal with him?

**CHAIRPERSON:** Ja.

20 **ADV FRANKLIN SC:** Thank you, Chair. Chair, you will remember how this all unfolded and obviously, what first happened is that Minister Gordhan made a written statement to the Commission on the 11<sup>th</sup> of September and Rule 33 was then served on Mr Moyane and because he had been implicated, he was then entitled to bring an

application which he did on the 13<sup>th</sup> of December, and he sought leave to cross examine Minister Gordhan that was opposed by Minister Gordhan.

After considering all of the affidavits as well as submissions, you made a ruling Chair on the 16<sup>th</sup> of April 2019 refusing Mr Moyane leave to cross examine on the long list of topics that he had indicated that he wished to cross examine on. However, there was one issue, which caused you some concern that involved the alleged laying  
10 of charges by Mr Moyane against Minister Gordhan.

And it was for that reason that you asked for a clarification the affidavit to be given by Minister Gordhan, which he did, following which Mr Moyane answered the clarification affidavit, and pursuant to all of that, the Chair made a second ruling on the 25<sup>th</sup> of November 2019 and Mr Moyane was given leave to cross examine on five specific topics, but on condition that he filed an affidavit.

So that is really the ruling, which governs the cross examination and it is there on record. As far as the  
20 procedural matters are concerned, before the cross examination, on the previous occasion, the Minister had made a request to be allowed to testify via video link, which was granted, and also he asked for an indication of the duration of the cross examination because that is an issue that has been canvassed in the application. And

having established a position from the Chair I was authorised to indicate which I did verify with my colleagues that your indicative estimate was not more than two hours, this is what...[intervene]

**CHAIRPERSON:** Or not more than an hour?

**ADV FRANKLIN SC:** No, on the previous occasion.

**CHAIRPERSON:** Oh previous occasion, yes, yes.

**ADV FRANKLIN SC:** Yeah, and so that was the indicative, the estimation on that occasion. So it was not for the  
10 Evidence Leaders to determine the duration, it is for the Chair to do so, the Chair did do so and I want to convey this to my learned friend.

And I am, of course, at a disadvantage thereafter, because I was not here since November my learned friend Mr Chaskalson stepped in on short notice for me, but I understand and I specifically asked my learned friend Ms Le Roux what the duration of the cross examination was and I am told that it was five hours.

**CHAIRPERSON:** Yes.

20 **ADV FRANKLIN SC:** I am not in a position to say if that is accurate or not, and she tells me that it is accurate. So the cross examination exceeded the limit indicatively that had been given. In preparation for the present hearing, which is the resumption of the hearing, once again, the question of duration of cross examination is raised, and I,

again, obtained from the Chair and on request what is the...[intervene]

**ADV MPOFU SC:** I am sorry Chair.

**ADV FRANKLIN SC:** Sorry, I am busy talking.

**ADV MPOFU SC:** I am sorry Chair; I think Mr Franklin is not interested in the issue that I just raised, he is on a totally different issue.

**CHAIRPERSON:** Oh, yes, no but I want to hear what he has to say, I want to hear what he is saying for now.

10 **ADV MPOFU SC:** Well, I have not come to that - If I will come to that, but I was talking about the complaints.

**CHAIRPERSON:** Yes, no, no, but I want to hear what he says I think he is coming to the point.

**ADV FRANKLIN SC:** Okay, Chair I can tell you this the background to the present situation, we find ourselves in and you asked, I was asked to establish from you what the ruling and the indication, and your indication was not more than an hour if I can convey this to our learned friends.

20 So, my learned friend, Mr Mpofu says it is not for the Evidence Leaders suppress the truth of course, that is not what anyone is doing. What the Evidence Leader is doing is conveying what is being decided by the Chair to be respected by, that is what we are doing. For the rest or what happened on the 30<sup>th</sup> of November, I have to refer to my learned friend Ms Le Roux and I will ask her to then

address the issues which have been raised in that regard.

**CHAIRPERSON:** Okay, alright.

**ADV FRANKLIN SC:** I am not able to do so.

**CHAIRPERSON:** Thank you, Ms Le Roux.

**ADV LE ROUX:** Thank you, Chair, let me just place two things on record. The first is, by our calculation using the timestamps from the YouTube video of last times appearance, excluding any interventions by Mr Chaskalson and myself, excluding adjournments just literally when  
10 there was question and answer interchange between Mr Mpofu and Mr Gordhan I counted that to four hours, 56 minutes, and 13 seconds.

That is where the five hours comes from if Mr Moyane legal team has done a similar exercise and come to a different number we can share our timestamp. Chair, on this first question of whether A to C have fallen away. I understand my learned friend's submission today to say given that it is common cause that nothing was filed naming Mr Gordhan can we just take five that out of A to C,  
20 we are obviously in your hands if that persuades you as to how to approach the question.

I would just say this in the course of the cross examination Mr Moyane his reasonableness as a SARS Commissioner in laying the charges that theme has begun in the cross examination and I assume it will continue

today.

But to the extent that is what A to C require him to cross examine about or entitle him to cross examine about, it has been covered, nothing I think is being stifled. So we are in your hands if you want to delete that portion and the topic is certainly being covered.

The final point is just say, it is very important that the record reflect that until such time as Mr Moyane filed an affidavit in the cross examination application. Minister  
10 Gordhan had never seen the complaint that was filed. He testified before that he had seen a press conference given by two of his cabinet colleagues that identified Mr Moyane as the complainant in the case that resulted in the 27 questions from the HAWKS to Minister Gordhan.

And he explained on the previous occasion when he testified before you in November 2018, as well as in the cross examination, that that is where he got the - Mr Moyane file charges against me piece of information from and when he saw the complaint that was actually filed for  
20 the first time in the cross examination proceedings. Then he said, well, now I understand I was not named.

But I understand that, you know, that complaint, case numbers became the 27 questions, became the criminal charges. So just to clarify that factual position that it was not until Mr Moyane filed his complaint



statement, after the Minister had initially testified before you, that it became clear that he had been doing that.

**CHAIRPERSON:** Okay.

**ADV LE ROUX:** Thank you Chair.

**CHAIRPERSON:** So, my inclination therefore, Mr Mpofu is to say, to the extent that Mr Gordhan's position is that he stands by sought of B and C.

**ADV MPOFU SC:** A to E.

**CHAIRPERSON:** Even starting from A, I would say that,  
10 you are entitled to cross examine him.

**ADV MPOFU SC:** Thanks, Chair.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** Thank you, chair and as I said Chair, just to allay anybody fears, I am indebted to my learned friend Ms le Roux for not blaming Minister Gordhan for having used that terminology of against him as I say everyone - I think maybe it is the fault of the newspapers, because everyone since then had laboured under the impression that that was so.

20 But it is not, it is simply to say that that technicality should not make those topics by the way.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** And we agree that then all that needs to happen is for the Chair in your ruling to take out the words against Mr Gordhan.

**CHAIRPERSON:** Well, that might not necessarily because the ruling stands, you know it is simply that the understanding now...[intervene]

**ADV MPOFU SC:** Okay, yes that ruling must be read with this ruling.

**CHAIRPERSON:** Ja, with this understanding.

**ADV MPOFU SC:** Fair enough.

**CHAIRPERSON:** Ja, ja.

**ADV MPOFU SC:** Thank you, Chair and Chair as I say  
10 that is not going to - as my learned colleague Ms le Roux says, some of this material was actually covered.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** So it is not going to necessarily and enlarge the scope it is simply to ...[intervenes]

**CHAIRPERSON:** Well, let us have certainty about how much time I am giving you.

**ADV MPOFU SC:** Yes, okay.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** No, sorry the second part of what you  
20 asked me to do was to take you to the parked issues, Chair I do not know if you have got...[intervene]

**CHAIRPERSON:** Oh, ja the parked issues, ja.

**ADV MPOFU SC:** Yes, I do not know if you have got the transcript of the 30<sup>th</sup> of November in front of you, I was told that is so.

**CHAIRPERSON:** Well I do not think I would have unless somebody has prepared it, ja.

**ADV MPOFU SC:** I was told it was on its way up so I do not know whether...[intervene]

**CHAIRPERSON:** Ja, okay, what page?

**ADV MPOFU SC:** Page 126, Chair.

**CHAIRPERSON:** Oh I am sorry, wants to say something.

**ADV LE ROUX:** Sorry, Chair just a practical question. I am not sure the Minister has a copy of the Commission's  
10 transcript.

**CHAIRPERSON:** The one that I am about...[intervene]

**ADV LE ROUX:** The one that you are about to refer to, yeah.

**CHAIRPERSON:** Yes.

**ADV LE ROUX:** That version of the transcripts I am not sure the Minister has got it.

**CHAIRPERSON:** Yes.

**ADV LE ROUX:** It is on your website; I can try to email it to him now.

20 **CHAIRPERSON:** That is fine you can do that.

**ADV LE ROUX:** So that the Minister can have that transcript. I assume the one you are going to look at is the one on the Commission website.

**CHAIRPERSON:** It would, it should be it should be I think it should be.

**ADV MPOFU SC:** I think, for the purposes of this exercise, it will not be necessary, but I agree it should be sent to him in case I refer to it in the cross examination.

**CHAIRPERSON:** Ja, okay alright. So we have sorted out the issue of you placing on record what you wanted to place on record, we have sorted out the issue of the of A, B and C and now we on the issues of part issues, ja.

**ADV MPOFU SC:** Chair, yes page 126.

**CHAIRPERSON:** Page?

10 **ADV MPOFU SC:** One, two, six of the transcript.

**CHAIRPERSON:** Oh, let us use the pagination, which is the red numbers at the top for consistency.

**ADV MPOFU SC:** I do not have them.

**CHAIRPERSON:** You do not have them?

**ADV MPOFU SC:** No, we just downloaded it from the internet.

**CHAIRPERSON:** Okay, all right, 126 of the transcript?

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** Ja.

20 **ADV MPOFU SC:** The typed page.

**CHAIRPERSON:** Okay, I have got it.

**ADV MPOFU SC:** Okay, you will see there in the middle round about line seven, Chair oh, no line five it may be that I will need the argument, this is you Chair speaking.

“It may be that I will need to be – the argument

might need to be addressed to me whether I should allow it or not particularly parked so that we can make progress. He will continue with other questions.”

He being me:

“And if he continues there are other questions that might be problematic, like this one, also, those will be parked and then when he is done, we can apply our minds to all those questions that will have been  
10 parked, do you understand?”

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** Mr Gordhan says:

“I understand, Chair.”

And then at page two, I am sorry Chair, 235 which I am told you have.

**CHAIRPERSON:** Yes, I have got it 235.

**ADV MPOFU SC:** It is TSM 1659 for the record.

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** Then, after I have said something their  
20 Chair, just above 20, Chairperson.

**CHAIRPERSON:** Well, the first one that I was talking about on the other page, should we not identify that one first, which, which issue was parked there? Okay, so that I can know what issues where were parked.

**ADV MPOFU SC:** Ja, we have to okay, Chair.

**CHAIRPERSON:** You were at page 126.

**ADV MPOFU SC:** Yes it was yes, so that it starts at 125, ja.

**ADV MPOFU SC:** Yes it was - if we go back to round about 123, Chair.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** You will remember that there was the issue about whether I could ask questions regarding Mr Zuma's involvement with Mr Moyane so to speak, in State  
10 Capture and the objection that was raised at that stage was that Mr Zuma was being implicated without being informed.

**CHAIRPERSON:** Given notice?

**ADV MPOFU SC:** Yes, but Chair in fairness on that issue, subsequently, in the cross examination, you might remember that, I asked Mr Gordhan, I do not know where the reference is, I asked him about the reshuffle, his being reshuffled, and asked him who was responsible for that and he did say it was Mr Zuma.

20 **CHAIRPERSON:** So that has fallen away.

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** Well, it has not fallen away in the sense that I think the objection was unfounded because the witness he...[intervene]

**CHAIRPERSON:** Yes, but what I am saying for today, we do not have to bother about it.

**ADV MPOFU SC:** No.

**CHAIRPERSON:** Ja, so let us look at those that I have to still bother about.

**ADV MPOFU SC:** Then look at two...[intervene]

**CHAIRPERSON:** So that cuts them down to two to five issues?

**ADV MPOFU SC:** Yes

10 **CHAIRPERSON:** Ja, okay.

**ADV MPOFU SC:** 235, if you go to 235 Chair.

**CHAIRPERSON:** Okay, yes.

**ADV MPOFU SC:** And then this one was, it was this issue that we just spoke about, of the A, B, C, and all that:

20 “And then I did deliberately avoid this debate, because if he had said, No, I did not accept that Mr Moyane was motivated by State Capture and that I only accepted it. If it was the charge against me, then I would not be able to answer this question but we are all bound by the answer that he gave, which is.”

And then the Chair then came in and said:

“Can you park this question like the other one, and then you exhaust others, and then we can come back later?”

So this one for intents and purposes, this is the debate that we have said.

**CHAIRPERSON:** Yes, it is sorted out so we are down to one.

**ADV MPOFU SC:** Yes, then Chair if you go to page 249, which is TSM 1673.

**CHAIRPERSON:** To page 249, yes.

**ADV MPOFU SC:** Yes, okay that was the - I suppose the bigger issue and it was a bit complicated. It was about  
10 whether, you remember Chair that in the so called 27 questions they covered two topics, the Rogue Unit, and the Pillay retirement.

And as we have discussed earlier, those were allegedly the extension of Mr Moyane's laying of the charges, which then moved on to those two issues. Now the question which arose was whether I was only entitled to question Mr Gordhan only on the Rogue Unit, which Ms Le Roux conceded or whether I could also question him on the Pillay issue, which was part of that 27 questions.

20 There was a bit of a debate, and the Chair said, we should park that to the end. The references to 249 and then the Chair said, oh no this time, it was my proposal to park the issue.

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** I said:



“Yes, just for the sake of progress, I will come back to this question so what I will do is I will start with the issue of the Rogue Unit, which was the subject matter of the complaint, and then we can come back to whether the Pillay issue can also be covered.”

And the Chair says:

“Okay, alright we can do that, we are at 16 minutes past.”

Because it was already late and we were to have that  
10 debate, so that was parked.

**CHAIRPERSON:** So just so that I understand. You wanted to cross examine Mr Gordhan in relation to the retirement of Mr Pillay?

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** Is that what you wanted to cross examine him on.

**ADV MPOFU SC:** Yes, in the same way, remember there were two topics. So the question was whether I would also, I would be similarly entitled to question him on the  
20 Pillay issue, which was the other issue that the Police had questioned him about as a result of Mr Moyane’s complaint.

**CHAIRPERSON:** You said something about the Rogue Unit. What was the position, did we deal with that at that time?

**ADV MPOFU SC:** No, we started it – that is where we were on that issue when we stopped.

**CHAIRPERSON:** Yes, but what I am saying is whether there was any ruling about whether it should - you could cross examine on it?

**ADV MPOFU SC:** Yes, no that was conceded.

**CHAIRPERSON:** Ja, on the Rogue Unit?

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** And so with regard to the Pillay issue,  
10 what was the – was there an objection or what was the issue?

**ADV FRANKLIN SC:** Chair.

**CHAIRPERSON:** Oh, yes.

**ADV FRANKLIN SC:** Sorry to interrupt. I have just been told by one of the Commission staff that there is a technical problem and relating to the live stream and they have requested a five-minute adjournment to sort that out.

**CHAIRPERSON:** Okay. I think let us take the short adjournment then hopefully, it will not last longer than  
20 between five and 10 minutes. Okay, we adjourn.

**REGISTRAR:** All rise.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay, Mr Mpofu now the issue of Mr Pillay was there an objection that it be, you include it in

your cross-examination?

**ADV MPOFU SC:** There was Chair, that is why you parked it.

**CHAIRPERSON:** Oh, just remind me what the objection was and I will hear what ...[intervenes]

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** What Ms le Roux has to say?

**ADV MPOFU SC:** Chair, if I may just paraphrase and my learned friend Ms le Roux will correct me if I am wrong.

10 Her objection was that the issue of the rogue unit I could cross-examine on it, because the ... that was the just of the ...[intervenes]

**CHAIRPERSON:** No, hang on. Did we not say it was the Pillay issue ...[intervenes]

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** That remained.

**ADV MPOFU SC:** Yes, that is what I said.

**CHAIRPERSON:** Ja, okay.

**ADV MPOFU SC:** I am just ...[intervenes]

20 **CHAIRPERSON:** Okay. Or maybe it might be better is Ms le Roux tells me what the objection was ...[intervenes]

**ADV MPOFU SC:** I can read it out. This is what she said  
Chair:

“So Chair, let me just state for the record the facts as they stand in the affidavit that were

filed in respect of cross-examination as I have understood the cross-examination so far. Mr Gordhan accepts that Mr Moyane did not name him in the complaint. That complaint is about the unit and the charge is announced by Sonny Abrahams.”

