

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

23 JULY 2021

DAY 423



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Recording & Transcriptions

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B KLINE; Y KLIEM;



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PROCEEDINGS RESUME ON 23 JULY 2021

CHAIRPERSON: Good morning Mr Hulley, good morning everybody.

ADV MATHIBEDI SC: Morning Chair.

ADV HULLEY SC: Good morning Mr Chair.

CHAIRPERSON: Good morning. Good morning. Good morning. Are we ready?

ADV MATHIBEDI SC: We are ready Chair.

ADV HULLEY SC: Thank you Mr Chair I believe we are.

10 **CHAIRPERSON:** Yes, thank you. Thank you. Mr Mathibedi it would be

ADV MATHIBEDI SC: Chair.

CHAIRPERSON: It would be better if – it would be better if you put on your jacket.

ADV MATHIBEDI SC: Thanks Chairperson.

CHAIRPERSON: Yes. Thank you. All right. This morning's session is to give various NPA officials and I am just trying to remember whether there are other officials other than NPA officials who had applied for leave to cross-examine
20 certain witnesses who gave evidence implicating them an opportunity to give a summary of their response to the evidence given by those witnesses and the summary is meant to be a summary of what is contained in their affidavits and they will do so through their counsel.

ADV HULLEY SC: Thank you.

CHAIRPERSON: Are you ready Mr Mathibedi?

ADV MATHIBEDI SC: Chairperson I am ready.

CHAIRPERSON: Yes.

ADV MATHIBEDI SC: Chairperson I am being assisted by Advocate Ramaimela and Advocate Matlanga.

CHAIRPERSON: Okay.

ADV MATHIBEDI SC: What we have decided to do is that I will deal with certain of the – of the topics as set out in the summaries.

10 **CHAIRPERSON:** Yes.

ADV MATHIBEDI SC: And my colleagues will deal with others.

CHAIRPERSON: Okay, no that is fine.

ADV HULLEY SC: Yes.

CHAIRPERSON: And – and you undertake all – all of you to complete within two hours, is that right?

ADV MATHIBEDI SC: Chairperson save that according to my watch it is now seven minutes past ten so we did not – we did not start – start at exactly ten o'clock.

20 **CHAIRPERSON:** Ja no we – it will be two hours from when you start.

ADV MATHIBEDI SC: Thanks Chairperson.

CHAIRPERSON: Ja okay all right. Now you may start.

ADV MATHIBEDI SC: Thank – Chairperson the first portion that I am going to start with it is from page 7 to page 28

paragraph ending at 81 and thereafter that Advocate Ramaimela will take over.

CHAIRPERSON: Okay.

ADV MATHIBEDI SC: Intro ...

CHAIRPERSON: Maybe before you proceed for the record you can just – you can place on record again who the – who your clients are that you will be – on whose behalf you will be doing this and when I say you, I accept that it is you and your juniors. In other words.

10 **ADV MATHIBEDI SC:** Thanks.

CHAIRPERSON: You may have decided to divide the work but as I understand it you represent a group of clients but if you represent different clients within the group, you can make that clear as well.

ADV MATHIBEDI SC: Thanks Chairperson. Chairperson the implicated officials that NPA officials that we – we represent are Advocate Pretorius, Advocate Baloyi, Advocate Maema, Advocate Mathenjwa, Advocate Mogotle, Advocate Chauke and Advocate Mashuga.

20 **CHAIRPERSON:** Thank you, thank you. Okay that is fine. Thank you. You may proceed.

ADV MATHIBEDI SC: Thanks Chairperson.

a. Introduction.

CHAIRPERSON: You said you start from page?

ADV MATHIBEDI SC: Page 7.

CHAIRPERSON: Okay thank you.

ADV MATHIBEDI SC: To 28.

CHAIRPERSON: Yes, thank you.

ADV MATHIBEDI SC: The implicated prosecutors applications for the condonation of the late filing of the Rule 3.4 statements submitted as well as their applications for the cross-examination of the witnesses who implicated them in state capture was set down for hearing on 15 and 16 of June 2021.

10 **CHAIRPERSON:** I just want – I am sorry Mr Mathibedi just one second. Yes, thank you.

ADV MATHIBEDI SC: Sorry Chairperson for the purpose of the record.

CHAIRPERSON: Ja.

ADV MATHIBEDI SC: An error on my side I forgot to – to mention Advocate Mosing.

CHAIRPERSON: Oh okay. Thank you.

ADV MATHIBEDI SC: Dr Pretorius' application for the condonation of the late filing of his supplementary affidavit,
20 leading of his evidence and cross-examination as well as the cross-examination of Booyesen and McBride was set down for 25 and 28 June 2021.

At the hearing of 15 June 2021 the implicated prosecutors were informed by the Chairperson that he was inclined to refer to matters falling under the law

enforcement work stream including the implicated prosecutors matters to other agencies for further investigation as the related investigations were not finalised and also due to time constraints.

It is in light of these operational constraints of the commission that the implicated prosecutors asked for and were granted leave to record their versions regarding evidence implicating them in hearings of the commission.

The recordal of the implicated prosecutors versions
10 was requested not just for the sake of an audience but it is integral to the implicated prosecutors constitutional right to a fair hearing and an accords with the rules of natural justice.

The notion of state capture is newly globally and locally. It is not yet legally defined in South: African law. In dealing with the submissions already made to the Chairperson alleging that the implicated prosecutors are implicated in state capture it is important that all the relevant and available information be placed before the
20 Chairperson for consideration.

This is pertinent to the development of state capture law in South African legal system. In light of the above it is pertinent that the implicated prosecutors present – present their versions in the commission so that the public may know why all the suspects were prosecuted or decisions

were made to decline to prosecute so that some form – some forms part of the report of the commission considering that operational constraints preclude them from exercising their right to cross-examine those that implicated them.

b. General Overview Opening Remarks.

The judicial authorities the comments that the Chairperson made during the leading of the evidence of some of the witnesses who testified in the commission as well as the Chairperson's announcement at the hearing of
10 15 June 2021 regarding the operational constraints of the commission provide a backdrop against with – which the summaries of the implicated prosecutors are recorded.

The constitutional court in the judgment of Secretary of the Judicial Commission on Inquiry into allegations of state capture, corruption and fraud in the public sector including state of organs versus Jacob Gedleyihlekisa Zuma with regard to the public interest into the commission of the inquiry stated as follows.

In addition to the function of advising the President a
20 Commission of Inquiry may also serve the purpose of holding a public inquiry in respect of a matter of public concern. The purpose of a public hearing under those circumstances is to restore public confidence in the institution in which the matter that caused concern arose. Here the focus is not what the President decides to do with

the findings and recommendations of a particular commission instead the objective is to reveal the truth to the public pertaining to the matter that gave rise to the concern “emphasis”. Similarly the constitutional court in the judgment of Minister of Police and Others versus Premier of the Western Cape and Others explained the purpose of an investigative commission and the requirements of public purpose as follows:

In addition to advising the executive a commission of
10 inquiry serves a deeper public purpose particularly at times of widespread disquiet and discontent. In the words of Corder J of the Canadian Supreme Court in Phillips versus Nova Scotia one of the primary functions of public inquiries is facts – is fact finding. They are often convened in the work of public shock, horror, disillusionment or scepticism in order to uncover the truth.

In times of public questioning stress and concern they provide the means for Canadians to be appraised of the conditions pertaining to a worrisome community problem
20 and to be part of the recommendations that are aimed at resolving the problems. Both the status and public respect of the Commissioner and the open and public nature of the hearing helped to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole they are an excellent means of

informing and educating concerned members of the public.”

There is a footnote number 3 I am not going to read that for you know due to time constraints.

CHAIRPERSON: Ja.

ADV MATHIBEDI SC: In the matter of the Chairperson of the judicial commission of inquiry into state capture this is President of the Republic of South Africa. The commission’s chairperson in motivating for an extension of the period for the commission to complete its work is said to
10 have explained that the outstanding work gets to be conducted includes the investigation and or completion of investigations of allegations that the law enforcement entities such as the National Prosecuting Authority NPA, the Director of Public Priority Investigation, CPCI or Hawks or the Special Investigating Unit, SIU may have also been captured.

With regard to the functions of the NPA and the obligations on how its officials are con – are to conduct their duties the Supreme Court of Appeal (SCA) in the
20 judgment of Zuma versus the DA stated as follows:

The first respondent (NPA) as an organ of state has a duty to prosecute without fear, favour or prejudice by upholding the rule of law and principle of legality.

It is also a constitutional body with a public interest duty. It beholds its officials to operate with transparency

and accountability. It has a duty to explain to the citizenry why and how it arrives at the decision to quash the criminal charges against the accused persons particularly where the matter involves very senior state officials.

In pursuance of its constitutional obligations it is incumbent upon the NPA to pass the rationality test and inform the public why it quashed the charges in view the convince would make the public lose confidence in the office of the NP – NDPP” our own emphasis.

10 There is no doubt that the comments of the Chairperson made during the evidence of Sesoko and Nxasana were to the effect that due to the grave and serious nature of the allegations levelled against the implicated prosecutors he would request the evidence leaders and the investigators to obtain the relevant dockets and or information that the prosecutors had before them when they made decisions to either prosecute or decline to prosecute.

20 The reason is that this will enable the commission to determine whether the implicated prosecutors had good reasons to recommend and institute prosecutions or to decline.

Chairperson I can say it without contradiction that all the dockets that were considered by the implicated officials were delivered and presented to the commission.

CHAIRPERSON: Yes.

ADV MATHIBEDI SC: Chair the above sentiments expressed by the Chairperson had been overtaken by crime and more particularly the operational constraints of the commission. As such the Chairperson as indicated in the introductory portion of this summaries will no longer afford the implicated prosecutors an opportunity to appear before him and take him through the dockets and or any information they had before them in making decisions
10 whether to prosecute or decline same.

The allegations that implicated prosecutors are captured either for political or corrupt reasons are based on conjecture and speculation.

Conjecture and speculation are not sufficient to establish what is imputed to the implicated prosecutors. Similarly there is no justification to infer wrongdoing on the part of the implicated prosecutors.

In the matter of State versus Motswene the court referred to tribe legal principles pertaining to conjecture
20 and speculation which are different from inferences and stated that inferences must be carefully distinguished from conjecture or speculation.

There can be no inference unless there are objective facts from which to infer the fact which it is sought to establish.

In some cases the other facts can be inferred with such practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability but if there are no positive proved facts from which the inferences can be made the method of inferences fails and what is left is mere speculation or conjecture.

1. The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences then there must be doubt whether the inference sought to be drawn is correct.

Rolls players and how some of them...

CHAIRPERSON: Sorry Mr Mathibedi of course that quotation is appropriate in criminal matters that approach to the drawing of inferences namely the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. That is appropriate in a criminal matter.

Once you talk about drawing inferences in none criminal matters such as civil matters then the test is different namely ...

ADV MATHIBEDI SC: Possible inference.

CHAIRPERSON: You do not have to exclude – ja you have got to look at the most possible inference. Is that correct.

ADV MATHIBEDI SC: That is correct Chairperson.

CHAIRPERSON: Yes, all right.

ADV MATHIBEDI SC: Chairperson by taking into account the – the nature of the proceedings that we are dealing with.

CHAIRPERSON: Yes.

10 **ADV MATHIBEDI SC:** We will respectfully submit that also this principle of – is also applicable in the circumstances.

CHAIRPERSON: I – I would imagine that it is applicability would be fine where the assessment relates to whether in taking a certain decision whether to prosecute or not to prosecute the prosecutor relied on acceptable inferences in weighing up the evidence whether there would be enough evidence to prosecute or not.

20 But in regard to whether for example I use the you know the bold allegation whether they were captured or not captured that might be different. But where you say was that decision that he or she took to prosecute this particular person or to decline to prosecute if he or she relied on inferences then those inferences would be guided by this kind of principle that you have quoted.

But once it is something else then it would be the

civil kind of approach. Would you agree with that?

ADV MATHIBEDI SC: Chairperson my – my submission is that because we are dealing with sui generis processes when it comes to – to the commission.

CHAIRPERSON: Ja.

ADV MATHIBEDI SC: Our submission is that both – both are applicable because our submission is that no concrete evidence was tendered before this commission in support of the allegations made by those who finger our – our clients
10 as either being captured for either political or corrupt reasons.

CHAIRPERSON: Well I guess in a way because the commission will not be making any definitive findings it is not so important for now.

ADV MATHIBEDI SC: Thank you Chairperson.

CHAIRPERSON: Ja okay all right.

ADV MATHIBEDI SC: Role players and how some of the matters are interlinked rendition Mosing guided the investigation into allegations of the illegal extradition of
20 Zimbabwean Nationals who were killed and tortured after being handed over to Zimbabwean police by Maluleke of the DPCI and other members of such.

Initially the investigation into the unlawful extradition of the Zimbabwean Nationals was conducted by Mukongwe a detective at the detective services

Mpumalanga and JJ Mahlangu attached to the stock theft unit Middelburg. Two months later Innocent Humbulani Khuba of the Independent Police Investigation Directorate, IPID joined Mokange and Mahlangu and appointed other members of the IPID and led the investigation.

