

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

12 JUNE 2019

DAY 111

FINAL

20

PROCEEDINGS ON 12 JUNE 2019

ADV PAUL JOSEPH PRETORIUS SC: Part of the work streams that have been presenting evidence before you. Tomorrow the aviation work stream will begin its work for the next few weeks. We obtained the statement finally in its signed form, attested form last night and at – as at yesterday it was not clear who would be implicated but Rule 3.3 Notices will be issued at the conclusion of the evidence. Can I hand up Exhibit EE1?

CHAIRPERSON: Well yes you may. Normally Rule 3.3 Notices are
10 issued before if you propose to have them issued after we should explain to the public why?

ADV PAUL JOSEPH PRETORIUS SC: Yes. Chair the direction from the Chair was that a series of witnesses be called. Those witnesses fall outside the normal planning of the legal team and the investigation team. It was only late last week that it was planned therefore for Mr Nxasana in the absence of other witnesses who were unavailable to come today. The time was set aside for consultation on Monday the investigators having done quite some preparation over the weekend. Mr Nxasana was not available on Monday and therefore had to come
20 from Durban to Johannesburg today – yesterday when his statement and evidence was prepared in consultation with the legal team myself. It was not clear until yesterday evening when the statement was finally attested to who would be implicated and to what extent. It was not possible to obtain from the various judgments and court records read over the weekend with any certainty who should be implicated and for

that reason and because this witness falls into a different category from those that are planned from the outset we would ask your leave to issue 3.3's after the conclusion of the evidence today?

CHAIRPERSON: Well does his evidence not really relate to matters that have already been dealt with in courts and judgment - judgments of the high court and the constitutional court and...

ADV PAUL JOSEPH PRETORIUS SC: Not in...

CHAIRPERSON: And where those who may be implicated have been aware of those – of what he says about his tenure at the NPA and they
10 have had a chance to respond to those. Does it cover anything new?

ADV PAUL JOSEPH PRETORIUS SC: Yes it does.

CHAIRPERSON: In his statement?

ADV PAUL JOSEPH PRETORIUS SC: The statement does Chair. It – the focus is not entirely on the litigation that has gone through the courts concerning the circumstances under which the contract of Mr Nxasana came to an end and what the courts have said about it and there are various other applications that have come before court including the constitutional court in relation to the termination of their services. The evidence of Mr Nxasana deals with a much broader set
20 of issues and it was only on full examination of those issues that the extent and the basis upon which implicated persons are indeed implicated can properly be dealt with. So there are different issues. The various court cases are a matter of record and I will in due course ask leave to place on record publicly excerpts from the judgment of the constitutional court in relation to the matter that finally came before

court where the constitutional court's attitude to the independence of the NPA and matters related to the independence are set out. But apart from that those particular issues that led to that litigation in the courts are not central to this statement. He deals with other matters in addition.

CHAIRPERSON: Well as you say he was among a number of witnesses that I said should be called. Other witnesses were witnesses who have been implicated by certain witnesses and other witnesses were not necessarily implicated but would need to come before the commission
10 to give their version which could corroborate or not corroborate previous witnesses and – and he – he falls under Law Enforcement but he – I had considered that he – his evidence – he needs to give evidence. But I conceded that what was important relates to in regard to his evidence – relate to his tenure at the NPA. Certain matters which have been in the public domain as far as I am concerned those are the matters I had in mind and particularly how he left the NPA. Now that has been dealt with extensively in affidavits that were filed by him and by the former president and other persons in the high court and in the matter that culminated in the constitutional court. I think it
20 was brought by Corruption Watch and maybe other parties. But there may be other matters that the legal team you know had you know also thought of once he was to be called. So I would like the full set of affidavits in the Corruption Watch matter to be placed before me as soon as possible to give me a full picture of the situation. So obviously you can – you can cover whatever the legal team or you think should be

– should be covered in relation to his evidence but in particular I was interested in his tenure at the NPA. Some of the matters that may be important for the commission in the light of his terms of reference there have been all kinds of allegations and evidence about the NPA and then of course the circumstances under which he vacated office.

ADV PAUL JOSEPH PRETORIUS SC: Yes.

CHAIRPERSON: So I thought I would just make clear what I had in mind but from the legal team's point of view you – you are at large to cover much more than that if you believe he has got more in – more
10 evidence that relates to matters falling under our terms of reference.

ADV PAUL JOSEPH PRETORIUS SC: Chair the investigators have done an enormous amount of work.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: In the time.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: From the day in which it was decided that Mr Nxasana should be requested to give evidence.

CHAIRPERSON: Yes, yes.

ADV PAUL JOSEPH PRETORIUS SC: The documents to which you
20 have referred particularly the court documents.

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: Have been collated.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: We do have them here.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: And are able to put them before you.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: It was however necessary to leave the public domain to one side and concentrate on the allegations relevant both in the court applications and other matters relevant as the evidence of the commission has been put before you.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: In order to get the detail.

10 **CHAIRPERSON:** Yes.

ADV PAUL JOSEPH PRETORIUS SC: Of exactly what allegations he makes.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: And who should be

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Served with notices in regard to the detail that you will hear.

CHAIRPERSON: Yes. No that is fine. Thank you.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Of particular concern to the legal team are the questions as to the independence and effectiveness of the National Prosecuting Authority and the question will be raised as to what extent if any there has been political interference in senior appointments in the National Prosecuting Authority and the effect this has had on the efficacy of the organisation and this is a matter addressed pertinently by Justice Madlanga in the constitutional court

judgment and I will ask leave to put excerpts on record in due course at the conclusion of the evidence.

CHAIRPERSON: Yes well I think you should put in the whole judgment and draw particular attention to particular

ADV PAUL JOSEPH PRETORIUS SC: Yes.

CHAIRPERSON: Parts of the judgment that you think are particularly important.