The just of the complaint Chair was that the charges that were laid by Mr Moyane related only to the rogue unit issue and the fact that, the mere fact that as the  
10 police went on to investigate they then included the Pillay issue, was not according to the theory. Should not have been a subject of the cross-examination because ...[intervenes]

**CHAIRPERSON:** Oh.

**ADV MPOFU SC:** Yes. You remember now Chair?

**CHAIRPERSON:** Okay, ja. I kind of remember. So the facts were the complaint laid by Mr Moyane did not include the issue of Mr Pillay’s retirement?

**ADV MPOFU SC:** Retirement yes, but the charges did.

20 **CHAIRPERSON:** But later on or when the charges were preferred, it was part of the charges.

**ADV MPOFU SC:** Correct.

**CHAIRPERSON:** Okay, alright. Let me just check. Ms le Roux, you persist in the objection or what is the position? I just do not want to spend time on it, in case that is no

longer the case.

**ADV LE ROUX SC:** Chair, on Pillay pension specifically or on all the part issues?

**CHAIRPERSON:** No, on the Pillay issue.

**ADV LE ROUX SC:** Yes Chair, we persist on that objection.

**CHAIRPERSON:** Yes, okay.

**ADV LE ROUX SC:** The complaint did not mention it. It came out in the Hawks investigation.

10 **CHAIRPERSON:** Ja.

**ADV LE ROUX SC:** It is not in the scope on what Mr Moyane was granted leave to cross-examine.

**CHAIRPERSON:** Yes, okay. Mr Mpofu?

**ADV MPOFU SC:** Chair, I am sorry. I am sorry Chair, trying to save time.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** I must confess I was not listening.

20 **CHAIRPERSON:** No, that is alright. So no, Ms le Roux says they persist in the objection in regard to the Pillay issue. So what is your argument as to why it should be allowed to be part of the cross-examination? I will tell you what I think now ...[intervenes]

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** What I am thinking, so that you know what my concern is. We have to look at the ruling to see

what falls within and what falls without the issues on which there could be cross-examination. Now A, B, C oh, A, B, C I wanted to have a look at the scope.

But I do not recall whether it said anything about charges, other than simply the criminal complaints.

**ADV MPOFU SC:** No, the complaints.

**CHAIRPERSON:** It did not say anything about charges as you recall?

**ADV MPOFU SC:** No Chair, it did not say anything about  
10 the charges, but it is the complaints that led to the charges. That is the debate we had earlier.

**CHAIRPERSON:** Ja, ja. My inclination would be that if it was not included by, it was not included by Mr Moyane in the complaint that he laid, my inclination would be that it falls outside.

**ADV MPOFU SC:** Of course.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** Thanks Chair. No, that is fine. Then I am not going to argue that.

20 **CHAIRPERSON:** Yes, okay. Okay, alright. So you are ready to start?

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** Yes. Okay, I will give you an hour, you would have to try your best to use it to, maximally. I am going to be stricter than I may have been last time in terms

of both questions and answers to try and make sure that we focus on the issues and use this time properly.

Okay. It is twenty five past six, an hour will take us to twenty five past seven. Yes.

**ADV LE ROUX SC:** Chair, I cannot believe I am the one delaying the start. The commission has just emailed the minister the electronic bundle, which updates to the bundle that Mr Moyane's legal team shared over the weekend. If we can just confirm that he has received the link and has  
10 been able to access it.

Otherwise if there is a reference to a page number, he will not have it.

**CHAIRPERSON:** Okay.

**ADV LE ROUX SC:** And we could read the document to him, but that might delay ...[intervenes]

**CHAIRPERSON:** Okay, do you want us to talk to him, confirm what he has received or what he has not received?

**ADV LE ROUX SC:** Minister Gordhan ...[intervenes]

**CHAIRPERSON:** You know what we are talking about?

20 **ADV LE ROUX SC:** Yes, Minister Gordhan, I shared the link that was received from the commission. It also went to your department email address. Have you been able to download the various bundles that were attached in that link?

**MINISTER GORDHAN:** Chairperson, again good evening

to you. Yes, I have. There seem to be some pages missing but in order to save time and in accordance with your ruling Chair, can we proceed and then where relevant I will look for the page.

Thank you.

**CHAIRPERSON:** Yes, okay. No, that is alright. Okay, Mr Mpofu? I need to get some of these, the files out of the way here.

**ADV MPOFU SC:** [indistinct – 00:07:25]

10 **CHAIRPERSON:** I think, I do not think, ja.

**ADV MPOFU SC:** [indistinct – 00:07:31]

**CHAIRPERSON:** Which ones do I need here Mr Mpofu, the files?

**ADV MPOFU SC:** Chair, you need three files. You need the PFM that goes to page 382 and then the other one goes to page 1108 and then there is a third file, I think it is called something something C.

**CHAIRPERSON:** Okay, I am not going to have all of them here. I will start with the one that you will start with first.

20 Why are they troubling you Mr Mpofu?

**ADV MPOFU SC:** I was hoping you do not notice Chair.

**CHAIRPERSON:** I am going, which one are you going to start with and as and when you refer to the others, my register will add them up. So which one are you going to start with?



**ADV MPOFU SC:** Chair, I am going to ...[intervenes]

**CHAIRPERSON:** On the spine, I do not know whether yours are written on the spine. There is one written N3B, application bundle. TS Moyane application to cross-examination J Gordhan.

**ADV MPOFU SC:** I have got those, A and B.

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** I combined them into one file.

**CHAIRPERSON:** Oh, okay. Alright, I can keep two but not  
10 three.

**ADV MPOFU SC:** Yes, you can keep those two.

**CHAIRPERSON:** Alright.

**ADV MPOFU SC:** And then you will need the third one  
Chair, which is the smaller file.

**CHAIRPERSON:** It can be handed up when you refer to it.

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** And then I do not know if the Chair has  
got the transcript, because I am also going to refer  
20 ...[intervenes]

**CHAIRPERSON:** I only have got the two files, I do not  
know if they have got the transcripts. Is it that one?

**MINISTER GORDHAN:** Move your chair this side.

**CHAIRPERSON:** When you refer to the transcript my  
registrar will give me the transcripts. Okay.

**ADV MPOFU SC:** Okay.

**CHAIRPERSON:** Okay, alright. Mr Gordhan, were you saying something?

**ADV MPOFU SC:** It is half past now sir.

**CHAIRPERSON:** Hm?

**MINISTER GORDHAN:** No, I am fine Chair, thank you. I found the file, thank you.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** I am just going to get, it is 18H30.

10 **CHAIRPERSON:** Oh, okay. Alright. Okay, let us start.

**ADV MPOFU SC:** Thank you Chair. Good evening Mr Gordhan.

**MINISTER GORDHAN:** Good evening Mr Mpofu.

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** I must just say I see that you are starting at half past.

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** Yes, alright.

20 **ADV MPOFU SC:** That is what I was putting on record Chair.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** Thank you. Okay, Mr Gordhan we I want us to try and be more efficient today because we have a lot of time restrictions. So when I put propositions to you, if it is possible you give me a yes or a no answer or I do not

know, but as I said earlier last time it might well be that sometimes there is a need for an explanation.

So obviously we cannot suppress that, but I am going to pose the questions in such a way that you will either agree or disagree with that proposition that I am putting to you.

**CHAIRPERSON:** Yes, maybe I can just emphasise. It is important to do it that way Mr Gordhan, because it also helps to make sure that you do not end up dealing with  
10 other matters. If you start with yes, I agree or no, I do not agree, if you need to explain or elaborate then you can elaborate, but if you start by saying I agree or yes or no, it helps to make sure that we stick to the question.

Okay, alright. Thank you.

**MINISTER GORDHAN:** Thank you.

**CHAIRPERSON:** Thank you.

**ADV MPOFU SC:** Thank you Chair. Yes. Mr Gordhan, we you remember the five areas of cross-examination that we, I had raised just to recap. We had said that Mr Moyane's  
20 version was that the hostility between you had come from what he called your arrogance which you denied and he also referred to what he called petty jealousies to do with his achievements at SARS which you denied.

Then there was also the discussion on racism which was a longish discussion which you and I had, but

ultimately you denied and so we were then left with two of those issues, which I will touch a little bit on ... I will do some recap, but we are left with two issues.

One was that about your alleged deflection from your own involvement in State Capture and then the last one was that you were victimising him because he was a whistle-blower who had unearthed a lot of criminality or illegality that you had left behind at SARS.

Do you remember that?

10 **MINISTER GORDHAN:** Yes.

**ADV MPOFU SC:** Thank you. Now what I am going to do, for the sake of progress I am going to combine, those last two topics that were left I will combine them into one, because they are in any event related whether he is accusing you of State Capture or criminality or other illegal action, it is exactly the same thing.

You and I had agreed previously that State Capture is unanimous to criminality, is it?

**MINISTER GORDHAN:** I am not sure what the question is  
20 Chair?

**CHAIRPERSON:** The question is whether you confirm that Mr Mpofu and you, the two of you agreed previously that State Capture is similar to criminality.

**MINISTER GORDHAN:** I partly agree.

**CHAIRPERSON:** Just repeat that?

**MINISTER GORDHAN:** I partly agree.

**CHAIRPERSON:** Okay, alright.

**ADV MPOFU SC:** Partly agree, okay. So you do not think that State Capture is the same as criminality, corruption and fraud, money laundering and things like that?

**MINISTER GORDHAN:** Those are some of the aspects Chair, but they could include more.

**ADV MPOFU SC:** Okay, alright. Okay, I will not argue with that, that is fine. Partly agree, it is good enough for  
10 present purposes otherwise we are going to go back into those long definitional issues. Okay. Now the, so today's cross-examination therefore is going to be under this last theme of your alleged criminal conduct or State Capture conduct and so on, all rolled into one.

But before I do that, I just want to tie up a few loose ends. Do you remember that when we ended up I was asking you about the Sikhakane report, which I had put to you had never been set aside in any legal forum and I struggled to get an answer, but the Chair came to my  
20 rescue and my understanding is that finally you conceded that that report had not been set aside.

Is that still the position?

**MINISTER GORDHAN:** No.

**ADV MPOFU SC:** Do you think it has now been set aside?

**MINISTER GORDHAN:** Since we last met Chair, if I may

explain. There has been two judgments at the Gauteng High Court I believe of the full bench in respect of certain reports from the public protector, one of which and I quote from the judgment, says:

“The reliance on a discredited KPMG report despite it being disallowed and the Sikhakane report despite it having been widely discredited, she also failed to engage the findings made in the Nugent report.”

10           So it has not I suppose been formally been set aside, but there is a commentary in that judgment on the Sikhakane report.

**ADV MPOFU SC:** Okay. Do you understand the question? I am saying as at the 30<sup>th</sup> of November when we, when the Chair put the question to you, the answer was that the report had not been set aside.

**MINISTER GORDHAN:** Correct.

**ADV MPOFU SC:** Let us assume what you are saying is correct, you agree?

20           **MINISTER GORDHAN:** Correct.

**ADV MPOFU SC:** Thank you, and the judgment you are talking about, is that the same judgment where you were, where the judgment said that you had made scandalous and vexatious remarks?

**MINISTER GORDHAN:** I cannot remember the whole of the

judgment Chair.

**ADV MPOFU SC:** Something like that.

**CHAIRPERSON:** He says he cannot remember the whole of the judgment.

**ADV MPOFU SC:** Well, yes Chair that is why I am changing the question.

**CHAIRPERSON:** Oh okay, what is the changed question?

**ADV MPOFU SC:** I am saying do you remember that the judgment said something like you had made scandalous  
10 and vexatious remarks about the person?

**MINISTER GORDHAN:** I cannot recall.

**ADV MPOFU SC:** Okay, well the judgment also said that you had made vitriolic and inappropriate remarks about the public protector. Do you remember that? It was not covered in the media, but that is what was in the judgment.

**MINISTER GORDHAN:** I do not remember Chair, but I suppose the judgment itself will speak for itself. Both in that respect and in other respects as well.

**ADV MPOFU SC:** I am sorry Chair. Sir, if you go to I think  
20 it is C.

**CHAIRPERSON:** Sorry?

**ADV MPOFU SC:** I think it is document C.

**CHAIRPERSON:** If you tell me the bundle first, that will help. In which bundle it is.

**ADV MPOFU SC:** Yes Chair, it is the bundle with the, the

very latest one, C. Have you got it?

**CHAIRPERSON:** Yes sir, she is waiting for the page number. Once we know ...[intervenes]

**ADV MPOFU SC:** Yes, okay oh I see. It is page 145.

**CHAIRPERSON:** Is that the paginated 145 or ...[intervenes]

**ADV MPOFU SC:** The paginated one.

**CHAIRPERSON:** Okay, alright. Have you got it Mr Gordhan?

10 **ADV MPOFU SC:** Paragraph 267 of the judgment.

**CHAIRPERSON:** Have you got it Mr Gordhan?

**MINISTER GORDHAN:** I have page 145 Chair.

**CHAIRPERSON:** Okay, alright.

**ADV MPOFU SC:** Yes. Since you say you have forgotten, this is what the judge has said:

“The allegations in paragraph 228 and ...”

**CHAIRPERSON:** I am sorry Mr Mpofu, I remember that when I wanted you to identify the bundle I think you said the latest one. I think for the purpose of the record I must  
20 say it is the one written N3C.

**ADV MPOFU SC:** [indistinct – 00:19:45]

**CHAIRPERSON:** Application bundle, just for the transcript. Ja.

**ADV MPOFU SC:** No Chair, I also did not know ...[intervenes]



**CHAIRPERSON:** Ja. Okay, ja.

**ADV MPOFU SC:** It says:

“The allegations in paragraph 228 and 232  
namely that Advocate Mkwabane’s  
competence, integrity, legal literacy and  
constitutional grasp of her powers, duties and  
functions are doubtful as well as setting out  
what other courts had said about her  
understanding of the constitution are irrelevant  
and the last, vexatious. The Constitutional  
Court warned that court should not likely allow  
vitriolic statements to form part of the record.”

Do you remember that is what was said about your  
affidavit? Mr Gordhan?

**MINISTER GORDHAN:** Can I get the paragraph again Mr  
Mpofu, which paragraph is it, 228?

**ADV MPOFU SC:** 267.

**MINISTER GORDHAN:** 267, okay.

**CHAIRPERSON:** And the question is whether you  
remember that the allegations that the judge is dealing  
with in that paragraph which it says are irrelevant,  
scandalous and vexatious are allegations that you had  
made in the affidavit.

Is that correct?

**ADV MPOFU SC:** Yes, that is correct.

**MINISTER GORDHAN:** Yes, noted Chair.

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** And you agree that those remarks were inappropriate and scandalous.

**MINISTER GORDHAN:** I agree that I notice or note what paragraph 267 says about the Con Court's view on this matter, and it is followed by 268 Chairperson, where it says that we agree that these paragraphs, these things are irrelevant, scandalous and prejudicial.

10           The allegations made in the remainder of the paragraph that directed that one of the grounds of the review, namely the public protector acted with an improper motive and was biased. So yes, at 267 and 268 those were, those are the words and 269 then refers to 228 and 232 of my founding affidavit.

Those paragraphs are struck out.

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** And that in the, in another judgment  
20   which was a week later, two weeks later it was found that your allegations amounted to spewing averments that are not supported by evidence. That is what the full bench of the High Court said.

That will be at page 208 of that bundle. You remember that one?

**CHAIRPERSON:** Let us get there first. Page 208 you said.

**ADV MPOFU SC:** Yes, Chair.

**CHAIRPERSON:** What paragraph at 208?

**ADV MPOFU SC:** 85 Chair.

**CHAIRPERSON:** Paragraph 85.

**MINISTER GORDHAN:** Chair, that those are from Sage 150 ...[intervenes]

**CHAIRPERSON:** Page ...[intervenes]

10 **MINISTER GORDHAN:** 154 to page 275. I did not receive.

**CHAIRPERSON:** Did not receive that pages?

**MINISTER GORDHAN:** I am sure that Minister Mpofo is referring to a full bench judgment of the High Court. It is obviously in the judgment.

**ADV MPOFU SC:** Yes.

**MINISTER GORDHAN:** And I am sure you will get to other paragraphs in the judgment as well.

**ADV MPOFU SC:** Yes, thank you Mr Gordhan. Yes, no you can take it for granted I will not mislead you. I am reading  
20 from the judgment. The, and I am surprised if your lawyers did not give you these judgments or maybe you have just forgotten.

Any way, the ...[intervenes]

**MINISTER GORDHAN:** Can I clarify please?

**CHAIRPERSON:** Yes.

**MINISTER GORDHAN:** The attorneys acting for Mr Moyane sent these documents to the state attorney who sent it to my legal representative, who sent it on to me. So it was a long train.