On 22nd January 2014 Khuba prepared and signed a report and submitted the report and docket to Mosing who sent the docket and report to DPP South Gauteng. The report recommended that Generals Anwa Dramat, Dramat,
10 Shadrack Sibiya, Sibiya together with Maluleke and other junior police officials be charged with amongst others kidnapping and defeating the ends of justice.

On 3 March 2014 McBride was appointed the executive head of IPID. On 6 March 2014 McBride instructed Khuba and Angus to retrieve the docket from the DPP South Gauteng. Khuba and Angus uplifted the docket on 7 March 2014.

McBride instructed Khuba and Sesoko to review the evidence and on 18 March 2014 the IPID prepared a second
20 report which recommended that Maluleke together with other junior police officials be charged with kidnapping and defeating the ends of justice.

It no longer included Dramat and Sibiya. In April 2014 on the instructions of McBride the docket and the report dated 18 March 2014 were delivered to Nxasana who

kept the docket unallocated until 13 January 2015 – a period of approximately eight months.

In December 2014 the then Minister of Police Nathi Nhleko, Nhleko suspended General Dramat. Sometime in 2015 Nhleko appointed Werksman to investigate the issue of the two IPID reports with different recommendations.

A case docket of defeating the ends of justice and fraud was opened against McBride, Khuba and Sesoko. In February 2016 Maema recommended that McBride, Khuba
10 and Sesoko be prosecuted.

Dr Pretorius agreed with Maema's recommendation. Dr Pretorius in line with the checks and balances envisaged by Section 24(3) of the NPA Act 1998 consulted with DPP North Gauteng. Advocate Sibongile Mzinatha who agreed with the recommendation. Sometime in 2016 after the rendition docket had gone on a merry-go-round explained in the relevant portion of this recordial the docket was allocated to Baloyi who finally took a decision to prosecute Dramat, Sibiya and Maluleke.

20 In 2018 Dramat and Sibiya made representations and Baloyi recommended that the charges against them be provisionally withdrawn. The case is currently proceeding against Maluleke.

The prosecutors involved in the rendition matter and the defeating of the ends of justice where Mosing, Baloyi,

Mzinyathi, Maema and Dr Pretorius – sorry Chairperson my light just went off – I am just asking for a light.

CHAIRPERSON: Oh okay. Okay.

ADV MATHIBEDI SC: There were – sorry Chairperson.

CHAIRPERSON: Ja.

ADV MATHIBEDI SC: There were various inter-locketory applications including the view applications against the issuing of racketeering authorisations issued by Advocate Nomgcobo Jiba the then acting NDPP on 17 August 2012
10 and Advocate Shaun Abrahams, Abrahams on 13 February 2016.

The review applications against the racketeering authorisation issued by Jiba culminated in the judgment by Govern J. Both has relied on the findings of Govern J judgment before this commission and ignore the fact that in the judgment of GCB versus Jiba and Others Legodi J found that Govern J did not have the full facts before him.

The findings made by Legodi J were supported in the SCA judgment when the matter went on appeal. Similarly
20 the Mokgoro Inquiry also found that had the full facts been placed before Govern J he may have come to a different conclusion regarding the finding of mendacity against Jiba.

The current NDPP Advocate Shamila Batohi – Batohi appointed De Kock panel to reconsider racketeering authorisation issued by Jiba and Abrahams.

This resulted in the De Kock Report. The implicated prosecutors are of the considered view that the report is fraud in a (indistinct) respect as set out in their affidavits.

For example the quant to the failure to the panellists to consult and salute – solicit the views of the prosecution team to the questions that they stated they could not find answers to.

Another example is that their summary of their evidence is in most respect patently incorrect. Of the – all
10 of this pointed out in Maema and Mathenjwa’s affidavits and as a result of the De Kock’s Report the racketeering authorisations were withdrawn by Batohi whilst the predicate charges were withdrawn by the current DPP KZN they implicated prosecutors who form part of the prosecution team are of the considered view and have demonstrated in their affidavits that their withdrawal was irrational having regard to the decision of the SCA in the matter of Zuma versus Democratic Alliance and Others where the SCA amongst others held:

20 “The exclusion of the prosecution team from the final deliberations leading up to the decision to discontinue the prosecution appeared to have been deliberate and was in itself irrational. They were senior litigators steeped in the case acquainted

with the legal issues and had a critically important contribution to make regarding the ultimate decision to terminate the prosecutions.”

In the relevant portions of this recordial we cite out the summaries of the implicated prosecutors.

The Amigos case. Advocate Steenberg was the prosecutor assigned to deal with the matter at its inception. He then left the NPA to join the international criminal court
10 and Advocate Cyril Simphiwe Mlotshwa – Mlotshwa who became the acting Director of Public Prosecution – DPP KZN assembled a prosecution team lead by Advocate Ndeli Dunwa – Dunwa and consisted of Advocates Siphunza, Vincent Npanjana and Makosini, Thembu Mthembu, Spunzi and Tanjana later left the NPA and were replaced on the team by Advocate Bulelwa Thembani – Thembani.

Mlotshwa signed the indictment in respect of the predicate charges on 31 August 2011. Although the formulation of the charges in the indictment was said to be
20 defective by Advocate Johan Kruger – Kruger, Kruger was the head of the Special Project – SPD and his responsibility was to process the racketeering charges before they got authorised by the NDPP in terms of Section 24 of POCA on the same date.

Advocate Menzies Similani – Similani issued an

authorisation certificate in respect of racketeering charges. Mosing succeeded Kruger as head of the SPD and in that position, he was mandated together with Advocate Lawrence Mrwebi – Mrwebi to assist the prosecution team in amending the indictment as Kruger (indistinct) relating to the charges they in has – had still not been attended to.

10 Mlotshwa was still DPP at the time but was later replaced by Advocate Moyiponi Mnopo. Upon finalisation of amending the indictment a decision was taken by Mnopo to withdraw charges against some of the accused where it was found that the evidence available does not support the charges laid against them.

SARS related matter. The interception of communication at the Directorate of Special Operation DSO and the NPA officers.

20 The above case relates to the unlawful installation of surveillance equipment and unlawful interception of communication at the offices of the DSOL and NPA by SARS High Risk Investigation Unit widely known as the Rogue Unit. The existence of the Rogue Unit became public after it was widely published in the media. The publication referred to above also revealed that Rogue Unit was formed and operated in contravention on the law.

The investigation that ensued resulted in criminal prosecutions so the proceedings being instituted against

certain SARS officials. The prosecutors who were involved in the above criminal proceedings are accused of enabling the state capture by McBride and Booysen.

Early retirement of Ivan Pillay.

During the investigation of the Rogue Unit case a correspondence relating to Pillay's early retirement was discovered. Perusal of the correspondence revealed that the early retirement in question might have been granted in circumstances that are contrary to the applicable legal
10 prescripts.

The prosecutors who had guided the investigation in the Rogue Unit case directed that the early retirement issue should also be investigated.

The investigator investigations resulted in criminal proceedings being instituted against Oba Magashula – Magashula, Ivan Pillay – Pillay and Pravin Gordhan – Gordhan. This too led to the prosecutors involved being labelled as enablers to the state capture also by McBride and Booysens.

20 CC Refusal to charge Brigadier Siklele Xaba and others. Mr Vlok Symington – Symington matter Brooklyn case 790/10/2016. This matter is a sequel to the matter relating to Pillay's early retirement.

After having been criminally charged Magashula and Pillay made Section 179(5) representations to the NDPP for

charges against them to be withdrawn. Amongst others in their representations they mentioned that the manner in which Pillay's early retirement was handled was based upon an opinion that was prepared by Symington.

When the matters of the investigation team went to obtain a statement from Symington a standoff between Symington and the members of the investigation team ensued in relation to PCLU memoranda that Symington was in possession of.

10 Flowing from the (indistinct) of Symington laid criminal charges against the members of the investigation team – so investigating team and the bodyguard of the SARS commissioner.

When the matter ultimately came before Baloyi in his capacity as the acting DPP North Gauteng he declined to prosecute. His refusal to prosecute led to him being accused of enabling state capture by McBride and Booysen.

Kameelsdrft CAS 12/01/2017 Role Players.

20 Paul O'Sullivan – O'Sullivan, Sara J (indistinct) Trent, Demani Binang – Binang and (indistinct) Mahlangu – Mahlangu went to the home of the then acting police national commissioner General Phahlane – Phahlane and O'Sullivan falsely identified himself to the security officer and estate manager as a member of the IPID. A claim which Mahlangu and Binang failed to correct.

Security details relating to Phahlane's home and motor vehicles was asked for by O'Sullivan and he also threatened the estate manager and (indistinct) of Phahlane's house with arrest if they did not cooperate with him.

Advocate A Geysler was the prosecutor who was charged with the responsibility of guiding the investigating team in regard to this matter. And after his resignation it was allocated to Mashuge who ultimately preferred charges
10 against O'Sullivan, Trent, Binang and Mahlangu.

O'Sullivan sent a flurry of threatening emails to Phahlane and Mashuga. The former of which form part of the charges against O'Sullivan.

McBride implicated Mashuga as part of the prosecutors who have acted improperly and or unlawfully and sought to among others unduly interfere in the investigative independence of the NPA, the IPID and the Hawks.

Standalone matters, withdrawal of charges against
20 Madlulu. Madlulu was charged with kidnapping and murder of Mogebe. The docket was taken to the DPP as G for a decision. The possibility of referring the murder charges for an inquest was raised and a view expressed that it was prudent to rather refer the matter for inquest and depending on the outcome of the inquest then proceed with kidnapping

and murder charges in one prosecution.

PCLU involvement in matters outside its mandate. The PCLU dealt with matters referred to it in terms of proclamation number 46 2003 published in the Government Gazette number 248276 of 23 May 2003 the proclamation which set out matters that failed within its purview as well as any matter – any other matter referred to it by the NDPP.

The affidavits of Dr Pretorius, Mathenjwa and Maema deal with matters that were referred to the PCLU in terms of what is referred to as the Omnibus Cause. The Omnibus Cause relates to any matter that the NDPP refers to the PCLU for investigation and prosecution.

Reference Group. With the permission of the Minister of Justice and Constitutional Development Mathenjwa was seconded to the Reference Group that was assembled by the Minister of Police Nathi Nhleko to advise him on diverse matters within his ministry. The Reference Group had Terms of Reference which define its code.

Among the items falling under the scope was the alleged involvement of the police members in illegal rendition. Mathenjwa was tasked to look into documents that contain allegations relating rendition and brief members of the group on that.

In the process of dealing with those documents Mathenjwa realised that the rendition matter was being

investigated by the IPID and the investigating officer was Innocent Khuba. The group felt the need to meet with Khuba and requested Hadebe who was the convenor of the RG to arrange same.

Hadebe arranged the meeting and McBride attended and briefed the meeting about the rendition. Mathenjwa's view was that McBride's view had nothing to do with the merits of the case they were appointed to advise the minister on.

10 Members of the Reference Group were made to sign confidentiality clause. Secondment of Maema and Mathenjwa to PCLU, vis a visa Nxasana's evidence before the commission.

Maema and Mathenjwa at the time that they were seconded to the PCLU they were still dealing with the Cator Manor matter. They both then say the allegations made by Nxasana that the commission to the – at the commission that Nxasana told them that there was no evidence against Booysen.

20 In fact when the prosecution team briefed Nxasana about the Cator Manor matter after he had summoned them to his office, he informed them that while still in private practice and representing clients were being investigated by Cator Manor as VC Nxasana told Peter George accused number 3 and Nico Cross accused number 18 that the whole

story would eventually catch up with them.

The prosecution team never had an opportunity to present a prosecution memorandum before Nxasana such that Nxasana will be aware of the evidence in the docket and thus form the view that there was no evidence against Booysen.

Prosecution of Paul O’Sullivan. All matters involving O’Sullivan were.

CHAIRPERSON: Just one second Mr Mathibedi. I just want
10 to mention that with regard to Mr Nxasana I do intend to deal with his evidence in the commission report insofar as allegations he has made mainly relating to the former President.

ADV MATHIBEDI SC: Chairperson.

CHAIRPERSON: So – so I do not think I would deal with that aspect that may relate to what General Booysen says and some of the matters but I just mention that although it falls under a law enforcement agencies, I do intend dealing with it from an angle that does not relate to matters such as
20 what Mr Booysen – General Booysen is saying here. So – so I just mention that. I do not think it should affect any of your clients.

ADV MATHIBEDI SC: Thanks Chairperson.

CHAIRPERSON: Ja.

ADV MATHIBEDI SC: Chairperson we have set out three

cases that – that relates to Mr O’Sullivan and refusal to charge Gamenyane Pretorius Central case 868/11/2016. This matter relates to a case that was opened by McBride alleging that Mr Israel Gamenyane – Gamenyane was the acting head of IPID mismanaged files of the IPID. The matter was referred to Advocate Albie Leonard SC Leonard who declined to prosecute Gamenyane which Baloyi concurred.

Chairperson whilst on this aspect it is very
10 interesting to note that despite Advocate Leonard being involved in this matter he is not being referred to as those – as one of those prosecutors that are capture either for political or for corrupt reasons whilst Baloyi who is involved in this matter is being referred to as one of those who are capture for either political or corrupt reasons.

This clearly demonstrates selective condemnation of some of the you know implicated officials that – that we are attending to. So that we are representing.

Kidnapping, defeating the ends of justice, contempt
20 of court charges against the police officers who arrested O’Sullivan and Trent, Colin Dawood and others.