ADV PAUL JOSEPH PRETORIUS SC: That judgment is in your bundle.

CHAIRPERSON: Yes.

10 **ADV PAUL JOSEPH PRETORIUS SC**: After the divider at page 85 and following.

CHAIRPERSON: Okay. No that is fine.

ADV PAUL JOSEPH PRETORIUS SC: It is a very instructive judgment.

CHAIRPERSON: Ja.

ADV PAUL JOSEPH PRETORIUS SC: In regard to the issues that the commission is dealing with.

20 **CHAIRPERSON**: Yes. No that is fine. Indeed of course the main point of Mr Nxasana's evidence has to be about the independence of the NPA and whether there has been interference with it and by whom and in what circumstances would that interference be justified? Is it permissible, is it not permissible? So more than anything that is – that is the most important thing everything else is about that. You know all the evidence has to revolve around that whether...

ADV PAUL JOSEPH PRETORIUS SC: Indeed.

CHAIRPERSON: There was interference and if so what form it took and

under what circumstances.

ADV PAUL JOSEPH PRETORIUS SC: Yes. And not only Mr Nxasana but other witnesses will deal with...

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Those questions.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: And their answers.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: In due course.

10 **CHAIRPERSON:** Ja. No thank you.

ADV PAUL JOSEPH PRETORIUS SC: Chair bundle EE1 is out of sequence because the bundles for the aviation tranche of evidence have already been prepared.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: As bundle DD.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: So this is a little out of sequence but I think the circumstances left us with no choice.

CHAIRPERSON: Ja. Yes okay.

20 **ADV PAUL JOSEPH PRETORIUS SC:** May the witness be sworn?

CHAIRPERSON: Thank you.

ADV PAUL JOSEPH PRETORIUS SC: Or may he...

CHAIRPERSON: Please swear him in.

ADV PAUL JOSEPH PRETORIUS SC: Give the affirmation?

CHAIRPERSON: Or administer the affirmation.

REGISTRAR: Please state your full names for the record?

ADV MXOLISI SANDILE OLIVER NXASANA: Mxolisi Sandile Oliver Nxasana.

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

ADV MXOLISI SANDILE OLIVER NXASANA: No I have none.

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

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** I truly affirm.

REGISTRAR: Thank you.

CHAIRPERSON: Thank you.

ADV PAUL JOSEPH PRETORIUS SC: Mr Nxasana would you bring the microphone closer to you please? You have in front of you a bundle marked EE1, do you see that? It is Exhibit EE1?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes I have.

ADV PAUL JOSEPH PRETORIUS SC: Would you go to page 27 please?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes I am on page 27.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Whose signature is that at the bottom of page 27?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes I confirm that.

ADV PAUL JOSEPH PRETORIUS SC: Is that your signature?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes it is my signature.

ADV PAUL JOSEPH PRETORIUS SC: Did you attest to this affidavit

last night?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes I did.

ADV PAUL JOSEPH PRETORIUS SC: And the statement from page 1 to 28 are you satisfied that that correctly reflects the contents of the evidence that you are going to give and wish to give?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes Chair I do confirm that this is my statement.

ADV PAUL JOSEPH PRETORIUS SC: And subject to any typographical errors or other errors we may come across of which we do not yet know
10 the contents are true and correct?

ADV MXOLISI SANDILE OLIVER NXASANA: The contents are true and correct I confirm that.

CHAIRPERSON: Mr Pretorius before you proceed I notice that the witness did an affirmation now but the statement is – I noticed.

ADV PAUL JOSEPH PRETORIUS SC: Sorry Chair.

CHAIRPERSON: I noticed that the witness – the witness affirmed a few minutes ago but the affidavit is – is an affidavit and it is under oath. Is everything in order with that?

ADV PAUL JOSEPH PRETORIUS SC: I notice that now Chair. This
20 morning I asked the witness Mr Nxasana which he would prefer – which course of action he would like to take today I was – my attention was not drawn to the fact that this was an oath nor did I have – pay any attention to it quite honestly Chair. But perhaps the witness might explain?

CHAIRPERSON: Well we can – we can ask – Mr Nxasana?

ADV MXOLISI SANDILE OLIVER NXASANA: Chair thank you.

CHAIRPERSON: Yes.

ADV MXOLISI SANDILE OLIVER NXASANA: Chair it is an option that was open to me I was asked a question then I opted for an affirmation but I do not have a problem giving evidence under oath.

CHAIRPERSON: So...

ADV MXOLISI SANDILE OLIVER NXASANA: In line...

CHAIRPERSON: Either it is fine. This you did as an oath and it is fine and now you did an affirmation both are fine I just want to check that?

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** Yes it is fine.

CHAIRPERSON: They are both fine?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Okay alright. Thank you.

ADV PAUL JOSEPH PRETORIUS SC: Mr Nxasana it is common knowledge that you are a former National Director of Public Prosecutions.

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct.

ADV PAUL JOSEPH PRETORIUS SC: And in that capacity you carried out the duties of your office in Pretoria?

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: Right. Before we deal with the period of your own office and before we deal with the brief history of the NPA at least to your knowledge before you came to the NPA please tell the Chair what your qualifications are and what profession you performing at the moment?

ADV MXOLISI SANDILE OLIVER NXASANA: Chair I hold a B.Proc Degree and an LLB Degree both degrees which I obtained from the University of Zululand. I served articles of clerkship and I was admitted as an attorney in 1997 and from that date of my admission I practiced from my own account until 2013 when I was appointed as the National Director of Public Prosecutions.

ADV PAUL JOSEPH PRETORIUS SC: You left the National Director of Public Prosecutions post in May 2015, is that correct?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

10 **ADV PAUL JOSEPH PRETORIUS SC:** And since then what work have you been performing if any?

ADV MXOLISI SANDILE OLIVER NXASANA: I have gone back to set up my practice again and I am practicing in Durban for my own account as the attorney.