**CHAIRPERSON:** Yes.

**MINISTER GORDHAN:** And all I am saying that the pages I referred to are missing from this pack. That is all.

**CHAIRPERSON:** No, but that is fine. I think one can just read because I have got the judgment here.

10 **ADV MPOFU SC:** Yes.

**CHAIRPERSON:** “The above submission ...”

It says at paragraph 85:

20 “The above submission does not assist Mr Gordhan’s case. The public protector is complaining about the wording of the paragraph which he says is unnecessarily insulting, combative route. They cannot just be ignored. Much as we appreciate the fact that like any other [indistinct – 00:24:52] the applicants are entitled to challenge the report of the public protector if it affects them adversely and they are grieved thereby. We are however of the opinion that the applicants have gone overboard in this matter, more so because the averments are unsubstantiated. It

is indeed so that the public protector like any other high ranking official is not immune to criticism. We are in a constitutional democracy. People in high office like the public protector need not be overly sensitive against criticism levelled against them.”

I guess it covers what you wanted?

**ADV MPOFU SC:** No, it does not. If you just go on Chair.

**CHAIRPERSON:** Okay. Then the next sentence:

10                   “The only difference is that such criticism must  
be constructive and be backed by the  
necessary facts. It will thus not assist a  
litigant in spewing averments that are not  
supported by evidence. This is what the  
applicants have done in this matter.”

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** Thank you. So, yes Mr Gordhan, I was  
not referring to you receiving the documents. I was saying  
20 that these documents were, came out in December so they  
should have been sent to you but that is fine. You do  
accept that the quote, that quote, the first quote I read  
from had three judges.

This other court also had three judges. So six  
judges now. This one said you had gone overboard and

you were spewing averments that are not supported by evidence and that that should not be allowed, hence the material was struck off.

You accept that?

**MINISTER GORDHAN:** I will certainly accept it and ask the Chair to note the final outcome of these judgments, which is quite damning of the public protector and her biased and if you refer to in the 7<sup>th</sup> of December judgment, paragraph 290(5) for example the public protector's  
10 pandering of the rogue unit narrative and a public reference to the unit as a "rogue unit", and as a "monster" and the stated desire to defeat the "monster" display a profound biased towards Mr Gordhan or Minister Gordhan and accidentally the same Minister Pillay that is Mr Pillay.

**CHAIRPERSON:** Ja.

**MINISTER GORDHAN:** So like that there are various comments in paragraph 290 on the conduct of the public protector.

**CHAIRPERSON:** Effectively what you are saying is you  
20 accept that the court was critical of you, but you are simply saying you were not the only one of whom it was critical.

**MINISTER GORDHAN:** Certainly, thank you.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** Ja, but you are the only one here. I mean what has that got to do with it. You are the only

person who is being accused in this cross-examination of bending about accusations and insults at people without evidence.

So it does not matter if a thousand other people are accused of the same thing. Anyway, at paragraph 210 or page 210 ...[intervenes]

**CHAIRPERSON:** Of the last mentioned judgment?

**ADV MPOFU SC:** Yes, of the last mentioned judgment Chair.

10 **CHAIRPERSON:** Page 210?

**ADV MPOFU SC:** 210 yes.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** It says ...[intervenes]

**CHAIRPERSON:** What paragraph?

**ADV MPOFU SC:** 89.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** It also says:

20 “When the averments made by the applicant in paragraph 38, 39, 40 are considered, whether individually or cumulatively they can be construed as nothing else but gratuitous averments based on suspicion. The averments are therefore vexatious and made intending to annoy the public protector. A similar finding based on allegations cashed in similar terms

by Minister Gordhan had been made in the other case, in the rogue unit case.”

At paragraph 267 and 268, we have already gone through that. is it fair to say that these two judgments, while they might as you say might have been scalding about other people were also very scalding about your penchant to in the about insults and victory hall and gratuitous averments without any evidence and in doing so, going overboard as the judge has said, and spewing  
10 averments that are not supported by evidence.

Do you agree?

**MINISTER GORDHAN:** Chair, I confirm what the paragraphs in the judgment say and equally the judgment does not refer to other people. It refers to the public protector and finally, both the judgments found against the public protector.

I accept the paragraphs that Mr Mpofu refers to, that being that there were criticisms of one or two paragraphs in my affidavit.

20 **ADV MPOFU SC:** No, not one or two paragraphs. Do you accept that in respect of this aspect of the case of - about gratuitous insults to people. The – both full benches in other words all the six judges actually found against you in favour of the Public Protector.

**MINISTER GORDHAN:** Chair again I am not a lawyer but



when I read paragraph 290 onwards I do not find any commentary on those things.

**ADV MPOFU SC:** I think it is obvious that you did not either read these judgments or they were not given to you. The order that was at 273 Chair.

**CHAIRPERSON:** What page?

**ADV MPOFU SC:** 273.

**CHAIRPERSON:** Okay. Yes.

**ADV MPOFU SC:** Okay so again as I say it is not one or two  
10 paragraphs it says – order 3 Chair.

“The starting out application which was brought by the Public Protector in terms of 16 applications is granted in other words in favour of the – against him in respect of paragraph 38, 39, 40, 53, 54, 55 and 70 of Minister Gordhan’s affidavit.”

Do you remember that?

**MINISTER GORDHAN:** Chair there are two judgments. The one is the 7<sup>th</sup> of December 2020 and the other is the  
20 judgment I think of the 19<sup>th</sup> or thereabouts of December 2020. I think it will be extremely helpful if we know which judgment we are referring to.

**CHAIRPERSON:** Well he is referring to...

**ADV MPOFU SC:** There is only one judgment that is on 273.

**MINISTER GORDHAN:** Can I finish here?

**CHAIRPERSON:** Yes he is referring to the last mentioned one which ...

**MINISTER GORDHAN:** Which date?

**CHAIRPERSON:** Which was written by Judge Gcabashe, Judge Twala and Judge Davis. What page does it start on Mr...

**ADV MPOFU SC:** 273 – okay where it starts Chair is 100 and...

**CHAIRPERSON:** Let us – other – oh it is one with three  
10 judges.

**ADV MPOFU SC:** 135.

**CHAIRPERSON:** It is the one with three judges.

**ADV MPOFU SC:** Well they both have three judges.

**CHAIRPERSON:** Oh did they both have three judges. I thought it was two.

**ADV MPOFU SC:** All the judges found the same thing against Mr Gordhan. The first one was Judge Baqwa.

**CHAIRPERSON:** Do you want to just clarify – are the parties the same because that is the one way of distinguishing?

20 **ADV MPOFU SC:** No.

**CHAIRPERSON:** Or say what page it – where it starts it is a long judgment.

**ADV MPOFU SC:** Well yes the first one Chair ends at 160.

**CHAIRPERSON:** Oh let us go to the second one because that is the one you are asking about.

**ADV MPOFU SC:** Yes that is the one I was asking about.

**CHAIRPERSON:** Where does it start?

**ADV MPOFU SC:** It starts at 168 I think.

**CHAIRPERSON:** 1?

**ADV MPOFU SC:** 165.

**CHAIRPERSON:** 165. Okay it starts at 165 Mr Gordhan the one that ja it is –

**ADV MPOFU SC:** I was reading at 273 Chair so I do not why there is confusion.

10 **CHAIRPERSON:** I see it does not tell – the one I have does not have the date at the beginning of when it was given.

**ADV MPOFU SC:** But the date in front of 275 - 275.

**CHAIRPERSON:** Ja Do you see which one we are talking about Mr Gordhan? If you have got the page it starts at page 165 it is where you were the first applicant and Mr Maga – Mr George Ngakane, Virgil Magashule was the second applicant and Mr Pillay was the third applicant. And Mr Mpofo was reading paragraph 3 of the order at the end of the judgment.

20 **ADV MPOFU SC:** I think you are ...

**MINISTER GORDHAN:** Sorry Chair you can proceed I am looking at my computer to try and track it down.

**CHAIRPERSON:** But I can tell you that the paragraph, paragraph 3 really says that the application brought I think by the Public Protector for paragraphs 38, 39, 40, 53, 54, 55

and 70 of your founding affidavit should be stuck out was granted. That is what it says. So Mr Mpofu wanted you to confirm that you – you know that this is the order that was granted under paragraph 3?

**MINISTER GORDHAN:** Since you have read it for Chair thank you very much and I know that. Thank you.

**CHAIRPERSON:** Yes okay.

**ADV MPOFU SC:** Okay well more importantly the paragraph 6 of that judgment was that the first and third applicant and  
10 you were the first are ordered jointly and severally to pay the costs of the Rule 6.15 application including the costs of your counsel on the scale as between attorney and client. In other words on the punitive stake. So the court has decided to award punitive costs against you for the insults the gratuitous insults that you had held without evidence at the Public Protector, do you remember that or was that explained to you why you had to pay punitive costs to the Public Protector even though it was not covered in the media?

**MINISTER GORDHAN:** I note the observation Chair.

20 **ADV MPOFU SC:** Yes and the point I was making about that is that it – now with the further confirmation of at least six judges within a week or two after we had been here you not only were told that you made false accusations of corruption and criminality against someone twice by two full benches but you were also marked at with punitive costs for doing so.

So that seems to be your propensity what you say about that?

**CHAIRPERSON:** That seems to be?

**ADV MPOFU SC:** Your propensity.

**MINISTER GORDHAN:** (Inaudible)

**CHAIRPERSON:** What was the answer Mr Gordhan?

**MINISTER GORDHAN:** No there was not a question but the allegation was that that is a propensity which I deny.

**CHAIRPERSON:** Yes, ja the –

10 **ADV MPOFU SC:** There was a question. I said do you agree with that?

**MINISTER GORDHAN:** I deny that.

**CHAIRPERSON:** Yes.

**MINISTER GORDHAN:** Vehemently.

**ADV MPOFU SC:** And it was also said that you remember where they was discussion about racism and belittling people and so on in November?

**MINISTER GORDHAN:** Yes.

20 **ADV MPOFU SC:** Do you know that again three judges, Judges Gcabashe, Twala and Davis a few weeks after the last cross-examination found that your attitude was condescending towards African women namely the Public Protector.

**MINISTER GORDHAN:** Can you refer me to a paragraph please?

**ADV MPOFU SC:** So if I may – 155. Now that would be the – the second judgment it is sorry Chair if I may just – oh yes para – page 205 paragraph 78. And in relation to that one you had made an allegation that similar to the ones you made against Mr Moyane that the Public Protector was motivated by state capture and corrupt motives in issuing her report.

**CHAIRPERSON:** I am sorry where are you reading from it is not on 78 is it?

10 **ADV MPOFU SC:** Chair.

**CHAIRPERSON:** Where are you reading from?

**ADV MPOFU SC:** I am not reading I am just.

**CHAIRPERSON:** Oh okay I thought you were referring us to page 205.

**ADV MPOFU SC:** Yes I am.

**CHAIRPERSON:** Oh you are not reading it.

**ADV MPOFU SC:** I am just telling him – giving the witness context.

**CHAIRPERSON:** Okay. Okay.

20 **ADV MPOFU SC:** In that regard you had accused the Public Protector of being motivated by state capture motives for issuing a report against you 48 hours before the announcement of cabinet or the inauguration, remember that?

**MINISTER GORDHAN:** Where is the question of race in

paragraph 78?

**ADV MPOFU SC:** Do you remember the – just answer the question Mr Gordhan let us not start on you...

**MINISTER GORDHAN:** No, no Chair.

**ADV MPOFU SC:** Do not ask me questions.

**MINISTER GORDHAN:** Chair with great respect Mr Mpofu first referred us to paragraph 78 to illustrate his point that there is a so called racism in my conduct and I said where is the paragraph? He then refers to paragraph 78. Now for the  
10 public record nowhere in paragraph 78 is the issue of race referred to that is the only point I am making.

**CHAIRPERSON:** No I am...

**MINISTER GORDHAN:** And I am sure you can see it in front of you as well Chair.

**CHAIRPERSON:** Yes. No my recollection is that he did not use racism he said condescending – condescending and if you look at paragraph 78 there is a reference to condescending.

**MINISTER GORDHAN:** He said that condescending towards  
20 applicant – two applicants.

**CHAIRPERSON:** That woman I think...

**MINISTER GORDHAN:** No he referred to African women.

**CHAIRPERSON:** Yes.

**MINISTER GORDHAN:** Chair he referred to African women.

**CHAIRPERSON:** Mr Mpofu just as a matter...

**MINISTER GORDHAN:** Nowhere in paragraph 78 is...

**CHAIRPERSON:** Let us start with the question that you put first.

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** So that I can know whether Mr Gordhan's answer is – is to the point or not or is not right.

**ADV MPOFU SC:** No well Chair you can know that for sure because it is not to the point. I have asked him a question.

**CHAIRPERSON:** Ja what was the question?

10 **ADV MPOFU SC:** I am telling him to the paragraph. I said to him that does he remember that the one of the judgments found that his attitude towards the Public Protector was condescending and then he said what page and then I am taking him to the page.

**CHAIRPERSON:** Yes but you did not read the page – the paragraph.

**ADV MPOFU SC:** No I have not read the page yet.

**CHAIRPERSON:** Yes, yes.

**ADV MPOFU SC:** I am just – I am just.

20 **CHAIRPERSON:** You can put a question before reading it is it not?

**ADV MPOFU SC:** I mean I do not know what is going on now. Pardon.

**CHAIRPERSON:** Did you put a question to him before reading the paragraph?



**ADV MPOFU SC:** Yes I put a question he said he wanted the page so that is why I had a break to look for the page.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** Now I found the page I am continuing with my questioning.

**CHAIRPERSON:** Oh okay alright let me read what the paragraph 78 says.

**ADV MPOFU SC:** No Chair – no we are not there yet. We are not there.

10 **CHAIRPERSON:** Yes but why are we coming here if you are not going to let us read it?

**ADV MPOFU SC:** Because I need to build up to the question that I have asked him.

**CHAIRPERSON:** But I thought there is a question you put to him after he had said where – what – refer him to the relevant page and that is the question that I think I missed.

**ADV MPOFU SC:** Well Mr Gordhan if I may ask Chair?

**CHAIRPERSON:** Yes.

20 **ADV MPOFU SC:** The – I was just giving you the background and then you butted in and asked me a question which is not allowed. The – what I was saying is in relation to this questioning that I am about to ask you it was in relation to an averment made in your affidavit that the Public Protector was motivated by state capture and corrupt motives in issuing the report. Do you remember that?

**MINISTER GORDHAN:** No I do not but I think what I remember Chair is that the – the issue was how does a Public Protector arrive at a final report within 48 hours of receiving some submission or the other.

**ADV MPOFU SC:** Yes.

**MINISTER GORDHAN:** The court on the other hand notes in paragraph 78 that it is also condescending of the applicants to want to argue that the Public Protector would be unable to deal with their representations within a limited period of time  
10 of 48 hours. The court in its – that is the court's view – I note the view it is recorded in paragraph 78 but there is no reference there to African women.

**ADV MPOFU SC:** Nobody said there is a reference to African women in the paragraph. I said the court said your attitude was condescending towards her and she is an African woman – you understand that? Do you know that the court said you were condescending towards Advocate Busisiwe Mkhwebane who is – happens to be an African woman?

20 **MINISTER GORDHAN:** The word condescending is in paragraph 78 I have read it out already, I have acknowledged it Chair.

**ADV MPOFU SC:** Yes. And all I wanted to say to you is that that again a full bench confirmed that you belittling and condescending in the context we are talking about it means

the same thing. Belittling somebody and calling them cheeky and telling them to grow up is also condescending would you agree?

**MINISTER GORDHAN:** Not necessarily.

**ADV MPOFU SC:** Sometimes?

**MINISTER GORDHAN:** I beg your pardon.

**ADV MPOFU SC:** If you say not necessarily I do not know what that means. Is it sometimes condescending to – to belittle someone and call them cheeky and tell them to grow  
10 up? What do you mean not necessarily?

**MINISTER GORDHAN:** I am not sure about this line of questioning Chair. So I note what the advocate says but I have no – no response to that and the previous occasion I denied any allegation of racism and my whole history as an activist of 50 years proves that as a member of the African National Congress which subscribes to the freedom charter. That is all I have to say.

**CHAIRPERSON:** Well he was asking you whether you equate calling somebody cheeky – what was the other..

20 **ADV MPOFU SC:** Grow up.

**CHAIRPERSON:** Grow up when you say that to somebody whether you equate that to condescending?

**MINISTER GORDHAN:** Not necessarily Chair I mean you could have a – your child behaving badly and you say to the child grow up stop behaving like that.

**ADV MPOFU SC:** Yes.

**MINISTER GORDHAN:** Because you are behaving childish. Or on the other hand somebody including a child who might be particularly impudent on a particular matter could be told you are being cheeky. So there are many different contexts in which those words could be used and that is all I have to say.