Baloyi declined to prosecute Dawood and others for the charges of kidnapping, theft of cell phone and imitation. Abrahams agreed with the decision that Baloyi took.

Prosecution of Glynis Breytenbach. Chairperson

there is a section that we are extensively dealing with that I am not going to read this.

CHAIRPERSON: Ja.

ADV MATHIBEDI SC: This brief one.

CHAIRPERSON: Yes.

ADV MATHIBEDI SC: And the prosecution of Jiba. Mogatle drafted an opinion and refused to prosecute Jiba for defeating the ends of justice and fraud which charges were premised on the finding made by Gorven J when he found
10 that by failing to respond to allegations made in the affidavit of Booyesen she was mendacious. Mogatle was of the view that the state will not be able to prove the element of intention which is an element for both charges.

Mogatle's opinion was premised on the fact that when Jiba deposed to the affidavit file in the Review Application instituted by Booyesen the prosecution team had furnished counsel for the NPA with all necessary facts.

The prosecution team in turn made statements to the effect that when they revert the affidavit of Booyesen they
20 prepared a memorandum for NPA's counsel to prepare a supplementary affidavit to deal with the issues raised in Booyesen's affidavit.

For reasons known to the prosecutions team the NPA counsel did not prepare the supplementary affidavit and thus full facts were not placed before Gorven J.

The failure to prepare a supplementary affidavit was also considered by Smith SC, the DPP North West who also declined to prosecute Jiba on the basis that Gorven J did not have the full facts before him and that Jiba had no intention to mislead the court and thus did not perjure herself.

Despite coming to the same conclusion as Mogatle Smith is not labelled part of the co group of captured advocates.

10 Chairperson what I would like to say about Advocate Smith is that he is one of the most senior and experienced – you know prosecutors that the NPA ever had. Tenga the then DP Northern Cape also declined to prosecute Jiba on the grounds that the process to issue the racketeering charges was procedural despite this fact.

 Tenga formed part of the De Kock group panel that criticised Jiba's decision to issue the racketeering authorisation. The report does not show whether Tenga disclosed that she had furnished an opinion contrary to the
20 findings made in the De Kock Report.

Tenga is not referred to as part of the prosecutors that are captured for either political or corrupt reasons in respect of the Cator Manor matter. The only criticism levelled against her is that she chaired the disciplinary hearing of the IPID's spokesperson Moses Gamene.

Chairperson unfortunately we will never have an opportunity of knowing why Advocate Smith and Advocate Tenga were not condemned as it happened with the NPA officials that we are representing because they are in the same boat as them. They are in the same category as them Chairperson.

Chairperson Advocate Ramaimela will take over from here.

CHAIRPERSON: Okay all right. Thank you – thank you Mr
10 Mathibedi thank you.

ADV MATHIBEDI SC: Thanks Chairperson.

CHAIRPERSON: Is it

ADV RAMAIMELA: It is Ms Ramaimela Chairperson.

CHAIRPERSON: Yes, yes. Please go ahead. Welcome.

ADV RAMAIMELA: Thank you very much Chairperson. Chairperson you would have noted that it took my leader over thirty minutes to read I think about twenty-eight pages and we have been granted only two hours.

CHAIRPERSON: Yes.

20 **ADV RAMAIMELA:** So what I intend to do Chairperson instead of reading because my portion which deals with the rendition and the defeating/obstructing the course of justice runs over approximately 55 pages. I will speak to the paragraphs.

CHAIRPERSON: Ja.

ADV RAMAIMELA: Where there is a need to emphasise perhaps, I can read those into the record.

CHAIRPERSON: Ja.

ADV RAMAIMELA: But as I have observed the Chairperson has the summary in front of him.

CHAIRPERSON: Ja.

ADV RAMAIMELA: And I trust obviously the Chairperson has read it.

CHAIRPERSON: Yes, no, no that is fine.

10 **ADV RAMAIMELA:** Thank you.

CHAIRPERSON: But also there will be – they will become public documents and they will be available. Ja.

ADV RAMAIMELA: Can I just enquire is it just the recordal or including the affidavits that do run into hundreds of pages taking into account that the rendition has seven lever arch files as a docket and one leaver arch file for defeating and obstructing the course of justice.

CHAIRPERSON: The affidavits will be public as well.

ADV RAMAIMELA: Thank you very much Chairperson.

20 **CHAIRPERSON:** Ja.

ADV RAMAIMELA: And I may just proceed.

CHAIRPERSON: Okay.

ADV RAMAIMELA: Chairperson you will find the portion that deals with the rendition at page 129 of this recordal.

CHAIRPERSON: Yes, go ahead.

ADV RAMAIMELA: Thank you Chairperson. And the way that this portion is drafted it is first it deals with the opening remarks. Those opening remarks run from paragraph 303 to paragraph 305. The importance thereof Chairperson is just to request that the judgment of Actibologad Hussle and another versus Triomed which was penned by Nugent JA as he then was reminded all of us that in law context is everything and he referred to the judgment where Lord Steyn in R versus Secretary of State for the Home
10 Department Exparte daily made that remark.

Nugent JA went on further and said:

“And so it is when it comes to construing the language used in documents whether the documents be it a statute or contract.”

So the purpose of that Chairperson was just to request that when these allegations were made there had to be a proper context within which they were made and because the prosecutors versions will not – the prosecutors cross-examination and their testimony will not be presented
20 to the commission that context obviously is missing because the public only has a version from only one side.

What my learned senior did was to read a summary of the rendition. It is a very long docket Chairperson so what we will try and do is to present at least some of the evidence that was there. Like the Chairperson has

recorded and we have referred in the recordal that during the leading of that evidence I remember it was that of Mr Sesoko where you said to Mr Sesoko that you would prefer to have the prosecutors come before you and tell you what evidence they had. You would also would have loved to look at the dockets to see what exactly was at – inside those dockets so that you can determine whether the decisions they took at the time were within the bounds of the law.

10 Be that as it may Chairperson, we find ourselves here without the benefit of having to do all of that because of operational constraint.

Now that Chairperson is the opening remarks.

Then at paragraph 306 which has numerous subparagraphs all the way to page 133 Chairperson this is just a role – a roadmap to give the reader of the portions.

CHAIRPERSON: Ja.

ADV RAMAIMELA: As to what is going to be set out in the summary. We told you that we will deal with the general
20 overview, the role of Advocate Mosini. How he got appointed to guide the investigation. The investigations conducted by Mr Khuba. You no doubt remember that he testified to it. Then we tell you the numerous IPID reports that had been prepared by Mr Khuba. Then the appointment of Mr McBride. Then Mr McBride handing over the docket to

Mr Nxasana, the Werksmans investigation – its report and the transcripts. And then the role of Dr Pretorius and Advocate Maema. Perhaps if I can just take a step back Chairperson.

The rendition matter ran through various prosecutors. Advocate Mosing assisted in the investigation that was his role. Then after the investigation had been concluded and the report of January 2014 was prepared by Mr Khuba and handed in Advocate Mosing followed the
10 necessary processes of informing the then acting NDPP Advocate Jiba and – about the conclusion and then the docket was taken to South Gauteng DPP office as it was the office which would have jurisdiction because there was centralisation process going on and it would be given the jurisdiction.

So instead of taking it to North Gauteng they took it to South Gauteng. It was given to Advocate Chauke the DPP who allocated it to Advocate Van Zyl.

All of that is set out later on but just to give the
20 sequence of the people who took part in what has been termed the rendition saga.

Then obviously at that stage it is no longer with Advocate Mosing. When it is in the office of Advocate Zias Van Zyl Mr McBride gets appointed in March 2014 the 3rd I think was – he takes over office on the 6th of March.

Immediately on taking office he instructs Mr Khuba and Mr Angus to go and retrieve the docket. They go and retrieve the docket Chairperson then the report of March 2014 is prepared.

That report we all know by now that it changed the recommendations of charging General Dramat and Sibiya and only recommended that Captain Maluleke and other junior members of the SAPS be charged.

Then instead of returning the docket to DPP South
10 Gauteng the docket gets taken to Mr Nxasana on the instruction of Mr McBride.

Mr Nxasana sits on the docket for lack of a better word Chairperson for eight months. April 2014 all the way to January 2015 without allocating the docket.

Then ultimately the docket gets taken to Advocate Mzinyathi and Baloyi and that is where Advocate Baloyi comes in.

Later after they had read the docket, they take it back to Mr Nxasana who now takes it to South Gauteng. In
20 South Gauteng it appears that it was allocated to Advocate Roberts.

At some point the docket leaves South Gauteng again finds its way back to Advocate Baloyi. But that is the web of explaining the role players Chairperson.

Now in the recordal Chairperson at page 133 which

is paragraph 301 we remind the Chairperson of the evidence of Mr McBride which evidence was led on the 11th of April 2019 just to place on record the relevance thereof.

Chairperson you will recall that Mr McBride testified and said that this rendition fiction is an American term in the South African law we do not have something called rendition. To the extent that we do not have such a crime Chairperson Mr McBride is correct.

But what Mr McBride failed to tell this commission
10 and the public at large Chairperson is what exactly is it that the people who were accused of having taken part in rendition did.

Chairperson at 309 we quote portions of your engagements with Mr McBride and I read you – after a series of questions from the evidence leader and Mr McBride’s response the Chairperson asked Mr McBride:
“What is it that they were alleged to have actually done that was referred to being rendition – what was it? Just the actual acts as you understood them that was referred to as
20 rendition – what was it?”

Now Chairperson the recordal and the evidence of the implicated prosecutors who dealt with this matter all the way from Advocate Mosing to Advocate Boloyi is that Mr McBride failed to answer this question. The record does not contain an answer of what is it that he understood the

actual acts to be rendition.

Chairperson we tried as best as we can to summarise seven lever arch files to condense the facts of what were the actual acts that constituted this rendition. We set that out Chairperson from paragraph 312 to paragraph 314 with its sub-paragraphs but because of the importance Chairperson at least to the prosecutors who have been labelled all sorts of things of having charged for rendition or the defeating the ends of justice which
10 emanates from this rendition. I will not be doing justice if I just do not read these paragraphs. The rest of the paragraphs I will speak to Chairperson.

Thank you very much Chairperson. Now I am reading from paragraph 311 – 311 says:

“According to the affidavit of Mosing the actual acts that were referred as rendition are the following.”

Now there follows the summary of all the statements, the documents that had been obtained by Khuba with the assistance of the others to set out the crime that had been
20 committed. In the docket Chairperson there are statements which are to the effect that after a meeting between Generals Dramat Sibiya had with their Zimbabwean counterparts sometime in August 2010 where they amongst others agreed to assist each other with cross-border crimes and extradition Zimbabwean police arrived at the Beitbridge

border post and requested entry into South Africa as they were due to have a meeting with Dramat.

A police officer Madilongo who McBride incorrectly refers to as a crime intelligence officer telephoned two of his superiors informing them that about the presence of the Zimbabwean police officers.

Madilongo's superiors instructed him to directly telephone Dramat and to seek his response. Madilongo directly telephoned Dramat on the cell phone number
10 provided to him by the Zimbabwean police officers.

Dramat then instructed Madilongo to permit the Zimbabwean police officers entry into the Republic. The Zimbabwean police officers arrived at the offices of the DPCI in Silverton and were introduced by Maluleke to his supervisor Lieutenant Colonel Verster. The importance of mentioning this Chairperson is that other than Maluleke who is an accused person there is a statement of Colonel Verster who confirms that Zimbabwean police were introduced to her by Maluleke.

20 The Zimbabwean police officers had a meeting with Dramat the next day. In the docket there is evidence of statements and reports that indicate that indeed such a meeting was held between Dramat and the police.

Then after that meeting Chairperson an operation for the tracing and arrest of Zimbabwean Nationals commenced

on the evening that the meeting was held. Numerous witnesses deposed to affidavits confirming the presence of Zimbabwean police officers during various operations. The operations were conducted by Maluleke an accused in the rendition matter and members of the tactical operation management section referred to as TOMS which operations were aimed at arrested the Zimbabwean Nationals.

The mandate of TOMS is set out in a document in the docket Chairperson. After each operation and the arrest
10 of Zimbabwean Nationals Maluleke and the police officers would personally drive the arrested nationals to Beitbridge border post and hand the arrested nationals Chairperson to the Zimbabwean side of the border.

Each time the handing over was done no extradition or deportation processes were followed.

If I can just pause here Chairperson and remind the Chairperson that later in the summary the prosecutors refer the Chairperson to a judgment that was in – quite interestingly penned by yourself Chairperson.

20 **CHAIRPERSON:** Oh.

ADV RAMAIMELA: In S versus – yes – Mohammed Chairperson.

CHAIRPERSON: Okay.

ADV RAMAIMELA: Where there was the issue of ex – or – of extradition.

CHAIRPERSON: Yes.

ADV RAMAIMELA: And the constitutional court said if you know that the person that you intend to extradite may be killed you do not do so. I do not need to remind the Chairperson of that. He knows it quite well.

Now some I continue reading Chairperson.

Some of the Zimbabwean Nationals handed over are alleged to have been tortured in police custody while others were killed. There is a statement of one of the persons who
10 had been arrested in the operations who had been taken over to the Zimbabwean side who said he had been tortured and some of the people that had also been arrested were killed.