ADV PAUL JOSEPH PRETORIUS SC: So you are an attorney in private practice [indistinct].

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: Alright. In Section A of your statement at page 1 you have given a brief timeline in order to
20 illustrate a point that is pertinent to the work of the commission. You set out in paragraph 3 a timeline and in that timeline you note who has been the National Director of Public Prosecutions for what period since April 2001. Would you place that on record please?

ADV MXOLISI SANDILE OLIVER NXASANA: Thank you Chair. To the best of my recollection Chair the – Mr Bulelani Ngcuka was the first

National Director of Public Prosecutions. I think from April 2001 until 31 August 2004. And Doctor Silas Ramaite in an acting position was the Director of Public Prosecutions – National Director of Public Prosecutions from August 2004 to January 2005. Then in – on 1 February 2005 to 7 February 2009 Advocate Vusi Pikoli was the National Director of Public Prosecutions. After him Advocate Mokotedi Mpshe in an acting capacity was also appointed as the National Director of Public Prosecutions from 1 May 2009 until 31 October 2009. After him on 1 December 2009 until 8 May 2012 Advocate Menzi
10 Simelane was the National Director of Public Prosecutions. Then on 20 December 2011 until 30 September 2013 Advocate Nomgcobo Jiba was also – was appointed to act as the National Director of Public Prosecutions. Then on 1 October 2013 I took up the position until the 31 May 2015. I was the National Director of Public Prosecutions. I was succeeded by Advocate Shaun Abrahams on the 18 June 2015 until 13 August 2018. On the 1 August 2018 to 31 January 2019 Doctor Silas Ramaite again was appointed to act in that capacity. Then from the 1 February 2019 to date we have a permanent National Director of Public Prosecutions in Advocate Shamila Batohi.

20 **ADV PAUL JOSEPH PRETORIUS SC:** The statutory term of office of the National Director of Public Prosecutions in terms of the National Prosecuting Authority Act what is that?

ADV MXOLISI SANDILE OLIVER NXASANA: It is ten years.

ADV PAUL JOSEPH PRETORIUS SC: Alright. Has any of the NDPP, National Directors of Public Prosecutions since its inception ever

completed a ten year term of office?

ADV MXOLISI SANDILE OLIVER NXASANA: Unfortunately not Chair.

ADV PAUL JOSEPH PRETORIUS SC: Right. Chair the constitutional court in the judgment we referred to earlier has made some pertinent remarks in regard to security of tenure in relation to the independence of the NPA and that issue will be dealt with in due course. For the moment Mr Nxasana you recall certain events in relation to some of the appointments and dismissals of National Directors of Public Prosecution that is not necessarily to give a complete record of the
10 evidence it is merely to highlight and raise questions at this point in time Chair. Would you tell the Chair of the events of which you have at least indirect knowledge from paragraphs 4 onwards?

ADV MXOLISI SANDILE OLIVER NXASANA: Thank you Chair. Chair the issues are of public knowledge. Advocate Bulelani Ngcuka as the first National Director of Public Prosecutions was subjected to a commission of inquiry after allegations were made against him that he was an apartheid spy and after he was cleared by the commission that was headed if my memory serves me well by Judge Heffer he then left the NPA. Then Advocate Vusi Pikoli was also subjected to the same
20 process of a commission of inquiry. I know at the time he had reinstated charges against the former President Jacob Zuma and also had instituted criminal proceedings against the then Commissioner of Police and the President of Interpol at the time Mr Jackie Selebi – Commissioner Jackie Selebi I mean. Despite also his – despite him being cleared at the Ginwala Commission of Inquiry he was

nevertheless removed from office.

CHAIRPERSON: Hm. I know that the inquiry that was chaired by Doctor Ginwala was an inquiry under the Prosecuting Authority Act as opposed to a Commission of Inquiry under the Commissions Act. I am not sure about the Inquiry that was chaired by Justice Heffer in relation to Mr Ngcuka whether it was a Commissioner of Inquiry under the Commissions Act or whether it was an inquiry under the – just an inquiry under the National Prosecuting Authority Act. But I think the point you make is not about those technicalities it is simply that certain
10 inquiries precede that.

ADV MXOLISI SANDILE OLIVER NXASANA: Precede that.

CHAIRPERSON: Their departure. But it is just important to

ADV MXOLISI SANDILE OLIVER NXASANA: To make a distinction.

CHAIRPERSON: To – when we are not sure ja.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes thanks Chair for bringing that to my attention.

ADV PAUL JOSEPH PRETORIUS SC: What is common to both proceedings however is that the inquiries whether judicial or internal to the NPA Act according to the best of your recollection anyway in
20 principle at least clear both Mr Ngcuka and Mr Pikoli?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: And then how was Mr Pikoli finally removed, can you recall? Without going into too much detail.

ADV MXOLISI SANDILE OLIVER NXASANA: Chair I remember that despite him having been cleared but at the time I think it was President

Kgalema Motlanthe was the President of the Republic of South Africa. I think the matter had to be referred to Parliament after the Commission of Inquiry but I think they took a decision that she should not be retained at NPA.

ADV PAUL JOSEPH PRETORIUS SC: You have told the Chair in your timeline summary that Advocate Mpshe was not in the position on any permanent basis.

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

CHAIRPERSON: I am sorry Mr Pretorius did he complete the story in
10 relation to Mr Ngcuka, his resignation after the inquiry, did he complete that part? What happened to Mr Ngcuka after?

ADV PAUL JOSEPH PRETORIUS SC: In relation to Chair?

CHAIRPERSON: In relation to Mr Ngcuka?

ADV PAUL JOSEPH PRETORIUS SC: Ngcuka yes.

CHAIRPERSON: Did he complete the story about what happened after the inquiry chaired by Judge Heffer?