**CHAIRPERSON:** Hm.

**ADV MPOFU SC:** And if he – yes – I agree with that. And if  
10 you use it in relation to someone that you have agreed is of the same age group as you would you agree that it can be condescending for someone of my age group?

**MINISTER GORDHAN:** No.

**ADV MPOFU SC:** It can never be condescending to – for someone of my age group to tell me to grow up.

**MINISTER GORDHAN:** No.

**ADV MPOFU SC:** And to – and that I am cheeky?

**MINISTER GORDHAN:** Not in the context.

**ADV MPOFU SC:** Are you being serious?

20 **ADV LE ROUX:** Chair could I – could I place an objection on the record?

**CHAIRPERSON:** Hang on, hang on. Yes.

**ADV LE ROUX:** Chair could I place an objection on the record?

**CHAIRPERSON:** Yes.

**ADV LE ROUX:** Two points. One Mr Mpofu is now reframing his question. This all started because he stated as a fact and the transcript will show it if we have to go back and look it. He stated as a fact that the full bench found that Mr Gordhan discriminated against an African woman. The Minister then asked for the paragraph, he got referred to it.

**CHAIRPERSON:** Yes but you going back now. We were....

**ADV LE ROUX:** The condescending – Chair if I can make the second point.

10 **ADV MPOFU SC:** That is not true.

**ADV LE ROUX:** Now we – if I can make the second point. Now because of how the conversation is unfolding around the condescending word in that paragraph in a judgment that everybody accepts what it says we are now going back to the racism topic that was canvassed at length for the last –

**CHAIRPERSON:** Ja but he is canvassing...

**ADV LE ROUX:** Mr Mpofu is halfway through his topic.

**CHAIRPERSON:** But he is canvassing it now in the light on the judgment about condescending.

20 **ADV LE ROUX:** Yes but Chair

**CHAIRPERSON:** **CHAIRPERSON:** Yes.

**ADV LE ROUX:** The point is what he is supposed to be using his hour for and he is now halfway through that is to deal with deflecting from your own involvement in state capture, the allegation made against Mr – Minister Gordhan

and because – and discriminating against Mr Moyane could...

**CHAIRPERSON:** But remember that...

**ADV LE ROUX:** Now we are back to the conversation (speaking over one another).

**CHAIRPERSON:** Remember that if he does not use his hour optimally it is his – it is his – he has been...

**ADV LE ROUX:** Then he is going to ask for another hour.

**CHAIRPERSON:** He has been given an hour. Mr Mpofu continue.

10 **ADV MPOFU SC:** Yes Chair and I hope this mighty waste of my time will not be calculated in the – in the hour because I do not know why my learned friend feels the need to lecture me about how to conduct my cross-examination. So anyway incidentally we were still on the – on the topic of condescending which seems to be coming from all quarters. The...

**ADV LE ROUX:** Chair can we – can I object to that as well? Mr Mpofu is doing his job I am doing my job. We do not need to make it personal. He does not need to take such an  
20 attack at me, at the evidence leaders etcetera. If he just asked questions from the one issue remaining we could actually get out of here today.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** Chair I do not need Ms Le Roux to tell me how – which question to ask and when and why? Really this

is my cross-examination she must just sit down.

**CHAIRPERSON:** Okay thank you. Let us continue.

**ADV MPOFU SC:** Thank you Chair. Anyway the question Mr Gordhan really is a simple one that these judgments seemed to confirm that it is your propensity

a. To insult people in a vitriolic scandalous manner without evidence and

b. That to be condescending towards them.

What is your comment?

10 **MINISTER GORDHAN:** I deny the – I deny that completely and emphatically.

**ADV MPOFU SC:** You do not think this judgment says you are condescending – what is it that you are denying?

**MINISTER GORDHAN:** Your – the word propensity which you conveniently introduced.

**ADV MPOFU SC:** Oh I see so it just happened that two full benches found your remarks to be vexatious, insulting, vitriolic, fatuitous all the words that I have used? Six judges that is just it does not show any propensity if that happened  
20 in front of those six judges, is that your evidence?

**MINISTER GORDHAN:** Chair there are two judgments that 00:20:47 in a few paragraphs on language used in an affidavit as opposed to many paragraphs with reference to the substance of the matter and the substance of the matter is the conduct and the outcomes of that conduct in respect of

the Public Protector parts of which I read in the one judgment on the 7<sup>th</sup> of December from paragraph 20 – 290 onwards. In both judgments the courts were completely condemning of the outcomes of or and the findings of the Public Protector including indicating displays of bias towards Minister Gordhan and Mr Pillay and I quote from the 7<sup>th</sup> of December paragraph 20.90. So I think what we asking for is balance so that we can move on to the next question. Thank you.

10 **CHAIRPERSON:** Mr Mpofu.

**ADV MPOFU SC:** I tell you. Okay the Public Protector is not under cross-examination now I am cross-examining you Mr Gordhan do you understand at least that?

**MINISTER GORDHAN:** Oh certainly but I think Chair the only point I am making is that it is important to give both context I think I heard you say that before to a previous witness and the specific matter that you might want to refer to. The context is a judgment as a whole and the findings of the judgment and the specifics is one or two paragraphs.

20 That is the only thing I am pointing out.

**ADV MPOFU SC:** Anyway did – do you accept that part of your evidence in that – was that in reaching the conclusion that Mr Moyane was the state capture practitioner you relied among other things on gossip?

**MINISTER GORDHAN:** Yes I understand I used that word



and I apologised for that and – and understood once the transcript was actually referred to. But any other factors that – in that respect one can refer to in relation to Mr Moyane and state capture but if the Chair wants to get into that we can get into that.

**ADV MPOFU SC:** Do you even...

**CHAIRPERSON:** I must just mention Mr Mpofu I know when you are on your feet you might not keep an eye on the time it is about thirty minutes past seven.

10 **ADV MPOFU SC:** Yes Chair but I mean if I am getting answers like this I have asked you a simple question do you – did you rely on gossip or not?

**MINISTER GORDHAN:** No.

**ADV MPOFU SC:** So why did you say you relied on gossip?

**MINISTER GORDHAN:** I – well the word gossip was used loosely which I explained then.

**ADV MPOFU SC:** So which is which? Did you rely on gossip or did you not rely on gossip?

20 **MINISTER GORDHAN:** Chairperson we have a repetition of the same question in different forms but if I may the word gossip as I said was used and later I understood that or tried to explain that gossip is basically saying that was information at that time. However I think what Mr Moyane needs to answer to that was quite evident is that the state...

**ADV MPOFU SC:** No please.

**CHAIRPERSON:** No Mr Gordhan, no Mr Gordhan the question is simple –

**MINISTER GORDHAN:** No okay fine.

**CHAIRPERSON:** The question is did you rely on gossip or not and it is either yes or no?

**MINISTER GORDHAN:** No not.

**CHAIRPERSON:** No?

**MINISTER GORDHAN:** I have some direct – I had some direct information which I have now recollected at that time I  
10 did use the word gossip that is noted Chair.

**CHAIRPERSON:** Okay alright.

**ADV MPOFU SC:** I did not ask you about using the word I said did you rely on gossip among other things?

**MINISTER GORDHAN:** And the answer which I have given already Chair is not entirely.

**ADV MPOFU SC:** Okay you partly relied on gossip. Okay that is fine I can leave it there. Alright now the – you were then accused by Mr Moyane of criminality. Do you accept that – do you know about Precca the – the Act that says that  
20 if you know something about corruption if you do not report it you yourself are guilty of a crime?

**MINISTER GORDHAN:** Vaguely yes.

**ADV MPOFU SC:** Yes. And you yourself knew you testified earlier that you knew about Mr Moyane's involvement in state capture/corruption and all those things as far back as

2016, correct?

**MINISTER GORDHAN:** Yes.

**ADV MPOFU SC:** And have you ever reported that to the police?

**MINISTER GORDHAN:** As I explained earlier Chair when Mr Mpofu was referring to criminality and corruption and so on in defining state capture I said it goes beyond just those elements. So state capture is not only about criminality it is about for example hollowing out an institution of its senior  
10 and most capable people, hollowing out people who have institutional knowledge, breaking up those parts of the institution that in this instance have to deal with cigarette and tobacco smuggling and other forms of illicit trade which harm the South African economy and I think I have presented that to you as well as Chair on a previous occasion. And dismantling the executive committee for example that existed at that particular time. And centralising power. Earlier today I believe you heard evidence about a central procurement  
20 entity which was quite fascinating because that is the easiest way in which to engage in the kind of activity that Mr Mpofu is referring to which is criminal conduct in relation to procurement. So state capture goes beyond “criminality” it is institutional damage on a wide scale in respect of governance, in respect of the operations of an organisation, in respect in this instance of the revenue collection and

there are commentaries from the treasury in that particular regard as well and damage caused to the Human Resource capability that an institution has. So it is a much wider...

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** No.

**MINISTER GORDHAN:** Scope of 00:27:37 to the definition.

**CHAIRPERSON:** Mr Mpofu.

**ADV MPOFU SC:** Well I do not know if you or even the Chair remembers what the question was. It was a simple  
10 question I do not know what you have been going on for five minutes. Do you remember what the question was?

**MINISTER GORDHAN:** The question was whether I had reported any corrupt activity in relation to the Precca Act and so will refers to the Act and what I was explaining to you is the difference between criminality on the one hand and state capture on the other hand as a wider concept.

**ADV MPOFU SC:** Yes and when are you going to answer the question?

**MINISTER GORDHAN:** To (inaudible).

20 **ADV MPOFU SC:** Did you or did you not report the matter to the police? I mean really

**MINISTER GORDHAN:** I beg your pardon.

**ADV MPOFU SC:** Did you Pravin Gordhan report the matter of involvement of Mr Moyane in state capture to the police yes or no? I mean you do not need this family matter of

rumbling.

**MINISTER GORDHAN:** As far as I know Chairperson and I will be guided by yourself state capture in legislation is not defined as a crime.

**ADV MPOFU SC:** Chairperson it is really – I have to intervene.

**MINISTER GORDHAN:** There might be a specific...

**ADV MPOFU SC:** Did you report the matter to the police or not?

10 **MINISTER GORDHAN:** Report what?

**CHAIRPERSON:** The matter of Mr Moyane's alleged involvement in state capture that is what the question is. Did you report Mr Moyane's alleged involvement in state capture to the police?

**MINISTER GORDHAN:** But in – the – there has to be singular acts of corruption which at that point in time I could not identify subsequent...

**CHAIRPERSON:** So the answer is you did not.

20 **MINISTER GORDHAN:** The acts of corruption around giving a debt management company a contract to collect debts. But no I did not report it because I did not see it was in the prevue of state capture.

**ADV MPOFU SC:** Thank you. So the answer is no?

**MINISTER GORDHAN:** I think that is what you heard.

**ADV MPOFU SC:** Thank you. So what was the last ten

minutes about? Alright. Now the – the PFMA you were a Minister who was responsible for the PFMA as Minister of Finance. So you should know it in and out. Correct?

**MINISTER GORDHAN:** I am familiar with that.

**ADV MPOFU SC:** Yes. Now, when you... I am going back to the issue of the “rogue unit” in the letter he writes to Minister Manual. And it is fair to summarise that your letter was simply saying that SARS did not have the legal mandate to form such a unit. Correct?

10 **MINISTER GORDHAN:** As already... Yes.

**ADV MPOFU SC:** And that was from legal advice that you obtained. Correct?

**MINISTER GORDHAN:** I cannot remember the details.

**ADV MPOFU SC:** Okay. Anyway. Maybe you just knew it. But you knew it would be unlawful to form such a unit without the involvement of the National Intelligence Agency. Correct?

**MINISTER GORDHAN:** Sorry? It would be illegal to...?

**ADV MPOFU SC:** To form a unit such as that one without  
20 the involvement of the National Intelligence Agency. Hence, you wrote a letter to Minister Manual to that effect. Correct?

**MINISTER GORDHAN:** No, the letter to Minister Manual was to explain why cooperation between the Intelligence Agency and SARS was necessary, firstly. Secondly, why

the unit to be located within the MIA. Thirdly, to explain why the... necessity is for that activity. And fourthly, to request finances for the unit.

**ADV MPOFU SC:** Did you ...[intervenes]

**MINISTER GORDHAN:** It was the wording of the memo.

**ADV MPOFU SC:** No. Okay. Did you say in your letter... And it is *TSM(?)*-375, Chair.

**CHAIRPERSON:** I am sorry. Did you prefer to a paragraph and page?

10 **ADV MPOFU SC:** 375.

**CHAIRPERSON:** 375. That is ...[intervenes]

**ADV MPOFU SC:** You said ...[intervenes]

**CHAIRPERSON:** Ja, okay. Continue.

**ADV MPOFU SC:** To say:

“Collecting tactical intelligence invariable means penetrating and it means accepting organised criminal syndicates.

This is an activity for which SARS does not presently have the capability including the legislative mandates to manage... to understand activities...”

20

Did you write that? Signed Pravin Gordhan.

**MINISTER GORDHAN:** Yes.

**ADV MPOFU SC:** So then your answer is yes. You knew that SARS did not have the legislative... It would be

unlawful for SARS to do something that it is has not a legislative mandate to do. Correct?

**MINISTER GORDHAN:** As I explained earlier Chair, that was correct.

**ADV MPOFU SC:** Yes. So if you – and this money – was this money given by Treasury?

**MINISTER GORDHAN:** I cannot recollect now.

**ADV MPOFU SC:** You cannot recollect?

**MINISTER GORDHAN:** [No audible reply]

10 **ADV MPOFU SC:** Well, if it is ...[intervenes]

**MINISTER GORDHAN:** It could not have been on reflection because that memo and his intent were not persuade.

**ADV MPOFU SC:** Yes. So it could have been. And if it was ...[intervenes]

**MINISTER GORDHAN:** I am saying the opposite.

**ADV MPOFU SC:** You say the money was not given as a fact?

20 **MINISTER GORDHAN:** I say it is unlikely to have been – any money... either from SARS or from the fiscus to have been made available because, as the transcript will show in the November cross-examination, this unit did not materialise in the form that was envisaged in that memo.

**ADV MPOFU SC:** No, but then you – but he unit was formed – it was operating within a few weeks of this letter.



This was in 2007.

**MINISTER GORDHAN:** It was a different type of unit with a different mandate in accordance with the SARS mandate.

**ADV MPOFU SC:** Okay but that is not the evidence of mister... The KPMG report, the Sikhakhane report, the Kroon report. All found that it was unlawful to – for SARS to breach its mandate. And you know, at least in 2007, that forming such a unit would be breaching its mandate but ...[intervenes]

- 10 **MINISTER GORDHAN:** The Sikhakhane report has been found to be incorrect in its... And paragraph 290 of the high court judgment on the 7<sup>th</sup> of December, says that the Public Protector completely disregarded the Sunday Times apology and the Kroon apology. So the Sikhakhane report, Chair, was discredited. The KPMG report has been mutilated and...

And as far as Judge Kroon is concerned, he apologised for the... with which he issued the statement and apologised for the contents thereof. So none of the three have any legs left at all.

- 20 **ADV MPOFU SC:** Okay. Let us take that bit by bit. You accept that the Sikhakhane report has never been reviewed and set aside or challenged in court?

**CHAIRPERSON:** So you remember the answer to that earlier Mr Mpofu?

**MINISTER GORDHAN:** I want to know ...[intervenes]

**ADV MPOFU SC:** Okay. Maybe let take you... Are you serious that the Sikhakhane report was discredited because the Sunday Times or something found it to be – to have weakness ...[intervenes]

**MINISTER GORDHAN:** I am talking... Sorry, Chair. I am talking about the 7<sup>th</sup> of December full bench judgment of the Gauteng North Court under paragraph 20(6), the part where it says:

10                               “The Public Protector completely disregarded  
the Sunday Times’ apology ...[intervenes]

**ADV MPOFU SC:** Yes.

**MINISTER GORDHAN:** ...and the Kroon apology. And then earlier in paragraph 3:

“The reliance on the discredited KPMG report despite it having been disavowed and the Sikhakhane report despite it having been widely discredited.

She also failed to engage with the findings made in the Nugent’s report...”

20                               These are quotations from paragraph 290.

**ADV MPOFU SC:** Yes. Mr Gordhan, do you accept... Okay. At some stage I think you were a socialist. So you should you know the concept of time and space. You accept that you are not a prophet?

**MINISTER GORDHAN:** [No audible reply]

**ADV MPOFU SC:** In other words ...[intervenes]

**MINISTER GORDHAN:** [Indistinct]

**ADV MPOFU SC:** Ja. Well, I know you cannot accept as one of the dangers but you have not yet counted yourself ...[intervenes]

**MINISTER GORDHAN:** I did not *favour*(?) either.

**ADV MPOFU SC:** Okay. Now do you accept that up until the 7<sup>th</sup> of December or whatever the date was and by the time we had sent our cross-examination and for seven  
10 years after – nine years, actually, since 2007, the formation of the unit, you – what we knew was that it would have been unlawful and in breach of the law and that was confirmed by these three reports. You did not know prophetically that one day in 2021 there would be a judgment. Did you?