Now that are the acts Chairperson part of the acts that you were asking Mr McBride what constituted the rendition.

Now I continue Chairperson with the following.

CHAIRPERSON: I will – let me just ask something and I will remember later on to make sure you are not prejudiced
20 because of these questions – the questions that I have asked you. So I am counting the minutes so I will add them at the back.

ADV RAMAIMELA: Chairperson initially I only had twenty minutes now I have had to cut it down to ten minutes. I – if I can just ask if the Chairperson asks me how much more

time would you need?

CHAIRPERSON: No I will look at how much time I am taking – I am delaying you and then I will – I will add at the end of the two hours. I will add.

ADV RAMAIMELA: Chairperson that will ...

CHAIRPERSON: I will make sure you – I will add to make sure that at the end you...

ADV RAMAIMELA: Yes Chairperson.

CHAIRPERSON: You – your whole team does not have less
10 than two hours. So in the end you must still have the two
hours so I am going to bear in mind when I am asking you a
question. So what I – what I wanted to ask is for just some
understanding. Why – why was this matter you know
referred to as a rendition matter in a criminal investigation
context instead of just the normal crimes that we know it is
murder, it is kidnapping, it is whatever – whatever do – is
that something you know – is that something you do not
know?

ADV RAMAIMELA: Chairperson the – I think the answer
20 would lie in the reports. If – if we had been given the
opportunity. All the reports of the IPID nowhere do they
speak about rendition. They speak about kidnapping

CHAIRPERSON: Ja.

ADV RAMAIMELA: And they speak about assault

CHAIRPERSON: Ja.

ADV RAMAIMELA: So the rendition may have been a term that was coined by the media when the – the allegations surfaced.

CHAIRPERSON: Ja.

ADV RAMAIMELA: You would note in the summary Chairperson later on if I can just tell you even from paragraph 316 to paragraph 319.

CHAIRPERSON: Ja.

ADV RAMAIMELA: It is a very condensed summary of the
10 report of the police civilian secretariat.

CHAIRPERSON: Okay.

ADV RAMAIMELA: The police civilian secretariat investigated this matter after it had been reported. I think it was in the Sunday Times that people were extradited to be killed in Zimbabwe and then I cannot guess for the media.

CHAIRPERSON: Ja.

ADV RAMAIMELA: Perhaps to sell the papers they called it rendition.

CHAIRPERSON: Okay.

20 **ADV RAMAIMELA:** Because that was the term that was used then everybody called it that.

CHAIRPERSON: Yes.

ADV RAMAIMELA: But in the docket – in the IPID reports there is no use of the word rendition.

CHAIRPERSON: Okay.

ADV RAMAIMELA: Thank you Chairperson.

CHAIRPERSON: Okay I will – I think I – I think I will be correct to say it probably took three minutes so I took three minutes of your time.

ADV RAMAIMELA: Chairperson I – I did – it was 11:02 now it is 11:05. I am keeping Chairperson to his terms.

CHAIRPERSON: Okay proceed.

ADV RAMAIMELA: Thank you Chairperson. Now I was at paragraph 314.7 which appears at page 136. One of the
10 victims Makawe Sibanda deposed to an affidavit and stated that when Maluleke paid him a visit after the arrest he informed Maluleke that Witness Ndaya – Witness is the name of a person Chairperson was killed by Zimbabwean police whilst in custody which is what had happened after they were handed over to Zimbabwean police.

Maluleke allegedly told Sibanda that he knew they would be killed in Zimbabwe because that is what happens when one kills a police officer in Zimbabwe. The persons so handed to the Zimbabwean police were wanted in
20 Zimbabwe for the murder of a Zimbabwean police officer Superintendent Chitikhobo.

Now Chairperson from paragraph 349 with its subs it is a summary of the cooperation's

CHAIRPERSON: 3 – 314.9?

ADV RAMAIMELA: 314.9 indeed Chairperson.

CHAIRPERSON: Ja.

ADV RAMAIMELA: That is the summary of the operations that were conducted. You will see at 314.9.1 it is the first operation it was conducted on the 5th of November 2010 it appears at page 136 Chairperson.

CHAIRPERSON: Yes, I can see it.

ADV RAMAIMELA: Where four Zimbabwean Nationals were arrested and detained at Orlando police station and then a few days later two of the Zimbabwean Nationals were
10 illegally taken over the border and handed to the Zimbabwean police while the other two Zimbabwean Nationals were dropped off on the N14 freeway.

Now two of these persons were the Sibanda Makawa that I just referred to above Chairperson and he is the one who deposed to an affidavit which forms part of the docket.

And then also if I can just highlight that the documents that were used to hand over these people the Home Affairs documents were – I will – subsequently proved to have been falsified and there is evidence in the docket
20 from the officials of the Department of Home Affairs that the documents that were used were no longer in use at the time and most importantly at the time the DEZP which is the Dispensation for Zimbabweans was in place which prohibited their deportation for being illegal immigrants at that time
Chairperson.

Now at sub 2 it is the second operation which was conducted on the 23rd of November 2010. The Zimbabwean National who was arrested Richard Chuma [?] and he again was taken by Captain Maluleke in the company of Warrant Officer Seleka of TOMS to the Zimbabwean police at Beitbridge.

Then the next sub is sub 3 a third operation that was conducted on the 11th of January. This third operation was conducted by Maluleke of the Hawks with the assistance
10 Chairperson of Crime Intelligence gathering. Maluleke requested that Crime Intelligence gathering to help with the tracing of Gordon Dube.

So to the extent that there has been evidence before this commission Chairperson painting the investigation of this matter as a Crime Intelligence led investigation that is untrue.

Yes, there are persons who were from Crime Intelligence. All these persons their statements are in the dockets and they explain the role.

20 You will recall Madilongwe at the border is not a Crime Intelligence person. There is also the allegation by Mr McBride that Mukangwe and Mahlangu who were conducting the investigation before Khuba took over were Crime Intelligence. That is also proven to be false. They were detectives.

And it is only later when Advocate Mosing took over guiding the investigation that he raised it with Mukangwe and Mahlangu to say why is the IPID not involved in this investigation? And then they heeded his request.

Chairperson would have noted that on the 10th of September Mukangwe wrote to IPID to say here is an investigation can you take over we are willing to assist. Ms Cookie Mbeke in October 2012 assigned Mr Khuba to establish a task team. Mr Khuba took over the investigation
10 and included Mukangwe and Mahlangu who continued to investigate. All of that is in the docket. All of that is recorded in the investigation diary Chairperson.

Now to move on sub 3 is – I mentioned sub 3 Chairperson which is the operation of 11 January 2011 where Gordon Dube was arrested with the assistance of Technical Response Team commonly known at TRT as well as Crime Intelligence Gathering and again, he was taken over to the border, handed over to Zimbabwean police.

During his arrest there had been a shootout with
20 police Chairperson and a gun belonging to the Zimbabwean Superintendent who had been killed was found in his possession.

Captain Maluleke took this gun which the investigating officer in the matter of Dube needed as an exhibit for the crimes against Dube in South Africa. He took

it over to Zimbabwe Chairperson therefore obstructing the course of that other investigation. We leave it that. All of that evidence is in the docket Chairperson.

Now sub paragraph 4 is the fourth operation which commenced on the 26th January 2011 and that is where a Zimbabwean National by the name of Johnson Noyne [?] was arrested again with the assistance of TRT and this is where it is stated that he is taken to Silverton at the offices of the Hawks DPCI. This is where some of the statements
10 indicate that General Dramat came to the members and congratulated them for the success in the operations.

Now Chairperson – excuse me – those are the summaries of the operations. When you turn the page over at 139 you will find as I have already referred to you paragraph 316 all the way to 319 at page 139 to 140. It is the summary of the secretariat of – let me just make sure – the report of the Police Civilian Secretariat Chairperson. You will remember just now I just said she investigated because of the reports in the media. Then once she
20 investigated, she also considered the reports of the DPCI that had been given to the Minister when he was being asked questions in the National Council of Provinces and in the National Assembly Parliament wanting to know what exactly is happening because this has potential for a diplomatic crisis because foreign nationals are involved and

proper processes are not followed.

Now the Minister was given information notes to respond to Parliament and these notes were prepared on information that had been given by the DPCI.

The Police Secretariat conceded that the versions in these notes was questionable and contradictory and then she recommended that the IPID or a retired judge investigates.

Now we do not know why the matter was
10 investigated by Mokangwe and his colleague instead of going to the retired judge or IPID directly as recommended by the Police Secretariat.

Be that as it may I have explained it was investigated by Mokangwe and Mahlangu who after obtaining few documents we set them out Chairperson that at the time that they approached Advocate Jiba to assign a prosecutor to assist there was about seven statements and three other documents in the docket and then Advocate Jiba appointed Advocate Mosing to assist. That – all of that
20 starts at paragraph 320.

Then you will see that we set out at 322 and 323 the statements of the four Crime Intelligence officers who were seconded at the time Chairperson to TOMS which was led by General Sibiya.

Now all this mention of Crime Intelligence we

assume is the basis on which it is alleged that it was a Crime Intelligence driven investigation. But we also submit that it is betrayed by the objective facts that are in the docket and a slanted version has been placed before this commission and told to the public.

Then Chairperson also what was in the docket at the time were three other statements of the victims of the arrest and you will recall Makawe had been taken to Zimbabwe tortured and then made his way back.

10 Now with this evidence it is not enough but there is some sort of evidence which points to a crime of a person being arrested for being an illegal immigrant taken not by Home Affairs and not through extradition by a Hawks police officer to the border to Zimbabwe.

The prosecutors have a duty as my senior has referred to the decisions and the prosecuting act to assist the police to investigate and where they identify a prima facie offence – not a prima facie – a what is – yes, they have a duty to take the matter to court.

20 Now Chairperson interestingly enough Mokangwe asked Advocate Mosing – can you issue warrants of arrest? We mention that at paragraph 325.

Then Advocate Mosing says: No I cannot issue warrants of arrest. These investigations are very incomplete. There are numerous questions that arise from

the few statements that are in here. Go and investigate all these other issues.

He sets them out. They are in the police diary. Mokangwe and his colleague go and investigate. Later on I have stated Chairperson Khuba gets appointed.

Khuba's appointment starts at paragraph 328. At para – at page 142. And all these pages Chairperson we set out the steps that Mr Khuba took when he investigated. When he obtained the witness statements. When he
10 obtained the documents of Home Affairs which shows that proper processes were not followed. When he obtained the DZP and this led to Mr Khuba preparing his report of 22 April 2013.

So the report of January 2014 was not the first report. He had been preparing interim reports giving them to the then acting Executive Director Ms Cookie Mbeke.

The first report we set out a summary of it Chairperson at 336 it appears at page 145. We set out the evidence that Mr Khuba had obtained at that stage
20 obviously including that which already existed in the document.

Of importance we also set out Chairperson at paragraph 337 and 338 that there is a statement of – what is his name – Neethling who was attached to the DPCI Provincial Offices in Gauteng. The importance of the

statement of Neethling Chairperson is that at least here is somebody who is not attached to Crime Intelligence. Who also corroborates what the people who had been seconded to TOMS but from Crime Intelligence said? He also says that he had instructed his junior Selepe to escort Maluleke when one of the suspects Thuma was driven to Beitbridge.

So that is very important evidence Chairperson. It finds its way in the IPID report of 2013 April.

Then from paragraph 341 all the way to paragraph
10 347 Chairperson it is an IPID report of 2 July 2013 where Mr Khuba accounts for all the investigations that he has conducted and to answer the Chairperson's questions earlier at 342 Khuba concluded that report with possible charges of kidnapping, contravention of immigration act, forgery and assault. There is no rendition there Chairperson.

Now Advocate Mosting is still guiding the investigation He prepares a memorandum to account to his superiors. It is dated 7 July 2013.

20 Then the investigation continues Chairperson. Mr Khuba prepares another report. It is dated 4 September 2013. We set out the summary of that report Chairperson at paragraphs 348 to paragraphs 350.

And then thereafter Chairperson it is another report of the IPID. It is dated 22 October 2013. Excuse me.

Now Chairperson in this report there are notes from Advocate Mosing who raises certain question with Mr Khuba to say what about this – follow this aspect up – follow that one up and when you record your annexures, please put an exhibit number like you A1, A2. He is guiding the investigation. He is not investigating. Mr Khuba is investigating. It is a very high-profile matter. It involves generals in the SAPS so it is important that you know proper work be done and that those who are responsible be
10 held to account.

So that is the role of Advocate Mosing in the whole o called rendition saga Chairperson. And then comes the report of 22 January 2014. That you will find at page 154 Chairperson. It starts paragraph 361 to 364. It sets out what the report was all about and you will recall Chairperson when the evidence was led before you that this report recommended that Generals Dramat and Sibiya also be charged together with the other junior officials
Chairperson.

20 Then Advocate Mosing prepares a memorandum of October – of – I beg your pardon 14 February 2014 where the docket gets referred to South Gauteng. I have already told you that facts Chairperson. You will remember when it gets taken to South Gauteng and then it gets allocated to Advocate Zias Van Zyl from whom Mr Khuba and Angus

retrieved the docket.