ADV PAUL JOSEPH PRETORIUS SC: Yes. How did his term of office come to an end to the best of your recollection?

ADV MXOLISI SANDILE OLIVER NXASANA: My, my...

20 **ADV PAUL JOSEPH PRETORIUS SC:** And that is after the Judge Heffer inquiry?

ADV MXOLISI SANDILE OLIVER NXASANA: My understanding Chair is that Mr Ngcuka resigned.

ADV PAUL JOSEPH PRETORIUS SC: And then in relation to Mr Pikoli you said to the Chair that the matter came before Parliament and

subsequent to that his – or as a consequence of that his term of office came to an end?

ADV MXOLISI SANDILE OLIVER NXASANA: It came to an end – I understand that at times he did make attempts to take the matter to court but I think he was drained out and he could not pursue the matter and ultimately a settlement agreement was reached and he left the NPA.

ADV PAUL JOSEPH PRETORIUS SC: Alright. Alright. The details Chair are understandably not placed before you in their thoroughness
10 but will be in time. Then in relation to Menzi Simelane what is your recollection?

ADV MXOLISI SANDILE OLIVER NXASANA: My recollection Chair is that when Menzi Simelane was – Advocate Menzi Simelane was appointed as the National Director of Public Prosecutions he was the Director General of Justice before that and at the inquiry – at the Ginwala Inquiry he was called to testify and the Ginwala Inquiry made some critical remarks about his testimony amongst other things that his evidence was contradictory and when he was appointed by the President at the time as the National Director of Public Prosecutions
20 the I think it was DA if I am not mistaken who then challenged his appointment and ultimately the matter came before the constitutional court. The constitutional court declared he – the appointment irrational and reviewed it and set aside.

ADV PAUL JOSEPH PRETORIUS SC: He was then I understand replaced in an acting capacity by Advocate Jiba?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: Alright and we will talk of that in a little more detail in due course. I understand you were then appointed when?

ADV MXOLISI SANDILE OLIVER NXASANA: Chair I was appointed on the 31 August 2013 with effect from the 1 October 2013.

ADV PAUL JOSEPH PRETORIUS SC: Alright. Do you recall any litigation before our courts in relation to a directive to the President to make a permanent appointment?

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** Yes I do.

ADV PAUL JOSEPH PRETORIUS SC: To the post of NDPP? Would you just tell the court – tell the Chair briefly about that please?

ADV MXOLISI SANDILE OLIVER NXASANA: Chair I think the organisation called CASAC had taken the matter to court compelling the President to make a permanent appointment. I think at the time the reasons they advanced was that the office of the NDPP was such a critical office that we cannot afford to have an acting NDPP at the time and that the position had to be filled on a permanent basis. And the court if my memory serves me well delivered the judgment and gave the
20 President who was President Zuma at the time an ultimate time to fill the post by a certain date – a particular date.

ADV PAUL JOSEPH PRETORIUS SC: Yes. When that evidence is placed before the Chair in the fullness of time and all its details certain questions arise and they arise as a matter of observation now and that is firstly your comment that appears to be entirely correct that no

National Director of Public Prosecutions in the whole history of the National Prosecuting Authority has ever fulfilled a full term of office?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: Secondly the history of encumbrance in that office appears to be filled with inquiries and allegations relating to their fitness to hold office and very often having been cleared of any wrongdoing or any adverse finding nevertheless their terms of office have come to an end?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair
10 especially with regards to the – with regards to Mr Bulelani Ngcuka and Advocate Vusi Pikoli.

ADV PAUL JOSEPH PRETORIUS SC: Ja. Given your own experience in relation to the National Prosecuting Authority and the post of the National Director of Public Prosecutions what is your view as to the effect of this history on the stability and effectiveness of the NPA?

ADV MXOLISI SANDILE OLIVER NXASANA: Chair my view is that from this history and also what I experienced at NPA my view is that there has been political interference as well as external interference that impacted on the decision making in the NPA.

20 **ADV PAUL JOSEPH PRETORIUS SC:** And would that have any effect on public confidence in the NPA?

ADV MXOLISI SANDILE OLIVER NXASANA: No doubt it did have – it does have effect on public confidence in the NPA.

ADV PAUL JOSEPH PRETORIUS SC: Yes. And what role does Parliament play to your knowledge in relation to the National

Prosecuting Authority?

ADV MXOLISI SANDILE OLIVER NXASANA: Chair there is a Portfolio Committee on Justice because NPA is also a – a – a unit falling under justice although it is independent. It plays political oversight over the justice as well as NPA.

ADV PAUL JOSEPH PRETORIUS SC: You will make some comments later in your evidence in relation to the role of Parliament and in relation to matters within your own knowledge.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

10 **ADV PAUL JOSEPH PRETORIUS SC:** But we will do that later in the statement.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: You have also mentioned that Parliament played a role in relation to Mr Pikoli?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct.

ADV PAUL JOSEPH PRETORIUS SC: But perhaps we should place that evidence before the Chair in the fullness of time.

CHAIRPERSON: Well the – the story might not be perceived to be complete when you talk about inquiries in relation to the NPA. If you
20 do not mention that recently there was also an inquiry relating to somebody who had acted as the National Director of Public Prosecutions. So if one states simply facts of course you what – what you were talking about were those who had been permanently appointed as National Director of Public Prosecutions namely Mr Ngcuka, Mr Pikoli and of course yourself but there is also somebody

who had acted quite a number of times and I know you will talk more about some of the events. Then there was an inquiry in relation to her and it is public knowledge that that inquiry reached certain conclusions and I think the matter may be going to Parliament for what it is worth. It may be that it is important to just state those – back those facts. Ja. Okay.

ADV PAUL JOSEPH PRETORIUS SC: Chair there will be reference.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Further in the evidence to at
10 least two other inquiries.

CHAIRPERSON: Yes. No thank you.