**MINISTER GORDHAN:** I do not claim to be a prophet Chair at all.

**ADV MPOFU SC:** Good.

**MINISTER GORDHAN:** However, I do want to bring to the  
20 attention of the Chair that Mr Moyane did ask for an opinion from Advocates Penngrove and Nomalo(?) which opinion, essentially, has said that the line of reasoning in Sikhakhane was wrong in respect of the lawfulness of the unit.

**ADV MPOFU SC:** Alright. Do you know that Advocate

Brassie found that your authorisation of the retirement was unlawful, since you are talking about advocates' opinions?

**MINISTER GORDHAN:** I am not aware of Mr Brassie's view on that matter.

**ADV MPOFU SC:** Ag, well, that is what he found. And also, are you aware that there was another report called the Khanyane opinion that also found that your authorisation of the "rogue unit" was unlawful?

**MINISTER GORDHAN:** The Khanyane report dealt with...?

10 I beg your pardon?

**ADV MPOFU SC:** That also found that your authorisation of the "rogue unit" was unlawful.

**MINISTER GORDHAN:** Can you read the relevant section for me, please?

**ADV MPOFU SC:** Do you know or do you not know that there was another report called the Khanyane report which found that the "rogue unit" authorisation was unlawful? Do you know, do you not know? Yes or no?

**MINISTER GORDHAN:** No, I am not familiar with the so-  
20 called Khanyane report. And if you are referring to it, all I want to know is, where does it say that?

**ADV MPOFU SC:** Okay I will get back to that report. So are you telling this Commission that you do not know what it found that your – like the other three, like, Kroon, like KPMG, like Brassie, like IGI that it found that your "rogue

unit” was unlawful or rather your involvement in it?

**MINISTER GORDHAN:** Whatever I understand it, Chair, you can hand the report refer to the investigative unit.

**CHAIRPERSON:** We are three minutes away from the end of the hour Mr Mpofu.

**ADV MPOFU SC:** Yes. And did you know about the person who should know, more than all of us, about this – what is the Inspector General for Intelligence found – and Chair you will find this at TSM-354.

10 **CHAIRPERSON:** Did you complete your question, Mr Mpofu?

**ADV MPOFU SC:** No, I was ...[intervenes]

**CHAIRPERSON:** Oh, okay.

**ADV MPOFU SC:** ...taking you to the reference.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** I hope our ...[intervenes]

**CHAIRPERSON:** Did you say 25 ...[intervenes]

**ADV MPOFU SC:** 354.

**CHAIRPERSON:** 354?

20 **ADV MPOFU SC:** 351. It starts at 351 Chair.

**CHAIRPERSON:** Okay. Okay I have got 351. Have you got it Mr Gordhan?

**MINISTER GORDHAN:** I do not need it Chair ...[intervenes]

**CHAIRPERSON:** You do not need it. Okay.

**MINISTER GORDHAN:** ...because I will comment on that once the question comes.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** Okay. I am reading from the report. Once again, you can take my word for it. It says ...[intervenes]

**MINISTER GORDHAN:** I know it... If I can intervene there Mr Mpofu? Sorry.

**ADV MPOFU SC:** Yes.

10 **CHAIRPERSON:** H'm?

**MINISTER GORDHAN:** Chair, this report was taken on review and set aside by a court.

**CHAIRPERSON:** Ja. But let us wait to hear what question Mr Mpofu wants to put.

**ADV MPOFU SC:** Ja. Again you are pretending to be a prophet. I am saying to you that at that time when you engaged in these illegal activities, you could not have known unless you are a new prophet that in 2020 something was going to happen. Anyway, the report says,  
20 paragraph at 3 – TSM-351:

“Moreover, it is clear from the project... document that only Mr Gordhan, Mr Pillay and Mr Van Loggenberg sanctioned this unit. There was a clear intention to keep the unit and its real purpose hidden from scrutiny...”

You remember that?

**CHAIRPERSON:** I am sorry Mr Mpofu ...[intervenes]

**MINISTER GORDHAN:** [Indistinct] ...[intervenes]

**ADV MPOFU SC:** I am sorry, Chair. It is at the end of paragraph 3.

**CHAIRPERSON:** End of paragraph 3? Okay alright.

**ADV MPOFU SC:** Yes, just the last sentence.

**CHAIRPERSON:** Okay alright.

**ADV MPOFU SC:** Do you remember that Mr Gordhan?

10 **MINISTER GORDHAN:** No.

**ADV MPOFU SC:** Okay. Then it also said at the next page 353. There is paragraph 7, Chair.

“There is further corroborative evidence to the fact that SARS knowing full well that it does not have a mandate to conduct covert intelligence collection in support of its activities, approach the MIA with a view for the MIA to establish a covert capacity and that... such to signing of an MOU... two institutions.

20 However, the MOU was never signed and the proposed dedicated covert intelligence capacity never took off.

It is against the aforementioned background that SARS then took it upon themselves to establish a covert intelligence capacity

considering the... proposed initiative with MIA  
was not successful...”

Do you remember that?

**MINISTER GORDHAN:** No. And I deny that it was covert,  
firstly. And secondly. Chair, I need your guidance on this.  
There have been a number of insinuations about criminality  
on my part and yet another one in this context was  
mentioned that I engaged in illegal activities. Now I do not  
want to take up the Commission’s time but at the same  
10 time I do not want my integrity attacked and I do not want  
to be insulted.

**ADV MPOFU SC:** Okay ...[intervenes]

**CHAIRPERSON:** Yes ...[intervenes]

**MINISTER GORDHAN:** ...words like prophet.

**CHAIRPERSON:** Yes, I think ...[intervenes]

**MINISTER GORDHAN:** I strongly object to that behaviour.

**ADV MPOFU SC:** Okay. Another ...[intervenes]

**CHAIRPERSON:** No, no ...[intervenes]

**MINISTER GORDHAN:** Ask the question. You will get an  
20 answer.

**CHAIRPERSON:** Let ...[intervenes]

**ADV MPOFU SC:** No, let me ...[intervenes]

**MINISTER GORDHAN:** Ask the question and you will get  
an answer.

**ADV MPOFU SC:** I will pause. I will pause.



**CHAIRPERSON:** Hang on mister ...[intervenes]

**ADV MPOFU SC:** I will go to the criminality.

[Parties intervening each other – unclear]

**CHAIRPERSON:** Mr Gordhan, your counsel is listening and she will get a chance to re-examine. So she might get you to clarify some of the issues. Mr Mpofu, your time was up before Mr Gordhan started. I think I will let you finalise one more question or you clarify that one but we are at the end.

10 **ADV MPOFU SC:** No, Chair ...[intervenes]

**CHAIRPERSON:** So it is just that Mr Gordhan was in the process of asking and then he asked for guidance.

**ADV MPOFU SC:** Well, Chair ...[intervenes]

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** I should think that I am entitled to finish this topic, at least. The... and with all these unnecessary interruptions Chair and ramblings on. I hope you have taken that into account because ...[intervenes]

**MINISTER GORDHAN:** ...rambling ...[intervenes]

20 **ADV MPOFU SC:** Because about 15 or 20-minutes of time has been wasted by both Mr Gordhan and his counsel.

**CHAIRPERSON:** Okay, just...

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** But it is extra time. It is five minutes. It is extra time, it is five minutes, okay?

**ADV MPOFU SC:** Alright. Well, before we get that. I think the picture is clear. The criminality that you are guilty of. Firstly, you are guilty of perjury because you lied about saying that you relied on gossip and you gave contradicting accounts of that. So it is a criminal offence to do that. It is called perjury. You understand that?

**MINISTER GORDHAN:** I note your comment.

**ADV MPOFU SC:** Yes. The second criminality on your part is that having identified that Mr Moyane was involved  
10 in what you called state capture and motive to get to demoted or taken out of your job which you and I agreed earlier that state capture of organ corruption or at least can be synonymous. You failed to report that to the police and you breached Section 34 of ...[indistinct]. That is the second criminality. The third criminality ...[intervenes]

**MINISTER GORDHAN:** [Indistinct]

**ADV MPOFU SC:** I am sorry. You want to comment?

**MINISTER GORDHAN:** Oh, sorry, sorry. Go ahead.

**ADV MPOFU SC:** No, no. The third criminality is the one  
20 we are busy with now which involves you having knowingly authorised a unit which is in breach of the intelligence legislation in this country and I am busy with that right now. You understand?

**MINISTER GORDHAN:** [No audible reply]

**ADV MPOFU SC:** I am not saying you agree but do you

understand what I am saying?

**MINISTER GORDHAN:** It is a strange question Chair. I note what he is saying.

**ADV MPOFU SC:** Yes. Okay. So can I continue now? So at page 354 ...[intervenes]

**MINISTER GORDHAN:** Chair, may I respond to those allegations?

**CHAIRPERSON:** Ja.

**MINISTER GORDHAN:** So, firstly, I deny that I did perjury  
10 myself. Secondly, I think it is for you as the Chair of the Commission to decide whether Mr Moyane is finally guilty of state capture or not. I made the reasonable inferences at a particular point in time which are fully justified by labour developments. And thirdly, the ...[indistinct] report, as I mentioned earlier on, is also discredited, reviewed and set aside by a court of law.

**ADV MPOFU SC:** Yes. Ja but not on the basis that I am questioning you but anyway that is a matter for argument. The report says this quote at 354 Chair.

20                    “This, in fact, means that SARS being an organ of state should request intelligence from the agency and it is not mandated to create its own intelligence collection capacity.  
  
The establishment of a capacity within SARS with the capability of exercising powers,

objects and functions which are exclusively reserved of the Intelligence Services is clearly illegal...”

And then the next, paragraph 5, it says:

“Mr Van Loggenberg, Mr Pillay and Mr Gordhan established this unit and recruited persons with a specific skill set to engage in activities outside the SARS mandate...”

And it was on that basis that the IGI proposed  
10 that you and the others be charged. Do you remember that?

**CHAIRPERSON:** Well, the ...[intervenes]

**ADV MPOFU SC:** I know that it was, as you are saying, later reviewed but at least this – the part that I read to you where the extent or they were valid until that point. Correct?

**CHAIRPERSON:** I will allow the answer and then your time is up Mr Mpofu. Answer Mr Gordhan.

**MINISTER GORDHAN:** Chair, in the first instance, very  
20 similar to Advocate Sikhakhane and his refusal to allow ...[indistinct – audio distorted 00:18:00] would call them. The Inspector General of Intelligence never interviewed me. There were one or two phone calls to try and set up an interview but it never actually occurred. Secondly, as I said before, the IGI report was actually set aside.

And thirdly, that was in fact, as the Commission will note from the various evidence that it has before it, the height of the period of state capture. And it is well-known that the IGI offers or parts offers they are compromising in that particular regard as well.

**ADV MPOFU SC:** So ...[intervenes]

**CHAIRPERSON:** Thank you.

**MINISTER GORDHAN:** So that is all I have to say Chair. Thank you.

10 **ADV MPOFU SC:** Chair ...[intervenes]

**CHAIRPERSON:** Thank you.

**ADV MPOFU SC:** I am sorry Chair. I really have to put this. I wanted to ask for a comment but it is for the record.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** The... If the Chairperson can go to the first volume?

**CHAIRPERSON:** Well, if it is for the record, you can just mention what volume, what page and then say that.

**ADV MPOFU SC:** Chair, it is Volume – you call it VE-3, I  
20 think or...

**CHAIRPERSON:** Yes?

**ADV MPOFU SC:** Yes. It is the statement of complaint of Mr Moyane.

**CHAIRPERSON:** H'm?

**ADV MPOFU SC:** At page 31 thereof.

**CHAIRPERSON:** H'm?

**ADV MPOFU SC:** And... Well, Chair will decide if you allow me to ask a question but let me put something on record first.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** That the statement itself, Chair, on page 1, you will see that it is headed as follows.

**CHAIRPERSON:** H'm?

**ADV MPOFU SC:** Yes.

10                   “The statement of complaint in order to satisfy...”

                  This is Mr Moyane’s – this is the celebrated complaint statement that was supposed to be motivated by state capture.

**CHAIRPERSON:** H'm?

**ADV MPOFU SC:** Yes.

20                   “The statement of complaint in order to satisfy my legal obligation to report allegations of corruption in compliance with the provisions of the Prevention and Combating and Corrupt Activities Act of 2004...”

                  And all I wanted to establish, Chair, from the witness was whether he was aware that this statement, the genesis of the statement was actually the fact that members of the “rogue unit” had confessed to Mr Moyane

and as a result thereof he – in discharging his own obligations. Otherwise, he would have been guilty of criminality.

**CHAIRPERSON:** I think you can place it on record and ...[intervenes]

**ADV MPOFU SC:** Well, I would like to ...[intervenes]

**CHAIRPERSON:** ...asking questions. Ja.

**ADV MPOFU SC:** Yes.

**CHAIRPERSON:** Okay alright.

10 **ADV MPOFU SC:** Yes, thank you.

**CHAIRPERSON:** Okay. He will not need to answer. You can just place on record that that is your understanding of the position.

**ADV MPOFU SC:** So I cannot put a question?

**CHAIRPERSON:** No, do not put a question.

**ADV MPOFU SC:** Okay Chair.

**CHAIRPERSON:** Ja

**ADV MPOFU SC:** Well, the – should I then ...[intervenes]

**CHAIRPERSON:** You can place it ...[intervenes]

20 **ADV MPOFU SC:** What I was going to ask him. Ja.

**CHAIRPERSON:** No, do not.

**ADV MPOFU SC:** Okay.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** This... Chair... Okay that part that I am referring to. And then I also want to refer to the one just

above that ...[intervenes]

**CHAIRPERSON:** H'm?

**ADV MPOFU SC:** ...where it says the – Mr Moyane's statement says the S v Helgard Lombard, Johan de Waal, Ivan Pillay, Adriaan Janse van Rensburg, that is the guy, the gentleman who was known as Ollie, and that Helgard Lombard and Johan de Waal were the people who had confessed to Mr Moyane about their involvement, their involvement and that of Mr Gordhan in the "rogue unit"  
10 activities including bargaining the office of then NPA.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** And then paragraph 19 of that statement, which is the last one, the last paragraph. It says – Mr Monyane says:

"I hereby institute criminal proceedings against all individuals mentioned in paragraph 3 above including those individuals who were in the line of command..."

And that would include Mr Gordhan.

20 "...and knew or ought to have reasonable known of the illegal activities to the criminality investigated, face the criminal justice system and the rule of law in respect of allegations of corruption, money laundering, racketeering, conducting covert intelligence of the NPA



...[intervenes]

**CHAIRPERSON:** I have to stop you ...[intervenes]

**ADV MPOFU SC:** “...and any other charges which  
...[intervenes]

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** “...and other prosecuting authority may  
deem fit...”

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** So those are – that was the reason why  
10 the complaint was raised Chairperson. Not to mambo-  
jumbo but state capture motives that we heard from  
Mr Gordhan.

**CHAIRPERSON:** Okay.

**ADV MPOFU SC:** Thank you.

**CHAIRPERSON:** Somebody must sanitise the podium.  
We are at nearly quarter to eight. I will give you a chance  
to re-examine but maybe we should take a short  
adjournment before that happens. We will take a ten  
minutes’ adjournment.

20 We adjourn.

#### **INQUIRY ADJOURNS**

#### **INQUIRY RESUMES**

**CHAIRPERSON:** Ms le Roux, we have got you but we do  
not have your client.

**MINISTER GORDHAN:** You do, you do, Chair.

**CHAIRPERSON:** Okay, Mr Gordhan is there now. Yes, Mr Gordhan, your counsel will not conduct a re-examination to clarify certain matters.

**ADV LE ROUX:** Thank you, Chair.

**CHAIRPERSON:** Ms le Roux, how much time do you think you estimate you would need? I just want to have an idea so that we can see whether we...

**ADV LE ROUX:** Chair, I think it is probably going to be a little over an hour. I would think sort of an hour and  
10 fifteen. I will try to do it as quickly as possible.

**CHAIRPERSON:** Yes, okay.

**ADV LE ROUX:** And I had structured so that it is schematic and that we do not have to go to bundles and go to documents as much as possible.

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

**ADV LE ROUX:** Thank you. Good evening, Minister.

**MINISTER GORDHAN:** Good evening, Advocate.

**ADV LE ROUX:** Mr Gordhan, I would like to clarify certain  
20 facts so that the record before the Commission is clear and I would also like to give you an opportunity to respond to certain themes and accusations which were made in the cross-examination. I have grouped these issues into eight topics and I hope to get through them quickly, so I would ask that you answer just the question that I pose and

hopefully we can then make some progress.