Then in paragraph 371 Chairperson all the way to paragraph 386 we set out that it is quite interesting that Mr McBride gets appointed on the 3rd of March that you find at 371. And immediately upon his appointment Chairperson he is already phoning Angus on the 5th of March. That you will find at paragraph 375 and he is instructing Khuba to say, I want a briefing. Khuba briefs him then he wants the docket to be uplifted.

10 And he is saying that the evidence in the docket must be reviewed. This is a person who has been office for merely two days and already he is asking for a review of the evidence. He does not say I want to see what the evidence is and then after he has read seven lever arch files, he says ja, no actually go and review this, that and the other on the report.

 You will also recall Chairperson from the evidence that Mr McBride's version has been consistent that he never saw the January 2014 report. He only was told about it. He
20 actually if my memory serves me well, he saw it the next year after General Dramat had been suspended.

 Be that as it may Chairperson all of that is in the docket. All of that is in the affidavits and what this is is merely a summary where we tried to point to the Chairperson that when you have regard to the probabilities

what had been happening here does not seem to be above board.

You cannot come on the 6th of February on the 18th work or an investigation that had been conducted over a year changes and then of importance Chairperson also is that after the change of that report instead of it being taken back to Advocate Zias Van Zyl where it was taken from it gets taken to Mr Nxasana.

Now Mr Nxasana instead of either taking a decision
10 which he can he does not take it. Neither does he take it to any other prosecutor to read it and take a decision or make a recommendation.

He sits quietly eight months. In that eight months Chairperson you will note in the recordal Dr Pretorius said he considered that together with Mr Maema when they were charging or taking a decision to charge for defeating the ends of justice that in that eight months Mr McBride is giving media reports. There are questions in the public domain what has happened? Mr McBride says, Generals
20 Dramat and General Sibiyi have been exonerated by the IPID.

The prosecutors take serious exception to the word in fact to the use of the word exonerated. Only a court can exonerate. The IPID makes recommendations.

Now they are of the considered view and the firm

belief that in the docket no evidence justified the changing of the recommendations. In fact if regard is had to the investigation diary Chairperson from the time that the docket was uplifted from Advocate Van Zyl to the time it is taken to Mr Nxasana only three new entries are made.

Those entries it is the report of the Civilian Secretary. There is also a report of – if I can just refresh my memory Chairperson. There is also a report of what has been referred to as an expert who – whose expertise is not
10 told but what she did is that she examined the statement of one of the key witnesses being Madilongwa who allowed the Zimbabwean police entry into the Republic and said that the statement of Madilongwa is unreliable because Madilongwa uses five pronouns in one sentence with the greatest of respect Chairperson Madilongwa is a Venda speaking police officer just as I am a Tswana speaking advocate.

When your mother tongue is in (indistinct) and you are writing in another language you are bound to use pronouns and not write to the satisfaction of Annemarie Van
20 Staaden who questioned Madilongwa's statement.

Now let – the prosecutors are of the view that that statement could not justify ...

CHAIRPERSON: Oh I just wanted to – I just wanted to – to remind you.

ADV RAMAIMELA: To remind me.

CHAIRPERSON: And your colleagues that I am not controlling how long you take.

ADV RAMAIMELA: Oh yes Chairperson.

CHAIRPERSON: I leave that to you and your team.

ADV RAMAIMELA: Yes.

CHAIRPERSON: So I am not going to say stop. So it is between you and your colleagues.

ADV RAMAIMELA: Between me and my team.

CHAIRPERSON: How long you take ja.

10 **ADV RAMAIMELA SC:** Chairperson, I do realise that I have taken long. If I can just take the Chairperson quickly to – I have already spoken about Ms Nxasana, to the investigation conducted by Werksmans. Chairperson, you will see that from page 166, paragraph 400, we have set out the investigations of Werksmans.

20 And then at page 170, paragraph 408, we have set out the interviews that Werksmans conducted with Mr Khuba and we have pointed, Chairperson, to what the prosecutors consider to be very noteworthy portions of the transcript where Mr Khuba appears to give a sense that the change of the report was at the instance of Mr McBride. And, in fact, he says he was called to come and sign the report and because he was told that his boss, Mr McBride, was happy he could not question anything and therefore had to sign the report. All of that is set out in the

paragraphs I have just referred the Chairperson to.

Now, Chairperson, from paragraph 412 all the way to paragraph 425, we set out the affidavits of Dr Pretorius and Advocate Maya(?) insofar as it pertains to the rendition – to the defeating of the – or obstructing the course of justice. Now what they are asking is that that background that I have just set forth is what they considered. It is the context that Nugent JA was referring to.

10 It may not all be set out in the one docket of defeating but that is the context and because Mr McBride had been going on the public domain saying there is no evidence against Ramat and Sibiya. He was obstructing the course of justice and together with that evidence and the contents of the defeating of the ends of justice, they took a decision to prosecute for that charge, and it had nothing to do with being captured.

 And then Chairperson from paragraph 426 to paragraph 445, this is the summary of the evidence or the
20 affidavit of Advocate Baloyi who is dealing with the rendition matter. He is prosecuting Captain Maluleka. And as I have already intimated or my seniors already intimated during the introductory part, that Dramat and Sibiya made representations and a decision was taken to provisionally withdraw the charges against them.

I do not intend to go into the details of the affidavit of Advocate Baloyi because the evidence that he has considered is part of the evidence that I had been narrating to eh Chairperson that Advocate Mosing assisted Mr Khuba when he was investigating the matter. Chairperson, on that score, that concludes the rendition and defeating the ends. I take my leader or Advocate Madlanga will be next. Thank you very much, Chairperson.

CHAIRPERSON: Yes, okay alright. Thank you, thank you.

10 **ADV RAMAIMELA SC:** Thank you. Mr Madlanga.

ADV MADLANGA: [No audible reply]

CHAIRPERSON: Mr Madlanga.

ADV MADLANGA: Good morning, Chairperson.

CHAIRPERSON: Good morning, good morning. Are you ready?

ADV MADLANGA: I am ready, yes, Chairperson. I am just struggling to get my picture on the screen.

CHAIRPERSON: Well, we can see you. Now we do not see you. Now we see you.

20 **ADV MADLANGA:** You can see me?

CHAIRPERSON: Ja, I can see you now.

ADV MADLANGA: Good morning, Chairperson.

CHAIRPERSON: Good morning.

ADV MADLANGA: Chairperson, I have been allocated to read into the record the topic dealing with the SARS

related cases.

CHAIRPERSON: Yes.

ADV MADLANGA: This, Chairperson, is captured on pages 82 to 106 of the filed summaries.

CHAIRPERSON: Yes.

ADV MADLANGA: This topic is dealt with under three headings.

CHAIRPERSON: I am sorry. I was making a note here. It starts from what page?

10 **ADV MADLANGA:** Pages 82 to 106, Chairperson.

CHAIRPERSON: Okay alright.

ADV MADLANGA: Of the summaries.

CHAIRPERSON: Okay.

ADV MADLANGA: This topic is dealt under three headings. The first one being the interception of communication at the offices of the Directorate of Special Operations and at the offices of the National Prosecuting Authority.

CHAIRPERSON: Yes.

20 **ADV MADLANGA:** The prosecutors that were involved in the SARS related matters, generally, were Dr Pretorius, Advocate Maema and Advocate Baloyi. Starting with the interception of communication case. The case involving this interception at the DSO and the MPA offices was widely published in the media under the headline, SARS

Rogue unit.

In this summary, the prosecutors implicated referred to the above case also as the Rogue unit Case whereas the official name of the unit was at the high-risk Investigating Unit. In a nutshell, Chairperson, the Rogue unit matter is about whether SARS officials installed, listening, and monitoring devices at the offices of the DSO and the MPA. If such devices were installed, it is important to be established who authorised such
10 installations, on what authority did such a person rely.

If it was SARS management where it is important to establish whether SARS has the statutory authority to authorise and to carry out such surveillance. The implicated prosecutors demonstrate that SARS had no authority to authorise and/or conduct such surveillance. The prosecutors further demonstrate by reference to legislative prescripts and witness statements that SARS is not statutorily authorised to act as it did.

Also, there is undisputed evidence that SARS
20 officials installed such surveillance equipment in the offices of the DSO and the MPA. And lastly, SARS, in fact, carried out the unlawful interception of communication. The Rogue unit post its origin to the memorandum 2nd of February 2007 which was written by Mr Pillay in his capacity as the General Manager of the Enforcement and

Risk Division of SARS.

The memorandum was directed to Minister of Finance at the time, Mr Trevor Manuel, seeking approval for the funding of special capability within the former National Intelligence Agency currently known as the State Security Agency to supply SARS and other law enforcement agencies with the necessary information to address illicit economy from where SARS was losing a lot of revenue.

From that memorandum that was written by
10 Mr Pillay, the following can be linked, Chairperson. One. The purpose of the memorandum was to seek approval to find a special capability within – to supply SARS and other law enforcement agencies with the necessary information to address the illicit economy. Mr Pravin Gordan, SARS Commissioner at the time, approved the recommendation on 8 February 2007.

Mr Jabu Moleketi the former Deputy Minister of Finance approved the recommendation on 22nd of February 2007. Mr Moleketi's approval was accompanied by a
20 handwritten comment, stating:

“...supported. However, this is a strange way of executing what I consider to be an economic mandate of NEA. It seems as an add-on rather than part of NEA's mandate...”

Mr Manuel, the former Minister of Finance, approved

recommendation on 22nd of February 2007. Lastly, in paragraph 2 of the memorandum, it is acknowledged that SARS did not have statutory authority to conduct covert surveillance on anyone. Mr Moleketi confirms this in his written comment when supporting the recommendation. It is worth noting that from the reading of the memorandum, the initial intention for establishing the unit was good and perfectly in order.

Also, the manner in which it was intended to be
10 established and conduct its business was legally permissible. The investigation confirmed that the Rogue unit did exist. However, the Rogue unit's establishment was not in accordance with the law. The Rogue unit did not conduct its business in accordance with the law.

Consequently, certain SARS officials were criminally charged. The said officials were charged of contravening Section 49(1) of the Regulation of Interception of Communications and Provisions of Communication Related Information Act No 70 of 2002,
20 amongst others. The abovementioned charge relates to the unlawful figment of surveillance equipment in the offices of the former DSO and the MPA and the interception of communication in those offices.

Basically, what is criminalised by Section 49(1) of RICA is the intentional interception of communication

without authorisation of a designated judge in terms of Section 16 of RICA. Mr Helgard Lombard made and submitted a statement in terms of Section 204 of the Criminal Procedure Act in relation to the above case. In his statement Mr Lombard confirms the following.

One. He was an employee of SARS at the time. His immediate supervisor Mr Andries Janse van Rensburg who in turn reported to Mr Pillay. He with the assistance of Mr Janse van Rensburg, to some extent, fitted the
10 surveillance equipment in the offices of the DSO and MPA.

On instruction of Messrs Janse van Rensburg and Pillay, he intercepted communication on the DSO officials using the surveillance equipment that he and Mr Janse van Rensburg installed. The installation of the surveillance equipment and the interception of the communication were conducted without authorisation of a designated judge in terms of Section 16 of the RICA.

Lastly, after Mr Janse van Rensburg had left the employ of SARS, Mr Johan van Loggerenberg took over
20 Mr Janse van Rensburg's position and the unit continued to conduct surveillance still without Section 16 authorisation. Evidence given by Mr Lombard above is corroborated by Messrs Japie, Shabala, Eric Kulelane Kwela, Dillo Nyaphudi, Danie le Roux and Francois van Niekerk, as well as Ms Nora Pitsi.

All the above witnesses were SARS employees attached to the rogue unit at the times relevant to the case. Mr Johan Daniel de Waal also corroborates the evidence given by Mr Lombard. Chairperson, if regard is had to the content of the memorandum of 2 February 2007 prepared by Mr Pillay, it is clear that Mr Pillay and everyone who supported the contents of the memorandum knew that SARS did not have the statutory authority to carry out surveillance.

10 In addition to Mr Lombard's confirmation of installation of the surveillance equipment at the DSO and MPA offices and the interception of communication, Colonel Isak Johannes Fischer confirmed the capability of the surveillance equipment as indicated by Mr Lombard. Copies of the statements of the individuals referred to above were in the docket and are attached as annexures to the Rule 3.4 statements of the implicated prosecutors filed with the Commission.

20 In view of the evidence set out above that was before the implicated prosecutors, they were justified to instituted criminal proceedings in this regard. They submit, Chairperson. Now, Chairperson, I come to the second topic under the SARS related matters. This one relates to the early retirement of and pension pay-out to Mr Pillay. The matter relating to the retirement of Mr Pillay

sufficed during the investigation of the rogue unit case when a correspondence relating to it was discovered.

The investigation referred to here was guided by the Priority Crimes Mitigation Unit as it had been referred to it by the NDP in terms of the proclamation. On perusal of the correspondence, it appeared that SARS might have incurred unauthorised, irregular, and fruitless and wasteful expenditure in respect of the early retirement of Mr Pillay. It appeared very improper that SARS could pay a
10 retirement penalty for an employee, particularly when an employee takes an early retirement due to purely personal reasons.

Since the PCLU must guide and manage the investigations of matters referred to it and matters incidental thereto, PCLU was obliged to request the investigators to investigate Mr Pillay's pension pay-out and guide the investigation in that regard. The investigation revealed that the manner in which Mr Pillay granted earlier retirement was in contravention of the law relating to
20 pensions.