ADV PAUL JOSEPH PRETORIUS SC: Chair but your comments are noted.

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: The appointment of a National Director of Public Prosecutions is you state governed by the constitution. You deal with that in paragraph 11 of your statement. Would you just tell the Chair very briefly about the provisions regarding the appointment of a National Director of Public Prosecutions?

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** Chair.

ADV PAUL JOSEPH PRETORIUS SC: I am sorry if you would just hold for a moment. May I say perhaps unsurprisingly Chair the live stream is down and I have been asked to request a ten minute adjournment?

CHAIRPERSON: Okay alright. We will take a ten minutes adjournment to enable the technicians to attend to the problem. We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: You may proceed.

ADV PAUL JOSEPH PRETORIUS SC: Thank you Chair. Mr Nxasana before the break you were at paragraph 11 of your statement and you had I think made the point that the appointment of the National Director of Public Prosecutions is governed by the Constitution.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

10 **ADV PAUL JOSEPH PRETORIUS SC:** If I may take the liberty Chair just to place on record the relevant sections of the Constitution.

CHAIRPERSON: *Ja.*

ADV PAUL JOSEPH PRETORIUS SC: You refer Mr Nxasana to Section 179 of the Constitution which provides in Subsection 1:

20 “There is a single National Prosecuting Authority in the Republic structured in terms of an act of Parliament and consisting of a, an National Director of Public Prosecutions who is the Head of the Prosecuting Authority and is appointed by the President as Head of the National Executive and b, Directors of Public Prosecutions and Prosecutors as determined by an act of Parliament.”

Who appoints the Directors of Public Prosecutions other than the National Director?

MR MXOLISI SANDILE OLIVER NXASANA: They are also appointed by

the President.

ADV PAUL JOSEPH PRETORIUS SC: Are they? Then the powers of the Prosecuting Authority are set out in broad terms in Section 179(2) which states:

“The Prosecuting Authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.”

Subsection 4 of Section 179 reads:

10 “National legislation must ensure that the Prosecuting Authority exercises its functions without fear, favour or prejudice.”

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: Then Subsection 5 deals with policy and the functions of the National Director of Public Prosecutions. How is policy in relation to prosecutions formulated and by whom?

MR MXOLISI SANDILE OLIVER NXASANA: It is ...

CHAIRPERSON: I am sorry. Before that Mr Pretorius with regard to who appoints who the National Director of Public Prosecutions is
20 appointed by the President.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

CHAIRPERSON: And you have just said also the Directors of Public Prosecutions are appointed by the President. Is that right?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

CHAIRPERSON: The Directors of Public Prosecutions are those the

NPA Officials who are in various provinces or some are heading the NPA in provinces but others are not necessarily heading NPA in provinces but fall within some or other office of the NPA or in the courts. What is the position? What is the structure?

MR MXOLISI SANDILE OLIVER NXASANA: Okay Chair. The National Director of Public Prosecutions is the Head of the Prosecution in South Africa and then we have – during my time four and I think that is still – that is what is still in existence. Then have four Deputy National Directors of Public Prosecutions. We then have Special Directors of
10 Public Prosecutions. Then we have all of these that I have mentioned are based at the Head Office in Pretoria – of the National Prosecuting Authority. Then in the divisions – in the regions – we have the Heads of the Prosecutions who are the Director of Public Prosecutions. All of them are appointed also by the President on the recommendation of the Minister of Justice – I think – in consultation with the National Director of Public Prosecutions.

CHAIRPERSON: So you have talked about Directors of Prosecutions and a Head of Directors of Prosecutions. Is that right?

MR MXOLISI SANDILE OLIVER NXASANA: Yes. The Directors of
20 Public Prosecutions are Head of Prosecutions in the regions.

CHAIRPERSON: So each Director of Public Prosecutions ...

MR MXOLISI SANDILE OLIVER NXASANA: Public Prosecutions.

CHAIRPERSON: Is – is Head of certain region insofar as the NPA is concerned?

MR MXOLISI SANDILE OLIVER NXASANA: Yes. If ...

CHAIRPERSON: Okay and the regions are not necessarily demarcated in accordance with provinces or are they necessarily demarcated according to provinces?

MR MXOLISI SANDILE OLIVER NXASANA: A decision had been taken to align them to provinces ...

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: Because initially that was the whole idea that the Directors of Public Prosecutions should be aligned to the – to the provinces.

10 **CHAIRPERSON:** Hm.

MR MXOLISI SANDILE OLIVER NXASANA: That they – they are Heads of Public Prosecutions in the provinces ...

CHAIRPERSON: Hm.

MR MXOLISI SANDILE OLIVER NXASANA: But we have exceptions like in Gauteng.

CHAIRPERSON: Hm.

MR MXOLISI SANDILE OLIVER NXASANA: In Gauteng we have – we have two Directors of Public Prosecution. That is one for the South Gauteng ...

20 **CHAIRPERSON:** Hm.

MR MXOLISI SANDILE OLIVER NXASANA: And one for the North Gauteng ...

CHAIRPERSON: Hm.

MR MXOLISI SANDILE OLIVER NXASANA: But I – when I left – at the time when I left they were in the process of aligning them so that it will

have one ...

CHAIRPERSON: Hm.

MR MXOLISI SANDILE OLIVER NXASANA: One Director of Public Prosecutions. We will have one Premier for the province. We will have one President ...

CHAIRPERSON: Hm.

MR MXOLISI SANDILE OLIVER NXASANA: Judge President. We will have Director of Public Prosecutions and in the Eastern Cape as well ...

CHAIRPERSON: Yes.

10 **MR MXOLISI SANDILE OLIVER NXASANA:** Because of the ...

CHAIRPERSON: Number of High Courts?

MR MXOLISI SANDILE OLIVER NXASANA: The number of High Courts and the – and the fact that the area is so wide to cover ...