**MINISTER GORDHAN:** That is fine.

**ADV LE ROUX:** So, Chair, the first topic I would just like to make sure we are absolutely clear on the record is exactly what happened with respect to the charge – to the complaint filed by Mr Moyane.

**CHAIRPERSON:** Okay.

**ADV LE ROUX:** So, Minister Gordhan, when you testified in November 2018 for the first time before the Commission,  
10 why did you think Tom Moyane had laid charges against you?

**MINISTER GORDHAN:** Because that was the narrative firstly. Secondly, two former ministers, Mahlobo and Nhleko said at a press conference in 2016 that Mr Moyane had laid complaint against me and they named me specifically. They also made a number of wild allegations about half a million rand or few hundred million rand being spent on equipment. That was never actually true and never found. And as you pointed out Advocate to the Chair  
20 earlier on, all this only emerged – the real facts only emerged once we had the affidavit made available by Mr Moyane.

So in the period 2016 and when the affidavit lodged in terms of the complaint was made available, Mr Moyane did not actually take the opportunity to clarify that in fact I

am not one of the people against whom the complaint was lodged.

**ADV LE ROUX:** Thank you. Then, Chair, I would like to move on to the second topic which is there was a theme in the cross-examination and its statement that Mr Moyane has made repeatedly in his affidavit in the application to cross-examine that he acted as a reasonable Commissioner, that when he lodged the criminal complaint he was acting as a reasonable Commissioner. Tonight we  
 10 heard that he also acted, and as the document makes clear, to discharge his obligation under PRECCA,. But he says that throughout this period when he laid the criminal complaint and then throughout your pursuit by the law enforcement agencies that he had merely done his duty as a reasonable Commissioner and I would like to test the proposition with you because you were SARS Commissioner for many, many years and through that period SARS has always been a target of attacks.

So I would like to explore with you, if you had been  
 20 Commissioner and certain things happened, how would you have reacted so that the Commission can evaluate Mr Moyane's version, that he was a reasonable Commissioner, and Minister Gordhan's version that he was furthering state capture.

So the first topic I would like – first example I would

like to cover under that, is let us just orientate ourselves in time. Mr Moyane begins his term as Commissioner on the 1 October 2014. Less than two weeks later on the 12 October the Sunday Times publishes its first story, SARS bugged Zuma, the start of what we now call the rogue unit narrative. If you had been Commissioner and the front page of the Sunday Times had that story, what would you have done in response to that article?

**MINISTER GORDHAN:** Well, firstly, I would have asked  
 10 the people mentioned in the article to explain the article to me. If I found that there was cause for concern I would try to get somebody within SARS, of an independent person to evaluate the first and then establish whether there is a serious concern in this particular regard or not and then, if necessary, either discipline the relevant individuals concerned, if they have crossed the line, so to speak, or take whatever legal or other actions that I would be advised to take by a legal professional and I am confronted with this every other day in respect of one entity or  
 20 another. But what also became apparent, as you point out, is that subsequent to the 12 October 2014, what was suspicious was the leaking of information from personnel files within SARS as well about the pension matter and other matters related to some of the senior people at SARS as well and the question is, well, if this is confidential

personal information within SARS, who is actually leaking it and why is this being done and what is the context in which it is actually being done as well. So, where necessary, investigations will be pursued and if proper legal advice says that I must lay charges, then we will do so accordingly.

A comparative example for reasonableness and action as a Commissioner is what did Mr Moyane do in respect of Mr Makwakwa and in that particular regard you  
 10 have a dossier of some sort given by the Financial Intelligence Centre to Mr Moyane and that dossier indicated that Mr Makwakwa was receiving funds in his account from various sources and it took Mr Moyane I think some four months only after this matter became public in one form or another to reluctantly act on that matter.

So if this was consistent practice by a consistent and professional Commissioner of the South African Revenue Service then there had to be even-handedness in terms of all of the matters.

20 But what was interesting as well, which has not emerged, Chairperson, is that whole issue of one of these witnesses being asked to – so KPMG [inaudible – speaking simultaneously]

**CHAIRPERSON:** I am sorry, Mr Gordhan ...[intervenes]

**MINISTER GORDHAN:** I am not sure if it falls in the ambit

of this, but again just taking the theme of reasonableness and professionalism in one's conduct. A witness is told pretend that you are sick and you are not available but you have set up the KPMG investigation to be undertaken and yet to telling a witness to "play truant" and play sick at that point in time. So ...[intervenes]

**CHAIRPERSON:** Hang on, Mr Gordhan, ...[intervenes]

**MINISTER GORDHAN:** So those are some examples.

**CHAIRPERSON:** Hang on, hang on. Ms le Roux, if you  
10 want to compare the question of how one person or one Commissioner would have acted in terms of reasonableness, should we not look at the same facts, if the same facts are known to them? I think that is much more helpful otherwise we are going to all kinds of scenarios. But in these facts who would you have – if you knew these facts about this matter, how would you have reacted or acted.

**ADV LE ROUX:** Yes, Chair, and that was my question.

**CHAIRPERSON:** Yes, yes.

20 **ADV LE ROUX:** If you had picked up the Sunday Times what would you have done? The Minister said he would have talked to the people involved in the unit, he would have investigated the source of this and he would have taken steps against them if [inaudible – speaking simultaneously]

**CHAIRPERSON:** But, was Mr Moyane aware of the Sunday Times article?

**ADV LE ROUX:** Yes, Chair.

**MINISTER GORDHAN:** Yes.

**ADV LE ROUX:** Yes.

**CHAIRPERSON:** Is that – has that been canvassed?

**ADV LE ROUX:** Yes, Chair.

**CHAIRPERSON:** Okay.

**ADV LE ROUX:** Because he takes certain steps on the  
10 back of the Sunday Times article.

**CHAIRPERSON:** Okay, if he knew that then I think that may be fine.

**ADV LE ROUX:** Yes.

**CHAIRPERSON:** I was not sure that ...[intervenes]

**ADV LE ROUX:** No, no, he ...[intervenes]

**CHAIRPERSON:** Ja, okay. Let us continue.

**ADV LE ROUX:** On that Monday morning, you know, he took steps about that.

**CHAIRPERSON:** Okay.

20 **ADV LE ROUX:** Accepting the truth of that story.

**CHAIRPERSON:** Okay, let us continue then.

**ADV LE ROUX:** Mr Gordhan, do you know if Mr Moyane spoke to any of the unit members on – after the 12 October, first article about the alleged unit?

**MINISTER GORDHAN:** Again I cannot give you absolute



details but I believe – well, Mr Mpofu referred to so-called confessions, I do not know the context and the actual content of the confessions by Mr Lombard and another gentleman. The second issue that is in the media over time as well, Chairperson, if the truancy question, as I framed it earlier on, pretend that you are sick and you are not available so that KPMG cannot question at that point in time, I am not sure what happened thereafter. And there might well have been other interactions that I am not aware  
 10 of.

**ADV LE ROUX:** And Minister Gordhan, we will cover both of those topics but do you know if Mr Moyane ever spoke to, for example, Mr van Loggerenberg who was the manager of the high risk investigation unit?

**MINISTER GORDHAN:** I do not know.

**ADV LE ROUX:** On the 9 November 2014 there was the article that said the unit had run a brothel, it is common cause and in the public domain that Mr Moyane disbanded Exco as a result of that. It is also common cause and in  
 20 the public domain that the Labour Court overturned those suspensions. If you had read an article a few weeks after the first one that said there was a brothel being run, what would you have done as a SARS Commissioner?

**MINISTER GORDHAN:** The same as I indicated earlier on, try to establish the true facts and whether these were

just wild allegations and again understand the context in which the allegations were being made and then decide the appropriate line of action having consulted legal and other people within the SARS senior management [indistinct] 12.31 who over the period from 1998 to the time I left in 2009 I had learnt to trust in terms of their judgment and the advice that they would actually offer.

**ADV LE ROUX:** In the months that followed, the Sunday Times published more than 30 articles that made more than 10 50 different claims about the activities of the unit. These included accusations of murder, interception, break-ins, bug-ins, eavesdropping ...[intervenes]

**ADV MPOFU:** Chair...

**ADV LE ROUX:** Members purchasing lavish cars and homes.

**CHAIRPERSON:** Hang on one second?

**ADV LE ROUX:** If you had been SARS Commissioner what would you have done with each one of these articles.

**CHAIRPERSON:** Sorry, Mr Mpofu?

20 **ADV MPOFU:** Thank you, Chair, I do not want to interrupt my learned friend but where I come from re-examination covers matters that were covered in the cross-examination, not new material that was not covered in the ...[intervenes]

**ADV LE ROUX:** Chair, this is not new material, the cross-examination ...[intervenes]

**CHAIRPERSON:** Let him finish, Ms le Roux.

**ADV MPOFU SC:** Can I just finish talking? And these topics that are being covered, Chair, this is the second one, I was waiting, hoping maybe we were going to move on. I do not know where it comes from about the 30 Sunday Times articles and so, how that arises from the cross-examination because that is new evidence. Not even been given by the witness but being given by me learned friend.

10 **ADV LE ROUX:** Chair, the cross-examination covered the reasonableness of Mr Moyane's conduct when he went and laid charges. The cross-examination said everything he did when he was SARS Commissioner was not in furtherance of state capture but was the conduct of a reasonable SARS Commissioner. We are testing that proposition with the examples of a slew of Sunday Times articles and where Mr Moyane does not respond to them, is that reasonable? That is what we are covering. I can move on from the media articles if you like.

20 **CHAIRPERSON:** Well, Ms le Roux, you are saying for the second time that you were testing something. The regulations say you re-examine to clarify so which might be different from what happens in litigation, the purpose under the regulations of re-examination is to clarify matters that might not have - might not be clear arising from the

evidence that has been led and the cross-examination that has happened.

**ADV LE ROUX:** Yes, Chair, and the cross-examination was not clear as to the basis for the contention that Mr Moyane was reasonable so we are clarifying and assisting the Commission by saying let us look at what Mr Moyane did, was that in fact reasonable because you are going to have to make a determination on whether Mr Moyane acted in furtherance of state capture or not and that is what we  
10 are busy testing.

**CHAIRPERSON:** Well ...[intervenes]

**ADV LE ROUX:** If he remained silent in the face of various things.

**CHAIRPERSON:** Well, let us go back to the question and as you approach each question if you can just bear in mind I will be asking myself what is being clarified. That is what is going to be important.

**ADV LE ROUX:** Yes, Chair.

**CHAIRPERSON:** One second? Mr Mpofu, is there  
20 anything left?

**ADV MPOFU SC:** Yes, Chairperson, again I hope I do not have to do this again. Apart from what you have said, Chair, all I am saying is that the “evidence” is now coming from my learned friend about the 30 Sunday Times articles, did not come from the witness, that is a fact. The second

thing is that re-examination by definition is the same as leading a witness in chief because that is your own witness. So she cannot lead the witness, she is actually doing worse than leading the witness, she is actually giving evidence but she is not allowed to lead the witness and she is not allowed to give evidence, that is all. And she must stick to clarification of issues that were raised in cross-examination. Thank you.

**ADV LE ROUX:** Chair, let me move on, we are wasting  
10 time.

**CHAIRPERSON:** Yes, please. Yes, yes.

**ADV LE ROUX:** Mr Gordhan you testified that Tom Moyane had exculpatory evidence that he failed to share with law enforcement regarding the Pillay pension charges. Do you recall that evidence?

**MINISTER GORDHAN:** Yes.

**ADV LE ROUX:** What exculpatory evidence were you referring to?

**MINISTER GORDHAN:** I was referring to an opinion given  
20 by Mr Vlok Symington in I think on whether the pension was acceptable in terms of the regulations that are applicable at the time and the second one was an opinion by Mr Mapahkela(?), an attorney acting for Mr Moyane who specifically said that the pension issue is not of a criminal nature and will not – he would not advise that complaints

to criminal charges be laid in respect of the pension issue and those were not made available to the NPA, as I understand it and remember it and as a result finally on the – is it the 31<sup>st</sup> I think of October, Chairperson, in 2016 the then head of the Prosecuting Authority Mr Abrahams withdrew the charges.

**CHAIRPERSON:** Sorry, Mr Mpofu?

**ADV MPOFU SC:** Chairperson, really, this is more than frustrating. How can my learned friend ask for clarification  
10 on the Pillay issue. When I raised the Pillay issue on the 30 November she objected that it should not be part of the cross-examination. Today you ruled, Chair, that it should not be and I accepted that. So how on earth can she ask on that very topic that I was not supposed to question about and now want clarification?

**CHAIRPERSON:** I understand your point. Ms le Roux?

**ADV LE ROUX:** Because, Chair, you permitted the question and the answer was given. Minister Gordhan was not given the opportunity to explain what exculpatory  
20 evidence Mr Moyane had before he filed the complaint. I am asking him to clarify that for you.

**CHAIRPERSON:** So you say the question was asked and he answered?

**ADV LE ROUX:** Yes and he – but he was not given the opportunity to explain what exculpatory evidence on the

pension ...[intervenes]

**CHAIRPERSON:** Okay, let us move on, I have taken note. I cannot remember, I thought I said that there would be no cross-examination but you were listening. If you say there was a question and there was an answer before I ruled. So let us move on.

**ADV LE ROUX:** I will move on, Chair.

**CHAIRPERSON:** Ja, okay.

**ADV LE ROUX:** Mr Gordhan, you testified this evening  
10 about an opinion received from Adv Trengove regarding the lawfulness of the establishment of the unit at SARS. Do you know what that opinion said about the Sikhakhane report's finding that the unit was unlawfully established. Can we just get that clear on the record?

**MINISTER GORDHAN:** In essence, that Mr Sikhakkane's understanding of the law was wrong. Secondly, that a distinction can be drawn between the kind of intelligence that an intelligence agency has the right to collect and have in its possession versus intelligence/information that  
20 a Home Affairs department or a SARS or whatever other entity would and need for its operational purposes and in essence, if one takes it at a very practical level, if one says that SARS' role is to manage its customs activity in a way in which our borders are secure and illegal or illicit economic activity does not take place and smuggling does

not take place then clearly it needs the information on who are the smugglers, which warehouse are the cigarettes stored in, how are they distributed so that excise taxes can be levied and, if need be, criminal charges laid and that has happened in the past if you look at the SARS annual reports.

**ADV LE ROUX:** Mr Gordhan, do you know whether people involved in the management of the unit and given that this is common cause, I think I can say it was Mr Pillay, do you  
10 know whether his detailed rebuttal to Sikhakhane was ever provided to law enforcement by Mr Moyane?

**MINISTER GORDHAN:** I am not aware of the detail there.

**ADV LE ROUX:** You testified this evening about Mr Moyane telling Helgard Lombard not to go to KPMG and telling him you are not well. Can we just start with who is Helgard Lombard?

**MINISTER GORDHAN:** I think he is one of the gentlemen mentioned in the complaint. So, Chair, your attention was drawn to page 1 of the bundle that Mr Mpofu distributed  
20 and he read [indistinct] 22.19 and Helgard Lombard, De Waal, etcetera, etcetera, or he might not have read that part, he referred to the statement part but Mr Lombard's name appears as the first name in the affidavit accompanying the complaint.

**ADV LE ROUX:** Have you ever met Mr Lombard?



**MINISTER GORDHAN:** Not that I can recollect.

**ADV LE ROUX:** Do you know anything about his time in the unit?

**MINISTER GORDHAN:** No, not the details. I mean, we have 15 000 people in SARS at that point in time involving various types of activity, as I have pointed out to the Chair previously and to Judge Nugent as well so the detailed operational activities of each of the individuals I would not be aware.

10 **ADV LE ROUX:** To make sure the record is clear, do you know why Mr Moyane appointed KPMG?

**CHAIRPERSON:** I believe there was a recommendation in the Sikhakhane report that some matters required further investigation and that as a consequence KPMG was appointed and of course Mr Sikhakhane, as I recollected, did not entertain any submissions from the people who actually were part of the investigating unit.

**ADV LE ROUX:** Then you referred but were not able to explain a reference to Mr Moyane telling Mr Lombard  
20 something like you are not well and that he must stay home. What precisely was it that you were testifying about?

**MINISTER GORDHAN:** I have been told, Chair, that this event took place when Mr Lombard was called. I cannot remember which document I read it in now but he was

called. Mr Lombard then on the morning that he should have made his appearance before the KPMG investigators, one of whom I think was a Mr van der Walt, and was that told that he should say he is sick and go home and I believe there is a recording somewhere that amplifies on this or illustrates this particular thing.

**ADV LE ROUX:** Mr Gordhan, were you ever interviewed by KPMG?

**MINISTER GORDHAN:** No.

10 **ADV LE ROUX:** Were you ever interviewed by the IGI?