It was meant to assist Mr Pillay to sort out his personal problems relating to the schooling of his children. The approval of Mr Pillay's early retirement by the Minister of Finance was coupled with the recommendation that almost immediately after retirement Mr Pillay would be re-

appointed by SARS to occupy the same position he occupied before taking retirement.

That is the position of the Deputy Commissioner even though the re-appointment was on contract basis. The re-appointment of Mr Pillay was done without following the correct procedure. For instance, the position was not advertised and therefore no interviews were conducted. Based on the above, Messrs Magashula, Pillay and Gordhan were criminally charged.

10 It is worth noting the following in relation to the criminal proceedings that were instituted against the three above. The prosecution team did not have Mr Symington's statement in the docket when the decision to prosecute was taken. Mr Symington was at the relevant time employed by SARS at its Legal and Policy Department.

 He prepared an opinion upon which it was alleged that the decision to approve Mr Pillay's early retirement was biased. The prosecution became aware of the existence of Mr Symington's opinion on 14 October 2016
20 when Messrs Magashula and Pillay made the representations in terms of Section 179(5) of the Constitution for the withdrawal of charges against them.

The prosecutors who were involved in charging the three above were accused of instituting malicious prosecution against them. This allegation is levelled

against the said prosecutors coupled with the allegation that they together with others referred to in General Booyesen's and Mr McBride's affidavits an abled state capture by persecuting corruption ...[indistinct] [01:46:43] and by refusing to prosecute politically connected individuals.

It is not the individuals who were charged that accuse the prosecutors of malicious prosecution but is General Booyesen and Mr McBride. Be that as it may.
10 Considering the generous nature of the proceedings of the Commission, the prosecutors must still respond to the unsubstantiated and baseless allegations that General Booyesen and Mr McBride made against them.

The charges against Messrs Magashula, Pillay and Gordhan were the following:

“1. It was fraud in that a false pretence was given to SARS and National Treasury to its prejudice that SARS was liable to pay in excess of a million rands to the GEPF on behalf of Mr
20 Pillay which was a penalty for taking early retirement for personal reasons.

2. Contravention of the Public Finance Management Act by causing SARS to incur or failing to prevent unauthorised, irregular, and fruitless and wasteful expenditure.

3. A further fraud in that a false pretence was given out to the Human Resources of SARS to its prejudice to enter into an employment contract with Mr Pillay for a remuneration package for a period of five years instead of three years which was in the approved memorandum which was approved by Minister Gordhan.

10

4. A further fraud in that a false pretence was given to Human Resources of SARS to its prejudice to enter into an employment contract with Mr Pillay for a period of four years when there was no approved internal memorandum or a letter authorising it.

20

The prosecutors who were involved in the prosecution of this case being Dr Pretorius and Advocate Maema demonstrate in their respective Rule 3.4 statements filed with the Commission that based on the objective evidence that was before them they were justified in recommending to the NDPP that the individuals referred to above must be prosecuted.

They demonstrate that there was a reasonable prospect of successful prosecution in the matter. In the paragraphs that follow, the implicated prosecutors demonstrate that there was a rational basis to bring

charges against the three individuals. The following evidence was in the docket when the decision to prosecute was taken.

On 12 August 2010, the former Commissioner of SARS, Mr Magashula, requested the former Minister of Finance, Mr Gordhan, to approve the early retirement of Mr Pillay from SARS with full retirement benefits with effect from 1 September 2010 and that SARS must pay the early retirement penalty that is payable to GEPF as
10 contemplated in Rule 14.3.3(b) of the GEPF Pension Law read with Section 19 of the SARS Act and Section 16.2A of the Public Service Act.

Approval was also sought for Mr Pillay to be re-appointed almost immediately after retirement in the same position as the Deputy Commissioner on contract for three years. Effectively, Mr Pillay would be enabled to pay for his children's education and continue his employment at SARS for another three years whilst SARS would suffer financial loss in excess of a million rands.

20 Provision was made in the memorandum for the former Deputy Minister, Minister Nhlanhla Nene to recommend the proposal but the former Minister, Mr Gordhan, approved the early retirement without Mr Nene's signature. Mr Nene explained that he had no recollection of the memorandum being presented to him for

comment.

After Mr Pillay went on early retirement, Mr Magashula entered into an employment agreement with Mr Pillay in the same capacity for a period of five years commencing on 1 January 2011 knowing that the approval granted was for a period of three years only.

And lastly, just before Mr Gordhan was appointed as Minister of Corporative Governance and Traditional Affairs in May 2014, he extended Mr Pillay's contract for
10 another four years when there was no internal memorandum authorising such extension when Mr Pillay's employment contract was to terminate in 2016. The contract still had a year – two years, in fact, to run before it expired.

Also, at the disposal of the implicated prosecutors there were two undated memoranda which were written by Mr Pillay. The one was addressed to Mr Magashula and the other to Mr Gordhan. In the one addressed to Mr Magashula; he mentions the reason for his early retirement
20 as:

“I was expected to perform at a very high level accompanied by accountabilities that go with the performance of such a high-level job.

This exerted its toll from me in the sense that my health condition is slowly deteriorating.

Adding to this, my family responsibilities for a long time suffered on account of the dedication required by my job. I have decided to take early retirement...”

In the one addressed to Mr Gordhan; he states:

“I have reached a stage in my life where it has become a reality that I had to make some very important decisions about the education of my children.

10 The decision I have taken will require a considerable capital investment, money that can be raised by means of a bank loan but which would be prohibitively expensive in view of the current financial circumstances where very high rates of interests are the order of the day and indications that are that this situation will prevail for the foreseeable future.

20 In view of this I have decided to inform you that I intend to retire in 2009 when I reach the age of 56-years.

As I have already reached the earliest optional retirement age of 55-years in terms of SARS Retirement Provisions, the retirement benefits will provide me with a lumpsum benefit which will financially support the decision I have made in

terms of the education of my children as well as a monthly pension.

Whilst this may not be ideal in terms of the benefits when finally when finally retiring, I am of the opinion that this is the best option available to me as far as my children's education is concerned.

10 This brings me to the second issue at stake, namely, how I view my retirement as raised above.

Clearly, I am doing this on account of a matter that has nothing to do with my work at SARS.

I still feel that I am still capable of doing my work.

I still have the enthusiasm and will to do it and I am of the opinion that through my work I can still contribute to the establishment of an even better South Africa for all its citizens..."

20 The implicated prosecutors held a view that the separate reasons for early retirement are quite different and contradict each other. Section 16(6) paragraph A of the PSA requires that the Executive Authority may authorise an employee to take early retirement if there are sufficient reasons to take such early retirement.

In their view, the reasons advanced for such early

retirement contradict each other and are purely personal and have nothing to do with his obligations towards SARS. The officials at Human Resources warned Mr Magashula that implementation of the decision would amount to SARS paying for the education of Mr Pillay's children but they were simply ignored.

In addition to the three memoranda referred to above, the implicated prosecutors had the following documents in their possession which they considered when
10 making the decision to bring the charges in issue. The first one is the affidavit of Mr Nico Johan Coetzee. At the relevant time Mr Coetzee was an employee of SARS. In his affidavit he says:

“In 2008, I was instructed to prepare a ministerial memorandum to be signed by Mr Gordhan who was Commissioner of SARS at the time to recommend to the then Minister of Finance, Trevor Manuel, that he approved Pillay's early retirement.

20 I awaited the approval by the Minister of the request by Mr Pillay.

In October 2009 while waiting for the approval of the memorandum, I received a revised memorandum from the Office of the Commissioner, Mr Oupa Magashula.

The memorandum contained different reasons from my original memorandum as to why the Minister should approve Mr Ivan Pillay's early retirement.

The reasons on the revised memorandum were that Mr Pillay wished to go on early retirement in order to enable him to provide for his children's education and not as I have previously stated that he wished to pursue other interests.

10 I raised concerns to the Commissioner through the emails dated the 8th and the 9th of October 2009 respectively that if the Minister should approve Mr Pillay's application on the grounds of personal interest it may create a precedent in terms of which other employees might come forward with similar requests of early retirement..."

In the email ...[intervenes]

CHAIRPERSON: Mr Madlanga, we are at twelve o'clock. I
20 propose to add ten minutes to cover for the two or three questions that I asked. Is that fine with you?

ADV MADLANGA: Chairperson, I – for me to finish, I may say I still need about ten minutes. And my learned leader, Mathibedi SC, is also intending to still come.

CHAIRPERSON: [laughs] Well, from ten to twelve, that is

two hours, but you know I promised – because Mr Mathibedi did not start exactly at ten. I would add and also for a few questions. So, I propose to add ten minutes, but let me do this. Let me add 15-minutes. We go to quarter past. How your team uses it, let me leave that to you. Is that fine?

ADV MADLANGA: Thank you, Chairperson.

CHAIRPERSON: [laughs]

ADV MADLANGA: Because I know, Chairperson,
10 Mathibedi SC still needs to address you, Chairperson.

CHAIRPERSON: Ja, ja.

ADV MADLANGA: Maybe I should at this stage stop and give ...[intervenes]

CHAIRPERSON: Well, maybe ...[intervenes]

ADV MADLANGA: ...you ...[intervenes]

CHAIRPERSON: Maybe have – maybe take five minutes to wrap up. Then I will see how I accommodate him within – I will not give him a lot more but take five minutes to wrap up your section.

20 **ADV MADLANGA**: Thank you, Chairperson. In a nutshell, Chairperson, the implicated prosecutors demonstrate that in the docket that was before them at the time when they decided to institute the criminal proceedings against Mr Pillay, Mr Magashula and Mr Gordhan actually supported the decision in that there were reasonable

prospects of a successful prosecution considering the evidence that was before them.

CHAIRPERSON: H'm.

ADV MADLANGA: If I may quickly move on to the last topic under these SARS related matters.

CHAIRPERSON: Yes.

ADV MADLANGA: It relates to the refusal to prosecute Brigadier Xaba and others who were investigating the rogue unit.

10 **CHAIRPERSON:** H'm.

ADV MADLANGA: The implicated prosecutors in this case – the implicated prosecutors in relation to the above matter were Dr Pretorius and Advocate Baloyi.

CHAIRPERSON: H'm?

ADV MADLANGA: This matter emanates still from the investigation that was conducted in relation to the rogue unit. After the documentation in which it was discovered that there was this early retirement pay-out to Mr Pillay, when Mr Magashula, Mr Pillay and Mr Gordhan were
20 charged, later Mr Magashula and Mr Pillay made representations to the NDPP in terms of Section 179(5) of the Constitution, and in the representations, they made they made mention of the fact that their decision to approve the early retirement was based on an opinion that was given by Mr Symington who was in the Legal

Department of SARS.

Then the PCLU instructed the investigating team to get a statement from Mr Symington and in guiding that investigation Dr Pretorius wrote a memorandum which he sent to the investigating team lead by Brigadier Xaba and Brigadier Xaba for what that memorandum to the attorney contracted to SARS who in turn forwarded it to Mr Moyane who was the Commissioner at the time.

Mr Moyane forwarded the memorandum to
10 Mr Symington Senior to discuss it with Mr Symington. When the investigating officers visited SARS to take the statement from Mr Symington, they realised that he knew the issues that were raised in the PCLU memorandum and they indicated to the Commissioner that they were not happy that he was having that document with him because they were fearing that it might be leaked to the media.

Then the Commissioner instructed his bodyguard to accompany the investigating team to go and retrieve that document from Mr Symington and on their arrival, Mr
20 Symington refused to give it to them and there was some standoff but ultimately, they took – managed to get the memorandum from him.

And he later laid criminal charges against the DPCI investigating team members and Mr TT, the Commissioner's bodyguard. When that docket ultimately

came to Advocate Baloyi, he declined to prosecute and that the reason, amongst others, was that Mr Symington made two statements and there were contradictions in those statements which Advocate Baloyi was of the view that they made the – they impacted negatively on the successful prosecution of the case. Hence, he declined to prosecute.

That is the reason, amongst others, that he is labelled by Mr McBride that he is a member of the core
10 group that was enabling the capture of the state.

CHAIRPERSON: Yes.

ADV MADLANGA: His decision, Chairperson, is actually in a way supported by the decision of Fabricius J in – when he was dismissing the application that was made by Mr Symington based on the same facts. He was of the view that there was no threat at all that was exerted against Mr Symington on the day. He even says that – in fact, there is a passage from the judgment of Fabricius J. He even says that the standoff could have been resolved
20 by a handshake and over a glass of beer.

CHAIRPERSON: [laughs]

ADV MADLANGA: That Advocate Baloyi views as supporting his position to decline to prosecute.

CHAIRPERSON: Yes.

ADV MADLANGA: Mr Symington and his legal

representatives also requested a certificate of non-prosecution which was given almost four years ago. Up to date no private prosecution has been instituted and that also – Advocate Baloyi submits that it is an indication that Mr Symington and his legal team also realised later that there is no success – there are no prospects of a successful prosecution.

With that, Chairperson, I should end to say that Advocate Baloyi in this regards submits that what is said
10 by Mr McBride against him cannot justify the label but he is enabling the capture of the state. Thank you, Chair.

CHAIRPERSON: Yes. Thank you, Mr Madlanga.
Mr Mathibedi.

ADV MATHIBEDI SC: Thank you, Chairperson.

CHAIRPERSON: I give you ten minutes. Is that fine?