CHAIRPERSON: Hm.

MR MXOLISI SANDILE OLIVER NXASANA: We had two Directors of Public Prosecution. Hence we also had two Deputy – Deputy Judge Presidents ...

CHAIRPERSON: Hm.

MR MXOLISI SANDILE OLIVER NXASANA: Like in Gauteng.

20 **CHAIRPERSON:** Hm.

MR MXOLISI SANDILE OLIVER NXASANA: Those are the only – those are the only exceptions.

CHAIRPERSON: But as a general rule when one hears the term Director of Public Prosecutions when it is used in the context of the NPA one should be thinking of somebody in charge of prosecutions in

the area falling under a certain High Court or in a – in a province but accepting that there are provinces where there are two Directors instead of one?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

CHAIRPERSON: Where there are two in the same province that is Directors of Public Prosecutions one of them would be the Head?

MR MXOLISI SANDILE OLIVER NXASANA: No.

CHAIRPERSON: Or they – they ...

MR MXOLISI SANDILE OLIVER NXASANA: They – they are equal.

10 **CHAIRPERSON:** There is no Head or they are both co Heads?

MR MXOLISI SANDILE OLIVER NXASANA: They are both co Heads, yes.

CHAIRPERSON: Okay, okay. So is the National Director of Public Prosecutions at the top ...

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: And then four Deputy ...

MR MXOLISI SANDILE OLIVER NXASANA: National Directors.

CHAIRPERSON: National Directors of Prosecutions?

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

20 **CHAIRPERSON:** And all those are at the Head Office in Pretoria of the NPA?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

CHAIRPERSON: And then you have Special ...

MR MXOLISI SANDILE OLIVER NXASANA: Special Directors.

CHAIRPERSON: Directors of Prosecutions. Is that right?

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: And – and those two are or how many would there be of Special Directors of Prosecutions – Public Prosecutions?

MR MXOLISI SANDILE OLIVER NXASANA: When I left – because this is not provided for by the ...

CHAIRPERSON: In the Act?

MR MXOLISI SANDILE OLIVER NXASANA: In the Act.

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: I think they were appointed
10 in terms of a proclamation ...

CHAIRPERSON: Oh.

MR MXOLISI SANDILE OLIVER NXASANA: By the President.

CHAIRPERSON: Oh, okay. So the number might change from time to time?

MR MXOLISI SANDILE OLIVER NXASANA: The number might change from time to time ...

CHAIRPERSON: Okay, okay.

MR MXOLISI SANDILE OLIVER NXASANA: Because at the time it was Advocate Lawrence Mgwebi for the Specialised Commercial Crime Unit
20 ...

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: And at the time it was Mr Dawood ...

CHAIRPERSON: Hm.

MR MXOLISI SANDILE OLIVER NXASANA: Who was the Special

Director for – what is this unit that deals with witnesses?

CHAIRPERSON: Sexual – oh – protection of witnesses?

MR MXOLISI SANDILE OLIVER NXASANA: Witness protection, yes.

Witness protection ...

CHAIRPERSON: *Ja.*

MR MXOLISI SANDILE OLIVER NXASANA: Office for Witness Protection and we also had a – another post for the Special Director which I recommended that it be frozen. At the time Abrahams – Advocate Shaun Abrahams was acting when I arrived at NPA ...

10 **CHAIRPERSON:** Hm.

MR MXOLISI SANDILE OLIVER NXASANA: And that was the Special Director for Priority Crime Litigation Unit.

CHAIRPERSON: Oh okay. Now in terms of the hierarchy it is the National Director of Public Prosecutions. It is the Deputy National Directors of Public Prosecutions and then is it then the Special Directors below that?

MR MXOLISI SANDILE OLIVER NXASANA: Well they (intervenes).

CHAIRPERSON: Or they are on the same level as the Directors?

MR MXOLISI SANDILE OLIVER NXASANA: As the Directors.

20 **CHAIRPERSON:** Oh.

MR MXOLISI SANDILE OLIVER NXASANA: They are on the same level but there is that power play ...

CHAIRPERSON: Oh.

MR MXOLISI SANDILE OLIVER NXASANA: Between the Special Directors and the Directors.

CHAIRPERSON: About who is at Head Office ...

MR MXOLISI SANDILE OLIVER NXASANA: And who ...

CHAIRPERSON: Who is not at Head Office?

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Okay.

MR MXOLISI SANDILE OLIVER NXASANA: I think that power play – you know – it played itself out

CHAIRPERSON: *Ja.*

MR MXOLISI SANDILE OLIVER NXASANA: In the matter that we will
10 talk about earlier ...

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: A bit later on.

CHAIRPERSON: Oh, okay.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: But legally they are on the same ...?

MR MXOLISI SANDILE OLIVER NXASANA: They are on the same level
yes.

CHAIRPERSON: Yes, okay.

MR MXOLISI SANDILE OLIVER NXASANA: It is just that they are
20 Directors.

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: They are Special
Directors.

CHAIRPERSON: Yes. Below the Directors do you have Deputy
Directors ...

MR MXOLISI SANDILE OLIVER NXASANA: We ...

CHAIRPERSON: Of Public Prosecutions?

MR MXOLISI SANDILE OLIVER NXASANA: We have Deputy Directors of Public Prosecutions.

CHAIRPERSON: Yes and then those ...

MR MXOLISI SANDILE OLIVER NXASANA: And ...

CHAIRPERSON: Could be a number – there could be a number of them?

10 **MR MXOLISI SANDILE OLIVER NXASANA:** There could be a number of them ...

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: And some of them at the Head Office. They are all over.

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: Well they also rank themselves – the Deputies – as senior and Deputies.

CHAIRPERSON: Oh, there are different levels?

MR MXOLISI SANDILE OLIVER NXASANA: Yes. Yes they have different levels.