**MINISTER GORDHAN:** No.

**ADV LE ROUX:** Were you ever interviewed by the Sikhakhane panel?

**MINISTER GORDHAN:** No.

**ADV LE ROUX:** Were you ever interviewed by Judge Kroon's panel?

**MINISTER GORDHAN:** No.

**ADV LE ROUX:** Were you ever interviewed by the joint standing committee on intelligence?

20 **MINISTER GORDHAN:** No.

**ADV LE ROUX:** Were you ever interviewed by the standing committee on Finance?

**MINISTER GORDHAN:** On this matter, no.

**ADV LE ROUX:** On the issue of the unit?

**MINISTER GORDHAN:** No.

**ADV LE ROUX:** So, Chair, to wrap up this theme. Mr Gordhan, in light of the fact of what you have testified to with respect Mr Moyane's conduct with respect to KPMG that you have – you are unaware of him ever further exploring the Sunday Times articles, you were denied *audi* by all of these bodies that made findings about the unit, would you like to make a final comment about Mr Moyane's contention that he acted reasonably when he laid a complaint against, when he laid a complaint with law  
10 enforcement?

**MINISTER GORDHAN:** No, the only point I wanted to make, Chair, is that you should take note that all of the reports that Mr Mpofu refers to earlier on where all reports that appeared to have a bias did not entertain any counterinterviews, if you like or *audi alteram partem* being implemented and in the KPMG instance I remember on the 14 December when I had just taken over of 2015 when I was reappointed by President Zuma as Minister of Finance saying in a press conference that KPMG's remarks in some  
20 document over here that I should have known about whatever it is that they were referring to in relation to the investigative unit was unacceptable and I challenged them and today apparently KPMG is sitting across the table and looking at settlements with the people that have been impacted a result of their shoddy work in this particular

regard.

**ADV LE ROUX:** Thank you, Chair, if I can then move on to the third topic which is your conception of this concept state capture because there were several moments in the cross-examination where you were asked to limit your definition for purposes of the question to criminality and you answered things like you only partly agree that it is about that, it could have other aspects. Could you just explain to the Chair what you understand state capture to  
10 include?

**CHAIRPERSON:** I do not know if you really want him to do that. Last time under cross-examination he provided quite some explanation which I understood.

**MINISTER GORDHAN:** And, Chair, you could refer to my original submission to you in 2018 in which I referred to a report by academics in South Africa and of course since then I have learnt a lot about the impact of state capture on institutions including state owned enterprises on which you are hearing evidence as well.

20 **CHAIRPERSON:** No, that is fine. What I am saying, Ms le Roux, it was quite clear what he said.

**ADV LE ROUX:** Thank you, Chair.

**CHAIRPERSON:** Ja.

**ADV LE ROUX:** Then related to that, Minister Gordhan, why is SARS important in the state capture project?

**MINISTER GORDHAN:** As I explained that earlier to the Commission as well, I mean, SARS is what you would call a critical fiscal institution that in my experience the Minister of Finance when looking at a prospective budget will have some sense on the basis of macroeconomic data which includes GDP growth, household consumption, gross fixed investment in an economy, the likely inflation scenario that will be provided by Stats South Africa, the view of the South African Reserve Bank on that particular  
 10 matter amongst other macro factors and make an estimate of what it anticipates on the basis of previous years' experience, the kind of revenue it can anticipate in the future, firstly.

Secondly, is the cost side or the expenditure side which will be tailored to in some senses manage the gap, if you like, between revenue and cost or expenditure.

Thirdly, the Minister of Finance and his team will have to look at the issue of borrowing requirement in a particular year and the current Minister of Finance has  
 20 made a number of comments in that particular regard in a particular framework then applies in relation to the borrowing requirements and the interest to be paid in respect of the debt that is actually owed.

So revenue constitutes a critical part of the budget process firstly, and secondly the tax to GDP ratio, as I

explained to you in 2018 Chairperson is a very important part of establishing whether and what kind of tax compliance you have in a country and there is evidence which show that during Mr Moyane's term of office, and this information comes from the Treasury, there was a decline in revenue, there was a decline in the tax GDP ratio and some would say there was decline in relation to the tax buoyancy issue.

So SARS plays a critical role in ensuring tax  
10 compliance, in ensuring that all of us declare our taxable income and that way Government knows what it can actually spend on.

**ADV LE ROUX:** Now one element of the cross-examination was that Mr Moyane says you were jealous because he was the first Commissioner to collect a R1trillion. Mr Moyane is appointed in October, could you clarify for the Chair and explain how much credit Mr Moyane can get for that R1trillion in the first year?

**MINISTER GORDHAN:** I mean, a R1trillion is obviously an  
20 important milestone in the kind of context that we have in South Africa. I think, when democracy came to South Africa in 1994 Chair, having the collection was around a few 100 billion rand to reach a trillion mark is a huge achievement. But as Mr Cecil Morden, who was the chief director for taxation, at the National Treasury said to the

Nugent Commission, and this is where he describes the tax revenue buoyancy, declining from 1.26 in 15/16 to one 16/17.

**CHAIRPERSON:** Hold on Mr Gordhan, Mr Mpofu?

**ADV MPOFU SC:** Chair, how is a witness now allowed to rely on a secondary resource about a matter which was not dealt with in cross examination, at the very least, to the extent that it was dealt with, he conceded that Mr Moyane was not only the first one to collect a trillion but he  
10 achieved that feat again, and again.

**ADV LE ROUX:** Yes, Chair I am asking...[intervene]

**CHAIRPERSON:** Let Mr Mpofu finish Ms Le Roux.

**ADV MPOFU SC:** Can I finish, thanks and that is the first part of the objection, Chair. The second part is the reliance on Mr, whatever his name is, but we do not know where that sauce is in – what the credibility of that person.

**CHAIRPERSON:** Okay, you want to...[intervene]

**MINISTER GORDHAN:** But Chair, can I complete my answer?

20 **CHAIRPERSON:** Before you do so let me hear what your counsel has to say to say to what Mr Mpofu has just said.

**ADV LE ROUX:** Yes, Chair in cross examination says one of the reasons why you cannot say Mr Moyane was part of State capture. One of the reasons you say that is because you are jealous, he collected a trillion rand. So I am

clarifying and trying to understand whether a trillion rand can be to Mr Moyane's credit and that is what the witness is explaining.

**CHAIRPERSON:** Ja, I think the question is legitimate, but just that your answer from the beginning, Mr Gordhan and if you come to the point where I interrupted you, we will take it from there we will take it from that stage.

**ADV MPOFU SC:** Chair, I am sorry I do not understand that ruling Chair how can the question be legitimate when  
10 it is based on a false premise? There was never, not me at least, nobody said in this Commission, that one of the reasons Mr Moyane was motivated by State Capture was because he was jealous.

That - the five issues that are raised in this Commission arrogance, petty jealousy, racism, deflection, and victimisation of a whistle-blower were explained as the reason for the hostility between the two gentlemen and that – so I do not know how...[intervene]

**CHAIRPERSON:** And the jealousy, what was the context  
20 of the jealousy?

**ADV MPOFU SC:** It was one of those five things which came from the hostility. So I do not know how you can uphold the ruling, I mean the argument which is based on a false premise.

**CHAIRPERSON:** As I understood the position, certainly it



had been said, that is how I understood, it had been said or suggested that Mr Gordhan was jealous because Mr Moyane had achieved the collection of a trillion rand something that had not happened before. Okay, that part you agree with?

**ADV MPOFU SC:** I agree Mr Chair, yes this is something that Mr Gordhan had never achieved.

**CHAIRPERSON:** Yes, that part you agree?

**ADV MPOFU SC:** Yes, I agree with that but I am saying  
10 that was not as my learned friend summarised when you agreed with her that was therefore the reason for the...[intervene]

**CHAIRPERSON:** You say in the way she had put it was different?

**ADV MPOFU SC:** It was wrong, not different but you upheld it Chair. I am saying that was a matter of the hostilities, I had faced the hostilities between them through among other things. So at least let us uphold the correct thing.

20 **CHAIRPERSON:** Yes, it is late it has been a long day for all of us.

**ADV LE ROUX:** Yes, Chair and Minister Gordhan's evidence has been there was to the extent there was hostility, it was because he believed Mr Moyane was following out SARS to advance the State Capture project,

that is how they connected.

**CHAIRPERSON:** Yes, but go back to your question about the achievement.

**ADV LE ROUX:** So the question is this – I am clarifying this issue that Mr Moyane says you were jealous because I got the trillion rand. And I am clarifying in saying, did Mr Moyane, in fact, get the trillion rand, can he take credit for the trillion rand and the Minister is explaining that it is inevitable because of inflation because of the tax base  
10 because of the economy, that someone who would have got to a trillion rand.

**CHAIRPERSON:** Okay.

**ADV LE ROUX:** So it would not be...[intervene]

**CHAIRPERSON:** Okay, can Mr Moyane take credit for achieving the trillion-rand collection. Mr Gordhan?

**MINISTER GORDHAN:** I have answered that already Chair with respect, and I said that the number is a good number to reach, and if I may, with your consent just give an illustration, if someone runs the 100 meters, three  
20 seconds ahead of the world record, you say that is a fantastic achievement.

The point we are making here is a simple one. We are going to reach 1 trillion at some stage, we are going to reach 1.5 trillion at some stage and we are going to reach 2 trillion at some stage. That is the logic of economic

growth, that is the logic of inflation and the level of tax compliance and economic activity you have within an economy. So it is a matter of jealousy and so on, I believe is not a matter that we should even be looking at here because there is nothing of that sort. What do I have to be jealous about?

The logical development towards a trillion rand is a logical development that will happen, whether Mr X is there or My Y is there at the end of the day. You should ask, did  
10 you actually see an increase in the performance of SARS?

Could there have been more than a trillion rand's collected if the tax gap widened during that period? And the answer to all of that is very simple, those things did not happen from the evidence I have seen.

**CHAIRPERSON:** So is your answer that Mr Moyane cannot take credit at all for that achievement, or is your answer that he can take some credit, but not all the credits, what is the?

**MINISTER GORDHAN:** We will give him some credit in  
20 the moment of generosity.

**ADV LE ROUX:** Thank you, Chair that was the fourth topic if I can move on to the fifth. Mr Mpofu alleged, Minister that you changed your statement to the Commission about meeting the Gupta's. Chair, this was in the context of my learned friend's cross examination that

meeting the Gupta's is a sign that you are involved in State Capture.

And he made the statement that you changed your statement to the Commission. The public record will record that at the time that you testified in November 2018, the EFF made this claim that you changed your statement. To be clear on the record Minister Gordhan how many statements did you file with the Commission before you testified in November 2018?

10 **MINISTER GORDHAN:** One as far as I know.

**ADV LE ROUX:** And how did it come about that your statement addressed the famous Ambani meeting where a member of the Gupta family may have been present?

**MINISTER GORDHAN:** I think I have said it here and I have said it elsewhere as well, that I have no recollection that a Gupta person was in that discussion, accompanying Ambani and for the umpteenth time let me say that the meeting that I went to was a meeting between me and Mr Ambani who might have been interested in investing in

20 South Africa.

He was accompanied by people even today, I cannot remember who was there but the person who reminded me was my former chief of staff, currently the Director General of the Treasury Mr Mogojane and he said no, you forgetting this person was there.

Well, I said, if you say I will included and so I put it into my statement and then informed Parliament that this is how - what I said to Parliament has to be changed, because there is new information that my former chief of staff has made available to me.

**ADV LE ROUX:** Do you know how the EFF obtained your draft statement, that that did not include the Ambani issue?

**MINISTER GORDHAN:** No idea.

**ADV LE ROUX:** Chair, if I can then move on to the sixth  
10 topic, which is the unit, and it is important to just go through...[intervene]

**ADV MPOFU SC:** Chair, again, this is not allowed in re-examination it is not the time to mislead the tribunal or to put a question in a skewed fashion. This is what I said to Mr Gordhan on this topic at page 367 of the record:

“Okay well, I am putting to you then that you are asking because what you are avoiding to answer which I do not understand, but one of the signs of meeting the Gupta’s but let us move on. So you  
20 had changed your statement to the Commission to reflect that you did meet with the Gupta’s, correct?”

And the Mr Gordhan:

“Yes, the reminder that I received from my then chief of staff who is currently the DG of Treasury Mogojane.”

So he accepted that he changed his statement to the Commission. So I do not know what it is that my learned friend wants the witness to now say.

**ADV LE ROUX:** Yes, I am clarifying that there was one statement that included that, to the extent that there is ambiguity, that changing your statement means you had a statement and then you changed it. He had a statement and there was one statement filed.

**CHAIRPERSON:** If I understand, I understood that what  
10 must have happened is that at some stage, whether in the Commission or in Parliament or elsewhere, Minister Gordhan had written or spoken on the basis of a certain number of occasions when he had met with the Gupta's or had been in a meeting where there was somebody from the Gupta family.

But that later on, after such a statement may have been made, whether in the Commission or in Parliament, his then chief of staff or DG of National Treasury alerted him of another occasion, when he said involved somebody  
20 from the Gupta family or associated with the Gupta family, that was my understanding of what had happened, of what the position is or was, is that correct?

**ADV LE ROUX:** Yes.

**MINISTER GORDHAN:** Can I clarify Chairperson?

**CHAIRPERSON:** Yes.

**MINISTER GORDHAN:** May I do that?

**CHAIRPERSON:** Ja.

**MINISTER GORDHAN:** So I think you are right, let us separate what happened in Parliament, and what happened in preparation for the Commission, during which I met some of your legal representatives as well.

So in preparing the statement, various drafts were prepared, and various people that were relevant to particular sections might have looked at it, or that  
10 particular draft of that section of the draft to verify my memory. And it was in the course of that that Mr MogoJane reminded me that this Gupta individual whoever he might be, was present in a meeting. That meeting was the meeting with Mr Ambani, so it was no meeting with Mr Gupta.

It was a meeting with Mr Ambani where this individual was present in the statement presented to you as the Commission and the Chair of the Commission. That is the version that is there, there was no change in the  
20 statement and that is the point what my legal representative is making.

**CHAIRPERSON:** So there was no final statements, signed statement that you may have lodged somewhere whether in Parliament, which had given a different number of context or?

**MINISTER GORDHAN:** No Chair, in parliament there is no such thing. That is why I am separating Parliament and the Commission.

**CHAIRPERSON:** Yes, and so, you say there was a draft...[intervene]

**MINISTER GORDHAN:** Yes, a draft that was meant for you.

**CHAIRPERSON:** Yes, a draft in preparation, which had been prepared for submission to the Commission, but that  
10 draft, and that draft included a different number of occasions.

**MINISTER GORDHAN:** That is it.

**CHAIRPERSON:** And subsequently, before that draft could be final you were reminded by your chief of staff or DG about another incident. So the final statement that you signed, was different from what had appeared in the draft, is that the position?

**MINISTER GORDHAN:** That is right, so there was no change in a formal statement to the Commission.

20 **CHAIRPERSON:** Okay, alright.

**ADV LE ROUX:** Thank you.

**MINISTER GORDHAN:** And any assertion Chairperson, or attempt to mask this of escape of the reality. I have never engaged with the Gupta's as the criminals in the State Capture process have done, I have never been to their



household, I have never met them on a one to one basis except for when I was forced to.

And I think even in my submission to you, I indicated one occasion when I visited President Zuma to discuss some other matter, and one of the Gupta brothers happened to be there, and we exchanged a few words about small business, that was the end of the story. But any assertion that I had anything to do with the Gupta's is rejected in a complete and emphatic way.

10 **CHAIRPERSON:** Okay, alright Mt Mpofu do you still have a problem?

**ADV MPOFU SC:** Chair, you know, this is not such a critical point, except that the Commission should not be misled, deliberately or otherwise.

**CHAIRPERSON:** Ja.

**ADV MPOFU SC:** I said at page 70, I said:

"I am sorry, Mr Gordhan if I interrupted you the question I was asking you is that you denied meeting the Gupta's I agree you cannot remember the exact formulation  
20 but when you answered the DA you denied, correct?'

Minister Gordhan:

"Yes, Advocate Mpofu."

Thank you.

**ADV LE ROUX:** Yes, Chair that was in Parliament, were clarifying that there was only ever one statement to this

Commission.

**CHAIRPERSON:** Yes, but that is why I explained earlier on I said do you remember I said that my understanding had been that Mr Gordhan had made a certain statement may be in Parliament may be in this Commission, where he had given a certain picture or number of interactions. But then there was another statement where there was a different number of interactions.

**ADV LE ROUX:** Yes.

10 **CHAIRPERSON:** Now if what Mr Mpofu is saying is correct, then it is in line with what my understanding had been. So leave out the drafts that Mr Gordhan talking about if what Mr Mpofu is saying is correct.