ADV MATHIBEDI SC: That is fine, Chairperson.

CHAIRPERSON: Yes, okay alright.

ADV MATHIBEDI SC: Thank you, Chairperson.

CHAIRPERSON: You may continue. H'm.

20 **ADV MATHIBEDI SC:** I am dealing with Cato Manor.

CHAIRPERSON: H'm.

ADV MATHIBEDI SC: 28 people died at the hands of the police officers of which General Major Booysen was leading.

CHAIRPERSON: H'm?

ADV MATHIBEDI SC: Now it is very important to indicate that what is surprising is that despite the fact that reliance is placed on self-defence by the members, none of the members sustained injuries. Even not a single police vehicle was damaged during the incident. And of critical importance is the evidence that in some of the scenes firearms were planted by the Cato Manor Unit and ballistic evidence revealed that some of those evidence – firearms that were retrieved by members of the Cato Manor could
10 not – were not functional. Even, you know, a bullet could not be fired from that – from those firearms. And the most outstanding incident, Chairperson, relates to a 16-year-old boy, Kwasi(?) Ndlovu(?) [00:08:59]

CHAIRPERSON: H'm.

ADV MATHIBEDI SC: And I have been in contact with the parents. The father says justice has failed him. We have a 16-year-old son who was shot in the – who was shot dead, You know, more than one bullet hit the young boy whilst in the rented house during the evening whilst he was
20 asleep. And the allegation is that they were acting in self-defence.

CHAIRPERSON: H'm.

ADV MATHIBEDI SC: Now if we have to look at the evidence of a member of the police, Mangena, Brigadier Mangena who dispels the notion that Kwasi Ndlovu was

posing any threat or a danger to the police. The evidence reveals that at the time he was shot, he was laying on a couch.

And the father says, at a later stage: “I was asked a question as to who is the person that was shot.” And he said: “It is my son.” And the operation ceased. And what is disturbing is that we have here members of the police who can utilise the services of the police intelligence to determine whether the people who escaped from prison are
10 the people who were staying in that house which turned out that they are not.

And we also have an incident of a person who was shot dead in a wheely-bin. You know, the photos reveal that the shooting happened from the top as the lead, you know, has got some hose(?). Chairperson, we respectfully submit that Advocate Maema and Mathenjwa demonstrated in their affidavits the evidence that was available at their disposal that led to the, you know, the laying of the initiation of charges against Booysen and other members.

20 And we must also bear in mind that Booysen is one of the implicated persons and there are all reasons why he is condemning Mathenjwa and Maema. And it is not – even his evidence that he went through those dockets to establish what the kind and nature of evidence was in those dockets.

And of critical importance is that it is not even his evidence that an investigation, an internal investigation was made by him to determine what is it that happened during those shooting incidents. Chairperson, we respectfully submit that the charging was justified. And the other aspect that relates to the De Kock Report. We have set out in what respect this evidence – this report is flawed which record was used to withdraw the charges against Booyesen and his colleagues.

10 Chairperson, the other thing relates to the involvement of Paul O’Sullivan in the investigation that transpired at the house or home of Mr Phahlane. Whilst it is acceptable that in certain circumstances witnesses or complaints are entitled and are allowed to go to a house of a suspect to go and do whatever, you know, pointing out should be made, but in this regard, Chairperson, with respect that that went beyond what was expected of a witness.

20 And also, there is a report which indicates as to why it was unattainable or undesirable for Paul O’Sullivan to have been involved in that investigation. And on his own version, McBride says: “I am aware of the kind of person Paul O’Sullivan is.” But he did not set boundaries for him and said: “You can only go up to this extent.” Which that did not happen.

CHAIRPERSON: H'm.

ADV MATHIBEDI SC: And also, evidence is that Chairperson, which demonstrates what kind of person O'Sullivan is. The plethora of emails that were sent to Pretorius that was sent to Phahlane, that was sent to Mashuga. We respectfully submit, Chairperson, that there was sufficient, you know, evidence that necessitated the charging of O'Sullivan and members of the IPID.

Similarly, also the charging of Advocate
10 Breytenbach. And of critical importance is that, as matter stand now, it is not – there is no statement emanating from Breytenbach who makes allegations that, you know, my charging was because of – you know, was politically motivated, Chairperson.

Chairperson, we respectfully submit that the only crime or scene that the implicated official committed is because they did their statutory duties and obligation as was expected of them without any fear, favour, or prejudice.

20 **CHAIRPERSON:** H'm.

ADV MATHIBEDI SC: Whichever decision, they took it, whether to prosecute or to decline to prosecute was based – was legally justified, Chairperson. Chairperson, lastly. We would like on behalf of the implicated MPA officials, we would like to take this opportunity to thank the Chairperson

for having given us a platform in this Commission to tell this Commission and the world that the allegations levelled against the implicated officials are malicious.

They are unfounded. There is no merit in that. They are based on conjecture. Such was merely meant to, you know, take away or shift away the unlawful conduct which they committed, the very same people that points a finger at the implicated officials. They are the ones who, actually, are criminals.

10 They are not, you know, crime busters as they seek, you know, the community or the public should believe, Chairperson. We thank the Chairperson for that opportunity for having given them the opportunity. At least, for them to have a say. Thanks, Chairperson.

CHAIRPERSON: H'm. Thank you, Mr Mathibedi. Thank you very much. So, we will end it here.

ADV HULLEY SC: Chair, if I can just mention ...[intervenes]

20 **CHAIRPERSON:** I have already indicated previously what is going to happen. Thank you very much. Thank you, Mr Hulley, to you as well.

ADV HULLEY SC: Thank you, Mr Chair. If I might just mention if you do not mind Mr Chair?

CHAIRPERSON: Yes, yes.

ADV HULLEY SC: You will recall that Mr Sesoko and

Mr Khuba's representative, Mr Baard Ford had applied before you previously ...[intervenes]

CHAIRPERSON: Ja.

ADV HULLEY SC: ...for leave to put in a summary of their own and to receive a summary.

CHAIRPERSON: Ja.

ADV HULLEY SC: And I have been contacted by Mr Ford during the adjournment.

CHAIRPERSON: Ja.

10 **ADV HULLEY SC:** He has reminded me and he has asked me to remind you that during the course of dismissing his application, you had indicated that they – that you would reconsider their position if the need arises. Now, Mr Ford, I understand, is on the link and he might want to address you on that. I just draw that to your attention.

CHAIRPERSON: No, no, no. I will not allow anybody else to address me, but the summaries are public documents now and they may have them, but this is where we will end this part of the ...[intervenes]

20 **ADV HULLEY SC:** Thank you, Mr Chair.

CHAIRPERSON: ...the hearing. I am going to adjourn for about 15-minutes and then I will resume to enable somebody else to provide summaries, read summaries in regard to another implicated person. So, the position with regard to this is. This is the end for now and any of the

witnesses who had given evidence may have their summaries, but I am not going to allow any further evidence or address in regard to these matters because this...

I have indicated, I am not going to make any findings and I will make recommendations for these to be subjected to other processes. Everybody will get a chance to do so in such processes.

ADV HULLEY SC: Thank you, Mr Chair.

10 **CHAIRPERSON:** Thank you to everybody concerned. We will adjourn for now. I will resume after 15-minutes. We adjourn.

ADV MADLANGA: Thanks, Chairperson.

INQUIRY ADJOURNS FOR A SHORT BREAK

INQUIRY RESUMES AFTER SHORT BREAK

CHAIRPERSON: Good afternoon, Mr Hulley, again.

ADV HULLEY SC: Mr Chair, the next piece – the next portion of evidence will relate to Mr Eksteen of BDK Attorneys. He will be giving a summary in respect of his
20 client who is Lieutenant General Phahlane. And Lieutenant General Phahlane has been given an opportunity through Mr Eksteen to read a summary of his evidence in relation to the response to Mr McBride and Mr Sesoko.

CHAIRPERSON: Ja. Mr Eksteen, are you there?

ADV EKSTEEN: Good afternoon, Chair. I am here.

CHAIRPERSON: Good afternoon, good afternoon. Thank you. You appear for Lieutenant General Phahlane. Is that correct?

ADV EKSTEEN: That is correct, Chair.

CHAIRPERSON: And you confirm that you will be giving a summary of Lieutenant General Phahlane's affidavit or affidavits in response to the evidence or affidavits of Mr McBride and Mr Sesoko. Is that right?

ADV EKSTEEN: That is correct, Chair. I will deal with
10 both as the allegations of Mr Sesoko and Mr McBride
...[intervenes]

CHAIRPERSON: Yes.

ADV EKSTEEN: ...are basically the same. There is only
on aspect ...[intervenes]

CHAIRPERSON: Yes.

ADV EKSTEEN: ...with ...[indistinct] [00:01:56] in
regarding to Mr Sesoko's evidence.

CHAIRPERSON: Yes. And also, you confirm the
understanding that this is – once this has been done, then
20 your client will no longer being seeking to pursue cross-
examination?

ADV EKSTEEN: That is correct, Chair. We understand
that fully and ...[intervenes]

CHAIRPERSON: Yes, yes. Okay alright. Is it fine if I
give you 30-minutes? Obviously, you are free to finish

earlier than 30-minutes.

ADV EKSTEEN: I am sure that that will be sufficient,
Chair.

CHAIRPERSON: Yes, okay. Go ahead.

ADV EKSTEEN: Thank you, Chair. I believe the
statement of my client is in front of the Commission. It
was quite a lengthy statement regarding the one of
McBride. Mr McBride's evidence as well. That, I think, his
statement with all the annexures amounts to over 500
10 pages.

CHAIRPERSON: Ja.

ADV EKSTEEN: So, I am apologise that we did not do a
summary which was then forwarded.

CHAIRPERSON: Yes.

ADV EKSTEEN: But I am just going to from the statement
highlight some portions which we think is essential
...[intervenens]

CHAIRPERSON: Yes.

ADV EKSTEEN: ...that the public should hear regarding
20 the allegations that was made against Lieutenant General
Phahlane in this matter.

CHAIRPERSON: Yes.

ADV EKSTEEN: Chair, I am going to start on his
statement regarding the evidence of Mr McBride on
paragraph 3.33, whereby Lieutenant General Phahlane

clearly says that the allegations that were made against him in front of the Commission during the testimony of Mr McBride is totally not new to him. These allegations come a long way back since 2009. He was implicated, negatively implicated and there was negatively publicity and undue attacks all the time since 2009 on Lieutenant General Phahlane.

CHAIRPERSON: Yes.

ADV EKSTEEN: After Mr McBride returned in 2016 to the
10 Office of IPID, the allegations then ensued by him and Mr Paul O’Sullivan who worked closely together with Mr McBride in the litigations. Now, I think the Chair would know that during the evidence of General Mabula and Brigadier Ncube when they had the opportunity to cross-examine Mr McBride, Mr McBride even conceded that the involvement of Mr O’Sullivan was not as it was supposed to be because he was not interacted as an investigator according to the IPID Act, or he was being seen as a complainant.

20 There were reasons given why they are involved in, but Mr McBride conceded that it was wrongful and that his involvement was a bit overboard. Now, Chair, I am going to go further on to say at paragraph 5 of his statement is that during June 2012 there were certain allegations made by POPCRU members regarding unlawful

practise that took place at the Forensic Service Division where General Phahlane at that stage was the Divisional Commissioner of the Forensic Services Department.

He immediately then after this informed the then National Commissioner, General Phiyega about these allegations and he requested that these should be investigated immediately as he felt he feels his name to be cleared and his division to be cleared of any wrongdoing in any part.

10 This was being done and General Phiyega instructed an outside forensic accounting services, CPN to conduct a thorough forensic investigation into the allegations which were made. Then in December 2016, the same allegations made by POPCRU and which were investigated by CPN, there again, came peddled(?) by McBride and O'Sullivan in the national media and before the Committee of the Parliament by Mr McBride.

20 Now the CPN has, after their investigation in 2012, gave a thorough report which is also in front of the Commission attached to General Phahlane's affidavit and I think which is self-explanatory and we do not need to give exactly what all is.

 But they found that there was no wrongdoing on General Phahlane's side or then there was certain aspects which they pointed out which needed to be attended by the

National Commissioner and other persons of the SAPS. Then General Phahlane... I am just so sorry for that, Chair. I just want to go through, quickly, here.

CHAIRPERSON: Ja, h'm.

ADV EKSTEEN: On the 16th of May 2017, General Phahlane had to appear before the Portfolio Committee of the police in Parliament after allegations that were made by Mr McBride on the 4th of May before this Portfolio Committee regarding allegations of corruption and
10 all things like that, counter charges that apparently were being investigated and other wrongdoings which he then asked that the Portfolio Committee to intervene.

General Phahlane and members of the SAPS did attend this Parliamentary hearing in front of the Portfolio Committee and they addressed all the aspects before the Chairperson, then Mr Francois Beekman. This was all because of allegations which were made by Mr McBride before the Portfolio Committee on the 4th of May.

Now one would – Chair would remember that, I
20 think during the testimony of Mr McBride, he is the one that said but he was dragged to Parliament by General Phahlane which is now totally incorrect because it appears that he was the first one that was in front of the committee and General Phahlane was then basically asked to come to this committee and not like Mr McBride wanted

the committee to believe – this committee to believe that he was dragged to the Parliament Committee and therefore General Phahlane just want to correct that as well in this aspect.