20 **CHAIRPERSON:** Now Prosecutors that one finds in the High Courts and in the Magistrate's Court would they simply be Prosecutors or some of them would be Deputy Directors and maybe even Director - Directors?

MR MXOLISI SANDILE OLIVER NXASANA: The Prosecutors that normally prosecute in the High Courts they are the Advocates who are

based in the DPPs Office – the Director of Public Prosecutions Offices
...

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: And anyone – you might find – you might find anyone prosecuting.

CHAIRPERSON: *Ja.*

MR MXOLISI SANDILE OLIVER NXASANA: Ranging from an - an Advocate to ...

CHAIRPERSON: *Ja.*

10 **MR MXOLISI SANDILE OLIVER NXASANA:** To a Senior Advocate

CHAIRPERSON: *Ja.*

MR MXOLISI SANDILE OLIVER NXASANA: Deputy Director, Senior Deputy Director.

CHAIRPERSON: They – they fall under the Office of ...

MR MXOLISI SANDILE OLIVER NXASANA: The DPP.

CHAIRPERSON: Of a particular DPP ...

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: In the province?

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

20 **CHAIRPERSON:** Okay, okay and ...

MR MXOLISI SANDILE OLIVER NXASANA: Then the Prosecutors that you find in the lower courts ...

CHAIRPERSON: Hm.

MR MXOLISI SANDILE OLIVER NXASANA: By lower courts I mean Regional Courts going ...

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: Down to the ...

CHAIRPERSON: District Courts.

MR MXOLISI SANDILE OLIVER NXASANA: To the District Courts.

Those are Prosecutors that fall under the Chief Prosecutors in the ...

CHAIRPERSON: In the particular court?

MR MXOLISI SANDILE OLIVER NXASANA: In the particular court.

The Chief – the Chief Prosecutors they – they – under them I think they cover a certain area ...

10 **CHAIRPERSON:** Of jurisdiction?

MR MXOLISI SANDILE OLIVER NXASANA: Of jurisdiction.

CHAIRPERSON: Yes, yes.

MR MXOLISI SANDILE OLIVER NXASANA: Under whom they have Prosecutors.

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: Below the Chief Prosecutor will be the Senior Public Prosecutors, Control Prosecutors.

CHAIRPERSON: Control Prosecutors, *ja*.

20 **MR MXOLISI SANDILE OLIVER NXASANA:** Then Prosecutors and – in their ...

CHAIRPERSON: Yes but ...

MR MXOLISI SANDILE OLIVER NXASANA: In their ranks.

CHAIRPERSON: Basically in – in the province where they operate the Prosecutors – Chief Prosecutors and whoever they fall under the DPP of the Province?

MR MXOLISI SANDILE OLIVER NXASANA: All of them, yes.

CHAIRPERSON: All of them?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

CHAIRPERSON: Yes okay, thank you.

ADV PAUL JOSEPH PRETORIUS SC: Thank you Chair.

CHAIRPERSON: And – and the President appoints the DPPs ...

MR MXOLISI SANDILE OLIVER NXASANA: The DPPs, yes.

CHAIRPERSON: But below that does he go that far?

MR MXOLISI SANDILE OLIVER NXASANA: No he does not go that far.

10 **CHAIRPERSON:** He stops there?

MR MXOLISI SANDILE OLIVER NXASANA: He stops there.

CHAIRPERSON: And then who appoints the DPPs – the NDPP?

MR MXOLISI SANDILE OLIVER NXASANA: The ...

CHAIRPERSON: Or who appoints them?

MR MXOLISI SANDILE OLIVER NXASANA: The Deputies.

CHAIRPERSON: The Deputy Directors?

MR MXOLISI SANDILE OLIVER NXASANA: The Deputy Directors.

CHAIRPERSON: *Ja.*

20 **MR MXOLISI SANDILE OLIVER NXASANA:** It is the NDPP and the –
and the Minister - the Minister.

CHAIRPERSON: The Minister in consultation with the NDPP?

MR MXOLISI SANDILE OLIVER NXASANA: With the NDPP.

CHAIRPERSON: Okay, alright thank you.

ADV PAUL JOSEPH PRETORIUS SC: Thank you Chair. You refer to
Section 179(5) of the Constitution. That is the subsection which deals

with the powers and duties of the National Director of Public Prosecutions. Perhaps we should place that on record and then I - you may make any comment that you wish. Subsection 179(5) reads:

“The National Director of Public Prosecutions a, must determine with the concurrence of the Cabinet Member responsible for the administration of Justice after consulting the Directors of Public Prosecutions Prosecution Policy which must be observed in the prosecution process.”

10 It appears then from the Constitution that is the National Director’s primary responsibility or at least responsibility in the first instance to determine policy in regard to prosecutions. Is that correct?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: What does that mean in practical terms? What policies are determined?

MR MXOLISI SANDILE OLIVER NXASANA: Chair it means that the – the NDPP must consult with the Directors of Public Prosecutions. The policy to be followed in prosecuting matters that is how to go about prosecuting matters and what is expected of the Prosecutors in
20 handling matters when they are prosecuting them.

CHAIRPERSON: That would include – would that include when to prosecute and when to not to prosecute and when to withdraw charges or prosecution?

MR MXOLISI SANDILE OLIVER NXASANA: That is – that is correct Chair.

CHAIRPERSON: Thank you.

ADV PAUL JOSEPH PRETORIUS SC: Do you recall the content of the policy in broad terms whilst you were the National Director of Public Prosecutions?

MR MXOLISISANDILE OLIVER NXASANA: I cannot remember anyone specific offhand.

ADV PAUL JOSEPH PRETORIUS SC: Perhaps – perhaps that is a task for the investigators ...