A statement was made maybe it was a verbal statement and not a written statement in Parliament, which after his chief of staff reminded him of some interaction necessitated a correction as it were. So, let Mr Gordhan qualify was there a statement in Parliament?

**ADV LE ROUX:** Yes.

20 **CHAIRPERSON:** And did that statement give a picture different from the statement that was filed in the Commission on the issue of...[intervene]

**ADV LE ROUX:** On Ambani and that Chair, and all I am doing is clarifying that when Mr Mpofu said, did you change your statement to the Commission? That we are

clear did he mean the statement he made once in Parliament not you had more than one statement to this Commission.

**CHAIRPERSON:** Oh, okay.

**ADV LE ROUX:** That you had changed your evidence in this Commission. His always been consistent in this Commission when his chief of staff reminded him of the Ambani meeting he included it in his one and only statement to this Commission.

10 **CHAIRPERSON:** Okay, Mr Mpofu it looks like...[intervene]

**ADV MPOFU SC:** Yes, Chairperson as I said, I do not want to belabour this point. I think at least my learned friend now agrees that there was a difference, at least as between the Parliament statement and the one given to the Commission.

I am saying and I accept that, but I am saying the problem goes further than that, in that Mr Gordhan in the previous answer that I read out to you Chair had conceded to changing the statement of the Commission, that is a  
20 different matter. So if there were two changes, that makes it even worse, the statement in Parliament was made in 11 April 2016.

The one change that I was talking about had happened two years later, 2018. So it cannot be the same mistake every time the DG is reminding him about the

same thing.

**ADV LE ROUX:** Chair, that is with respect that is inaccurate, there is one statement Minister Gordhan has explained that when he was preparing it for the Commission, his chief of staff reminded him of Ambani he included it in the statement.

So that is, in fact, the position that is what his consistent evidence has been we just clarifying it, I can move on to the next topic.

10 **CHAIRPERSON:** Ja, you can move on ja.

**ADV LE ROUX:** Chair and Minister Gordhan the next topic is various aspects of the so called Rogue Unit narrative. Mr Gordhan you testified again this evening, that there were two different units, there was the idea of one in the NIA that needed money approved by Minister Manual and then there was the actual unit.

It was established, it just had various names, its last name was the High Risk Investigations Unit. Did you ever have anything to do with that unit's recruitment for  
20 staff?

**MINISTER GORDHAN:** No.

**ADV LE ROUX:** Do you know what its operations were?

**MINISTER GORDHAN:** Not the details that I can remember now, no.

**ADV LE ROUX:** Do you know what all of the...[intervene]

**MINISTER GORDHAN:** But I know the general, sorry, sorry, my apologies, go ahead.

**ADV LE ROUX:** No, no finish?

**MINISTER GORDHAN:** No, I was just going to simply say that this was - as I explained to the Commission earlier, and I have repeated many times that customs and tax agencies around the world have these sorts of units.

I think in my original appearance before you Chair in 2018, I think I said, to go to the website of the World  
10 Customs Organisation, which I Chaired for five years and you will see some of the references for similar types of units. So if one wants to put this accurately, this was an Investigative Unit, it was not a Rogue Unit. It was an Investigative Unit that was going to catch the rouges, who were not paying their taxes and evading customs laws.

**ADV LE ROUX:** You testified this evening about something that is...[intervene]

**CHAIRPERSON:** I just want to mention it is 15 minutes before the expiry of an hour. I know you that you said you  
20 could be a little more than that, but I am just alerting you.

**ADV LE ROUX:** Thank you, Chair. Minister Gordhan you testified tonight about something called Project Sunday Evenings, this was the so called bagging of the NPA. You were cross examined about confessions that Mr Moyane received from members of the unit. Do you know anything

about a Project Sunday Evenings?

**MINISTER GORDHAN:** Not at that time, I have heard about it subsequently. I believe this was some work that Mr Nell of the NPA asked certain people to do, but I have no knowledge of the details.

**ADV LE ROUX:** Have you ever instructed anybody to bug the NPA?

**MINISTER GORDHAN:** No.

**ADV LE ROUX:** Have you ever instructed anybody to bug  
10 President, former President Zuma's home?

**MINISTER GORDHAN:** No.

**ADV LE ROUX:** Have you ever instructed anybody to bug anybody?

**MINISTER GORDHAN:** No.

**ADV LE ROUX:** Have you ever instructed anybody to use a fake ID?

**MINISTER GORDHAN:** No.

**ADV LE ROUX:** Have you ever instructed anybody to undertake undercover operations?

20 **MINISTER GORDHAN:** I am not sure what that means but as I said, I did not deal with operational matters.

**ADV LE ROUX:** When I say undercover operations, I mean operations where someone assumes another identity a cover, and they infiltrate, for example, a smuggling ring. Have you ever instructed anybody to do something like

that?

**MINISTER GORDHAN:** No, it is not my job to do that.

**ADV LE ROUX:** If I can then move on to the Sikhakhane Panel Report, you were asked repeatedly denied and confirmed that as far as you know, that has never been reviewed in a court. Do you know...[intervene]

**CHAIRPERSON:** Ms Le Roux.

**ADV LE ROUX:** Yes.

**CHAIRPERSON:** Has he not explained the position very  
10 clearly on the Sikhakhane Reports. I think he has said to his knowledge, it may not have been a set aside or it has not been set aside, but he said, there are certain judgments, which, as I referred to it as, as discredited.

**ADV LE ROUX:** Yes Chair and I want to clarify why he says it is discredited.

**CHAIRPERSON:** Well, he did not say it is discredited himself well, maybe but I know, I think he was emphasising that judgment and said it is discredited.

**MINISTER GORDHAN:** Yes.

20 **ADV MPOFU SC:** Chair.

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** And again, I do not know where the Chair got that formulation of judgments, which judgments?

**CHAIRPERSON:** He referred to judgments when you were cross examining him?

**ADV MPOFU SC:** No, he referred to one judgment.

**CHAIRPERSON:** Oh, well, maybe it was one.

**ADV MPOFU SC:** No, it is not maybe it was definitely one.

**CHAIRPERSON:** Well, I am saying maybe because - Mr Gordhan was at one judgment?

**MINISTER GORDHAN:** I was quoting from paragraph 290 of the 7<sup>th</sup> of December judgment, Chair.

**ADV MPOFU SC:** Oh thank you.

10 **CHAIRPERSON:** The others were opinions of advocates.

**MINISTER GORDHAN:** Yes.

**CHAIRPERSON:** But only one judgment, okay.

**MINISTER GORDHAN:** Yes, it is a matter of legality.

**ADV MPOFU SC:** Sorry, Chair.

**CHAIRPERSON:** He says one judgment.

**ADV MPOFU SC:** Thank you.

**CHAIRPERSON:** Ms Le Roux.

**ADV LE ROUX:** Yes, Chair. Minister Gordhan you testified before the Nugent Commission. Do you recall  
20 what the Nugent Commission said about the Sikhakhane Report?

**MINISTER GORDHAN:** Not the detail, I am afraid.

**ADV LE ROUX:** Do you know, Mr Moyane ever reviewing the Nugent Report?

**MINISTER GORDHAN:** No, there have been various



claims to that effect but as far as I know, no review has been set in motion.

**ADV LE ROUX:** If I can then move on to the KPMG Report, you described that as having been disavowed and that KPMG are now settling with people at SARS, could you just explain what process you are referring to?

**MINISTER GORDHAN:** Well, Chair there has been a number of engagements with KPMG as you know, the previous CEO resigned, the new Chairperson was  
10 appointed. I met the Chairperson on one or two occasions, and then he seems to have disappeared. However, I believe there are certain staff who have suffered in terms of their jobs being lost, and so on quite severe damage to their financial well-being and to the general well-being. Today, engaging in one way or another, with KPMG, and SARS to have some kind of reparation paid to them as a result of the suffering that they have been through.

So that that is what I am aware of and then I was referring again, to paragraph three of the 7<sup>th</sup> of December  
20 judgment, which makes reference to the discredited KPMG Report.

**ADV LE ROUX:** You also testified under cross examination that you received an apology from Judge Kroon could you explain to the Chair what that apology entailed, what was he apologising for?

**MINISTER GORDHAN:** Well, in the first instance, for not applying his mind, as I recall it, to the Sikhakhane opinion, independently, and secondly for issuing some statements, I think, at the time, on the basis of that and he was rushed into it, it would appear by certain people who are now at the bar and elsewhere in South Africa.

And thirdly, that he had wrongly said, whatever it was that Sikhakhane had said, in relation to the unit, and that more importantly he as a Judge did not put into  
10 practice how the alteram principle, meaning as you indicated earlier or rather, my response indicated earlier, he did not come and ask me what is my view on the various matters that were being considered by the Kroon panel.

**ADV LE ROUX:** Thank you, if I can then move on to the seventh topic. Minister Gordhan the Snowman Dossier was referred to in your cross examination. It was in the context of it being the basis for the IGI Report, into the unit. This Snowman Dossier, it is not the first dossier that has made allegations against you, is that correct?

20 **MINISTER GORDHAN:** Oh there has been various dossiers over time, I do not even remember their names. There was another which mentions Minister Nene for example at the time. What was it called Spider Web or something like that. So that is part of the fake news industry as we now know it today.

**ADV LE ROUX:** And when you say the fake news industry with respect to yourself what allegations have been made against that you consider to be fake news?

**MINISTER GORDHAN:** Oh I am supposed to have a very nice account in Canada for example with millions of dollars which is non-existent of course and various such allegations all designed to engage in counter smearing so to speak or smearing my integrity and good standing if you like in an attempt more importantly to actually mask the nefarious  
10 activities of various individuals and I referred to this Chair if you will remember in 2018 as well.

**ADV LE ROUX:** Do you know who the authors of these various dossiers are?

**MINISTER GORDHAN:** No.

**ADV LE ROUX:** Could you explain...

**MINISTER GORDHAN:** Some of them came to originate in – I beg your pardon – some of them seemed to claim to be originating in the intelligence services so you will recall that prior to my dismissal or rather recall from London when I  
20 was on an investment road show was this alleged report I forget what it is called now that was shown to officials of the ANC at the time and which had no foundation whatsoever or was it the SACP I am not sure. But once that was discredited that was it – set aside and some other reason was found to cover up what the real reasons were for the

dismissal of various ministers at the time.

**ADV LE ROUX:** Can you explain to the Chair why you think you feature in all these dossiers? Why are you the target of all these different dossiers?

**MINISTER GORDHAN:** No idea. I seem to be popular for some reason. But clearly exposing corruption – setting into motion controls that will limit the possibilities of corrupt activity in various institutions and such like activity is getting in the way of certainly the people who are extracting cash  
10 but more recently there was a claim made by Carl Niehaus in I think some press statement or the other who had said that I went out of my way as the Treasury officials prior to Ms Mandonsella now Professor Mandonsella completing her state – I think it was called the State of Capture Report and making funds available which is a complete distortion of the truth. The truth of the matter was she did request more money from the Treasury that money was not available and what the Treasury often does with such requests and demands if you like is to actually help the people concerned  
20 as a Director General or a Minister interrogate their own finances and see how they could make savings on the one hand so that they could actually find the money to do whatever it is that they wanted to do. And that is the systems that officials of the Treasury not me gave to the justice department and the Public Protector at the time to do

whatever she wanted to do at the time. So this claim that I went out of my way especially to make money available so that – for example this commission would be set up to investigate state capture is absolute nonsense to say the least.

**ADV LE ROUX:** And then finally Minister Gordhan there was a lot of time spent in cross-examination making the accusation that you are a racist. Could I ask you to explain to the Chair given your history in the struggle, given the fact  
10 that you were detained and brutally tortured, giving the impact on your family...

**CHAIRPERSON:** Well Ms Le Roux did he not explain that sufficiently not only today but last time under cross-examination. I thought he explained that quite well. I do not think there is anything unclear about what he was saying.

**ADV LE ROUX:** Yes Chair but I would like him to place on the record.

**CHAIRPERSON:** No he has it is clear he has – he – he referred to his struggle – his role in the struggle, he referred  
20 to his membership of the ANC if I recall correctly. He said quite a number of things I am not sure that there is anything unclear about where he stands or what he said about them.

**ADV LE ROUX:** Yes Chair.

**CHAIRPERSON:** Ja.

**ADV LE ROUX:** He testified that he is not racist. I am

asking him how it feels to be called racist on behalf of Mr Tom Moyane?

**CHAIRPERSON:** Ja but what does that clarify?

**MINISTER GORDHAN:** May I make a brief comment Chair so we can conclude this matter?

**ADV MPOFU SC:** No Chair can I object before he makes any comment brief or otherwise?

**CHAIRPERSON:** Hm.

10 **ADV LE ROUX:** Chair also – no can I just explain the question?

**CHAIRPERSON:** Okay.

**ADV LE ROUX:** Mr Moyane makes allegations...

**ADV MPOFU SC:** Chair I am on the floor really I cannot stand this –

**CHAIRPERSON:** Okay. Okay.

**ADV MPOFU SC:** This cannot be happening for the third time.

**CHAIRPERSON:** Mr Mpofu.

20 **ADV MPOFU SC:** Ms Le Roux must shut up when I am speaking.

**CHAIRPERSON:** Mr Mpofu let me just hear please.

**ADV LE ROUX:** Hey.

**CHAIRPERSON:** Must you must just hear.

**ADV MPOFU SC:** You too Mr Gordhan.

**CHAIRPERSON:** Mr Mpofu just sit down let me hear her

first.

**ADV MPOFU SC:** Oh I am still on the floor. He must also shut up.

**CHAIRPERSON:** No, no Mr Mpofu I am in charge here please sit down. Let me hear first what she has to say.

**ADV MPOFU SC:** But I am still talking Chair she butted in.

**CHAIRPERSON:** Yes but she had not explained ...

**ADV MPOFU SC:** So why must I sit down.

**CHAIRPERSON:** I want to hear an explanation then hear  
10 you then I will ...

**ADV MPOFU SC:** But Chair I am still speaking why must I (inaudible).

**CHAIRPERSON:** Yes but Mr Mpofu I am in charge here I am saying sit down.

**ADV MPOFU SC:** Well Chair.

**CHAIRPERSON:** Please. I will hear her and then I will hear you.

**ADV MPOFU SC:** Chair.

**CHAIRPERSON:** Yes Ms Le Roux.

20 **ADV MPOFU SC:** Maybe then we should leave because if we are not allowed to speak ...

**CHAIRPERSON:** I am warning you.

**ADV MPOFU SC:** You allow interruptions.

**CHAIRPERSON:** You are going to be allowed to speak.

**ADV MPOFU SC:** No.

**CHAIRPERSON:** Ms Le Roux explain?

**ADV LE ROUX:** Thank you Chair. Chair a lot of time was taken up in the cross-examination contending that my client was racist so that was when he first appeared in the cross and this evening they tried to extrapolate from the Public Protector judgments he tried to make an accusation that he had treated the Public Protector in a racist fashion. It is true that Minister Gordhan testified previously that he rejected the statements that he was a racist. I am now asking that  
10 you give him the opportunity to explain to you and to the country quite frankly how he feels as a person when he is accused of being a racist by Mr Moyane?

**CHAIRPERSON:** No that does not clarify anything Ms Le Roux the purpose of re-examination under the regulations of the commission is to clarify. There is – I do not think it is – it clarifies anything.

**ADV LE ROUX:** Chair it is also to assist you when you valuating the testimony that comes out in cross-examination.

**CHAIRPERSON:** No, no I have heard Mr Gordhan he has  
20 explained himself and I think sufficiently.

**ADV LE ROUX:** Then Chair that completes my re-examination.

**CHAIRPERSON:** Yes. Okay alright. Thank you. I think we are going to adjourn because I think now that I have not allowed the question then there is no – there would be no



objection.

**ADV MPOFU SC:** No Chair.

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** There is –

**CHAIRPERSON:** Yes.

**ADV MPOFU SC:** I want to say Chair place on the record that it cannot be that Mr Moyane and his legal representatives are treated like this in this commission. I was speaking I have – I did not interrupt when Ms Le Roux  
10 was making objections and I am in the process of making an objection and I do not know on what basis I should be told to sit down when I am still speaking and she has interrupted me. I cannot be interrupted by junior counsel when I am still speaking and I need to finish my point. So I think it is completely unfair I think it is uneven the way parties are get – get treated here and I just wanted to place that on the record. It is completely wrong.

**CHAIRPERSON:** I am just going to say this. Yes I did ask to hear what you have to say but she wanted to explain and I  
20 considered that it would be more convenient to have her explanation before I hear what you have to say. But we are going to adjourn the proceedings, tomorrow we will continue with the SARS related evidence.

Thank you to everybody for staying till late.

**MINISTER GORDHAN:** Thank you Chairperson.

**CHAIRPERSON:** We adjourn.

**MINISTER GORDHAN:** Thank you.

**INQUIRY ADJOURNS TO 24 MARCH 2021**