General Phahlane says that he indeed wants to credit Mr McBride for having learnt exceptional – well, from these masters and handlers in unleashing a propaganda machinery on a target which General Phahlane felt was him in this matter and then being relentless in his efforts to
10 cause harm and reputation of those in his sight.

The strategy(?) that was waged against the struggle, seems to what he admired and he did not let an opportunity to pass it out in reply such to his benefit. He, therefore, salute Mr McBride in this regard. This despite the pain and hurt General Phahlane had to go through in his person and character.

Chair, I will go on to... Before April/May 2016, General Phahlane has not ever met Mr Robert McBride. He have heard about him but he has never met him in person
20 or known, seen him, or anything. And then he was highly surprised on the day that he came out of his house and he saw that Mr McBride was at his house. He was driving an E-200 Mercedes at the time and he was driving – there was – he was accompanied by a lady at that stage.

Mr McBride introduced himself to

General Phahlane and he then informed General Phahlane that the reason why he is there is just to come and talk to him because he is also of the view that General Phahlane is like him under attack. It is noteworthy to note that at that stage McBride was also suspended from IPID.

He then told General Phahlane and said to him that: “The people do not want us good people and they will do everything in their power to fight us”. Now, General Phahlane at this stage did not understand what he
10 was saying about this but he took it up that because of his suspension and all the allegations that was now made against General Phahlane could have been this for him to say or make this remark to say: “They want us, good people, out and will do everything to get out of our positions.”

He then further said that: “They are using the media to attack us.” And that he and General Phahlane should be careful. McBride also cautioned General Phahlane to say that he must be very careful of
20 the Minister of Police, Mr Nathi Nhleko, and the former Head of the Director Priority Crime Investigations, Major General Ntlemeza who were allegedly behind the attacks on McBride and on General Phahlane.

To his surprise, McBride offered assistance and said that they must now work together in dealing with these

people who are trying to get them out and destroy and replace them by people of their own. General Phahlane's response to Mr McBride at that stage was that he has got nothing to worry about.

The allegations made in the media against him, there was nothing that he need to fear about because he knew there is nothing that he did wrong on his part and he even is the one who went and requested that all these allegations be investigated, and he wanted it to be done on
10 a thoroughly basis so that if he is being implicated that he go then and be held accountable for any wrongdoing on his part.

Then on the 5th of June 2016, General Phahlane and his wife were under attack by three gunmen while they were at a spa in Dunkeld, Johannesburg. And then the same night he even get a message from Mr McBride where Mr McBride sent him a text message and said: "Just heard. Sorry about that. Let me know if you need help. Offer still stands." General Phahlane then told him or just
20 responded by saying: "Noted. Appreciate it. Kind regards."

Then a few months back in 2017, he found out that it was McBride who obtained a copy because shortly after this attack there was a video that was circulated on YouTube and all things about what happened at the spa,

and it was to his surprise how investigators would now let this leak out. And this is why in 2017 he found out it was Mr McBride who obtained this video footage of the spa.

And this was then forwarded to Mr O'Sullivan and his assistant, ...[indistinct] [00:16:24] And it was also circulated to the media by one of the Generals, Mr Pieter Louis Myburgh. And this video just went all around the country and Mr McBride again returned to office in October 2016.

10 Paragraph 52 of his statement, it says that on the 14th of November 2016, he received a call from a Mr Frik Terblanche, the building contractor of his house who then informed him that he was approached by people who told him that they were conducting an investigation on the building of his house in Sable Hills, Waterfront Estate.

Smit indicated that four people, a white male, a white female and two African males approached him at the crèche in Sable Hill where his wife was rendering services. The leader of the four identified himself as Mr Paul
20 O'Sullivan who was leading during the interview and questioning in relation to the construction of General Phahlane's house.

He immediately reported this to General Phahlane. He also found it strange that he get questioned regarding the building of the house and what is going. He also

informed - seeing that he did not know General Phahlane, he got the message, immediately informed his driver, Captain Oliver du Preez to inform General Phahlane as soon as possible of the incident that occurred.

Then on the 16th, two days later, the same people went back to Mr Smit at his – at the crèche where his wife was working and they wanted him to make a statement and he said that he was thinking and later got a text message from Sarah Jane Trent which reads as follows:

10

“Dear, sir. IPID Investigation.

I confirm that the case number as CCN-2016030085. A meeting is arranged for 11:00 on Friday at IPID’s office, City Forum Building, 114 Madiba Street, Pretoria nearest corner Schubart Street.

We have confirmed that your status is a witness, not a suspect.

You are, of course, welcome to bring an attorney with you if you like.

20

We are looking forward to seeing then.

Regards, Sarah Jane Trent.”

Now, it was because of the second call and things that General Phahlane decided that he needs to bring this under the attention of the Crime Intelligence to be investigated because it was strange why private persons

are now gathering around, questioning the builder of his house, want to get plans of the house. All things like that. And he thought that this is not normal.

He needs to report this to the Crime Intelligence so that it can be seen and they must decide whether it needs to be investigated as he was at that stage been appointed as the acting National Commissioner and it looks like it could have been a threat against the acting National Commissioner.

10 This was then indeed being done and General Makele, the Head of the Crime Intelligence Unit at that stage, the acting Regional Commissioner decided that an investigation should be done by the Crime Intelligence Services itself. Because of the investigation that was being done by Crime Intelligence and the report that was being forwarded to General Makele, a decision was then been taken to appoint a totally independent team that was from another province, North West, to investigate this matter and to find out the involvement of O’Sullivan, Sarah
20 Jane Trent and all this because it did not seem to be correct. And if there was any wrongdoing and if is there any threat against General Phahlane at that stage.

CHAIRPERSON: H’m?

ADV EKSTEEN: Oh, sorry, Chair. I am just looking quickly. Ja, General Phahlane at that stage was, when this

all happened, he was in Limpopo with a strategic planning session with other members when he was informed about all of this, and on his return, he then was invited to have a strategic session with Lieutenant General Bonang Mgwanya and the former Major General Sibiya of the DPCI that requested to meet with him and Mr McBride.

He was persuaded and went to this meeting at – in Centurion at Leriba Lodge on Friday, the 18th of November 2016. And it was during this meeting,
10 once again, that he urged Mr McBride to ensure that a thorough investigation be conducted of the allegations against himself. He further cautioned him about the involvement of Mr O’Sullivan in the investigations.

Now, we now know that despite that, Mr McBride did not stop the involvement of Mr O’Sullivan. Mr O’Sullivan just continued on – with the investigations against Phahlane although he was not an investigator, permitted to being so. Then on the 22nd February 2016, General Phahlane received a telephonic call from Mr
20 Cedrick Nkabinde, who was at that stage the investigator from IPID, to inform him that he is now investigating the charge of defeating the ends of justice against General Phahlane which was registered under Kameeldrift CAS 123/11/2016.

The reason for Nkabinde’s call was to secure an

appointment because he wanted to obtain a warning statement from General Phahlane regarding this allegation. There was then arrangements made that General Phahlane would meet with Mr Nkabinde on the 23rd of November at roundabout two o'clock in the afternoon at the IPID Offices.

Unfortunately, due to other more important matters that raised, General Phahlane had to cancel the deal – the appointment with Mr Nkabinde, but what is of note here is that on the morning of the 23rd, it was shortly after eight
10 that General Phahlane received again a text message from the journalist, Mr Myburgh, which reads as follows:

“Hi, General.

This is Pieter Louis Myburgh from News24.

I was hoping to get your comment on the IPID matter.

I understand you have been asked to make a warning statement.

Thanks.”

Around nine, the same day, it was breaking news all over
20 the media, News24 and other media platforms that General Phahlane now suddenly cannot attend this and it was headlined as: “Phahlane – No Show at IPID”. So that is clear to point out to the Chair and this Commission how IPID and Mr O’Sullivan worked together and involved the media to put any negative publicity and whatever they can

get against General Phahlane.

This matter that was referred to of the defeating the ends of justice was, despite obtaining General Phahlane's statement, warning statement, it was processed to the NPA for a decision and due to the lack of evidence, the NPA declined to prosecute in the matter, but despite that there was another case being opened, CAS 146/05/2007 for corruption and fraud which involved an alleged receipt of gratification in the form of vehicles from
10 a person, not being in business with the SAPS.

Now this matter was in June 2018 struck from the court roll and to date it has not been returned and it is clear that - Lieutenant General Phahlane's view is that it is because of the lack of evidence that there was any wrongdoing on his part.

CHAIRPERSON: H'm.

ADV EKSTEEN: Or that there was any corruption involved. This was clearly not a corruption matter. It was – explanations were given and I think that is also the
20 reason why the matter has not returned yet after June 2018. I just want to go... Sorry. Apologies, Chair.

CHAIRPERSON: I think you are left with about seven minutes.

ADV EKSTEEN: Yes, Chair. Ja, then... Ja, Mr McBride created the impression that there were counter

investigations and he was the one who implicated that General Phahlane is the one. Now, clearly, what we have read here, it was General Makele who was at first - requested the Crime Intelligence Unit to do an investigation and after the report back to – then it was decided to include the North West Team under General Mabula(sic) (Makele?) to investigate.

It is also of note to comment that investigations were being done with the NPA. It was an NPA driven
10 investigation. They were in charged and they were the ones who gave General Mabula(sic) (Makele?) and them leads what to do and what they need to decide if prosecution would then be instituted or not.

It is also of note that Mr O’Sullivan as well as Ms Trent and two IPID members were later arrested on this incident. The matter was withdrawn but I believe that the investigation is still with the NPA and that matter might return to court as Mr McBride and he was also implicated in that matter.

20 Now, it is also of note to say that Mr Nkabinde later on made a full affidavit regarding, he called it the Phahlane Team that was formed to investigate the matters against him and there were a lot of things that were being reported to the Ombudsman, to the Parliament Portfolio Committee and all that. I think everybody knows that there

was a big thing in the media as well regarding that. And even after Mr Nkabinde was then unlawfully being suspended for then blowing the whistle on IPID regarding this.

Now, General Phahlane is of the view that Mr O'Sullivan, he even during the Portfolio Committee, made a comment to say it is not IPID, it is O'Sullivan police investigations against him and it is not like the legislator wanted IPID to conduct but they were not fully
10 under what O'Sullivan wanted them to do and not to do and who to do.

You have also heard this morning, General Phahlane also received several emails where he was threatened if he does not want, when he was in the position of acting National Commissioner, to suspend General Moono(?) [00:30:32] who the allegations made against by O'Sullivan. There were numerous things and then during these emails, as well, that is in front of the Commission, O'Sullivan also threatened that should he not
20 comply with it, the focus will then turn to that of against General Phahlane.

And we - General Phahlane and ourselves are of the view, this is also the reason why then they decided to approach the Commission. It is clear that the allegations which they made have got nothing to do with state capture.

There is no state capture. There were allegations made that the NPA favoured our client which is totally – I mean, we have heard it this morning from the NA itself, that they did their decisions independently, objectively, and according to law.

On the one of Mr Sesoko. If I can end there, Chair?

CHAIRPERSON: Yes.

ADV EKSTEEN: ...that I just want to make there, is that
10 to General Phahlane's surprise that Mr Sesoko suddenly dragged him into the redemption(?) matter and made allegations against him that he was involved in the redemption matter, which is clearly, clearly false, and baseless.

Never was General Phahlane ever involved in any investigations or even implicated by any persons previously. It was only now suddenly done by Sesoko. This clearly shows the maliciousness that IPID, by names of Mr Sesoko and then Mr McBride, have against
20 General Phahlane.

They want to implicate him in matters which he is not even involved in and, therefore, he also found it very, very surprising, and strange and also disturbing that he gets dragged into matters where he was never involved with.

Chair, I think that basically would sum up the summary just involving General Phahlane's implications. That the allegations, it is clear, these allegations are baseless. There is no evidence that there was every wrongdoing. The matters were investigated. There are still matters.

We concede to that, that is currently in front of court. And yes, the outcome of that will be – surely it is a matter that the public will know about, but
10 General Phahlane also leave that as sub-judicia as the matter is in front of court.

The other cases, like is said, were thoroughly investigated. It was the decision by the NPA's, and that the reason to implicate him in state capture was malicious and wrongfully.

CHAIRPERSON: Thank you, Mr Eksteen. Thank you very much. So, it will be recorded that, therefore, the cross-examination will not proceed and Lieutenant General Phahlane has had the opportunity of having you giving a
20 summary of his response to the evidence of Mr Sesoko and Mr McBride. Thank you very much. Mr Hulley, did you want to say anything? I do not think so, but if you want to?

ADV HULLEY SC: No, Mr Chair. I merely wish to record once you have completed.

CHAIRPERSON: Ja, yes.

ADV HULLEY SC: But that wraps up for – things to a conclusion.

CHAIRPERSON: Ja.

ADV HULLEY SC: The affairs of the Law Enforcement Agency Workstream for the day.

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

ADV EKSTEEN: I just want to say that General Phahlane thanks the Commission for the opportunity to put his side ...[intervenes]

10 **CHAIRPERSON:** Yes, yes. No, thank you very much. We will adjourn for the day and you are now excused. We adjourn.

ADV HULLEY SC: Thank you, Mr Chair.

INQUIRY ADJOURNS FOR THE DAY