MR MXOLISI SANDILE OLIVER NXASANA: *Ja.*

10 **ADV PAUL JOSEPH PRETORIUS SC:** In due course. Section 179(5) goes on to state that:

“The National Director of Public Prosecutions must issue policy directives which must be observed in the prosecution process.”

And Subsection C of Subsection 5 reads:

“The National Director may intervene in the prosecution process when policy directives are not complied with.”

Is that correct?

20 **MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair. That means Chair as the National Director of Public Prosecution you can *mero motu* on your own intervene when you believe that prosecution policy and directives have not been followed in a particular matter or when any of the parties involved in the matter approaches you as the National Director of Public Prosecutions and make representations that

you review the decision to prosecute him or her or a decision not to prosecute a particular individual.

ADV PAUL JOSEPH PRETORIUS SC: You refer to Section 179(6) of the Constitution in your statement at paragraph 13. What does that deal with? In other words who exercises final responsibility over the National Prosecuting Authority?

MR MXOLISI SANDILE OLIVER NXASANA: That is the Minister of Justice and currently it is the Minister of Justice and Correctional Services.

10 **ADV PAUL JOSEPH PRETORIUS SC:** Services, right.

MR MXOLISI SANDILE OLIVER NXASANA: But I must also explain Chair that whilst he – the Minister – exercises final responsibility over the NPA the Director General of Justice is the accounting officer of the National Prosecuting Authority.

CHAIRPERSON: I – I take it that he – he is being accounting officer is limited to how money is spent or is - does it go behind that as far as you understand the position?

MR MXOLISI SANDILE OLIVER NXASANA: Well as far as I ...

ADV PAUL JOSEPH PRETORIUS SC: Perhaps there is a public
20 interest in your question and its answer. Once again we are down ...

CHAIRPERSON: Oh.

ADV PAUL JOSEPH PRETORIUS SC: And offline. I have been requested to ask for 10 minutes. This is also important I think for the record ...

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: So ...

CHAIRPERSON: No, no that is important that we should have it on record.

ADV PAUL JOSEPH PRETORIUS SC: Perhaps we should take the short adjournment now.

CHAIRPERSON: Yes. It is – it is about the time for tea. I was not going to take it because we just had 10 minutes but we are forced to take it now. So we will take an adjournment until half past 11. Hopefully it will be sorted out ...

10 **ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair.

CHAIRPERSON: In the meantime. We adjourn.

HEARING ADJOURNS

HEARING RESUMES

CHAIRPERSON: I am told that the technical problems have been sorted out at least for now.

ADV PAUL JOSEPH PRETORIUS SC: At least for now Chair.

CHAIRPERSON: Yes. Let us proceed.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair. Mr Nxasana if you go to paragraph 14 of your statement you deal with Section 9 of the National Prosecuting Authority Act which is the legislation which directly governs the National Prosecuting Authority and you refer ...

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

ADV PAUL JOSEPH PRETORIUS SC: To the Section which sets out the requirements of the person who may be appointed as National Director of Public Prosecutions. What are those requirements?

MR MXOLISI SANDILE OLIVER NXASANA: Chair is that the person must possess legal qualifications that entitle him to – him or her – to appear in all courts in the Republic of South Africa and also that that person must be a fit and proper person with due regard to his or her experience conscientiousness and integrity to be entrusted with the responsibilities of Office of the NDPP.

ADV PAUL JOSEPH PRETORIUS SC: Yes and particularly relevant to your particular case are the provisions or were the provisions of Section 12 of the Act which we will deal with when we come to the
10 Constitutional Court matter involving yourself and others.

MR MXOLISI SANDILE OLIVER NXASANA: Okay.

ADV PAUL JOSEPH PRETORIUS SC: Where certain subsections were declared unconstitutional.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Let us then deal with Section C which details the circumstances preceding and surrounding your appointment as National Director of Public Prosecutions in 2013. Would you tell the Chair about those circumstances please?

MR MXOLISI SANDILE OLIVER NXASANA: Yes Chair. Chair as I have
20 pointed out that I was conducting my own private practice in Durban. Then during 2013 - I cannot remember the exact date and the month – I received a call from Mr Michael Hulley who was the President's Legal Advisor – former President Jacob Zuma's Legal Advisor at the time – who wanted to see me and I obliged. He came over to see me at my office in Durban. We had a discussion with him. He told me that he

was looking for a candidate to fill the position of the National Director of Public Prosecutions as he was mandated by President Zuma. He had with him three names that he told me that he had been given – were given to him by colleagues in Durban but when he bounced off those names to those colleagues they were of the view that I was the person who could do the job and my name was not amongst the list. Hence he then came to see me. He expressed then the – he asked me if I was willing to take over the – I would be willing to take over the appointment ...

- 10 **ADV PAUL JOSEPH PRETORIUS SC:** Before you go there Mr Nxasana in relation to the process by which you had been selected did he mention anything other more formal than bouncing your name off other colleagues?

MR MXOLISI SANDILE OLIVER NXASANA: No sir.

ADV PAUL JOSEPH PRETORIUS SC: Right. Sorry proceed if you will.

- MR MXOLISI SANDILE OLIVER NXASANA:** Then Chair it – I was surprised. I was shocked and surprised because not in bad way that I never thought that one day I would become a Prosecutor because I had chosen to become an Attorney but it also at the same time humbled me
- 20 that my colleagues especially from my division saw something in me that I could head an institute – institution of that magnitude. Then I felt that - I remember that I even remarked to him that if my colleagues have confidence in me so why not – why should I not have confidence in myself. Then I was willing as everyone would be willing to serve the country. I thought that the – my colleagues saw some qualities in me

that entered me to be appointed to that position. I then agreed.

ADV PAUL JOSEPH PRETORIUS SC: Did you subsequently meet with the President at the time?

MR MXOLISI SANDILE OLIVER NXASANA: Yes. A meeting was then scheduled to meet the President at his official residence in Pretoria and I remember – I think it was around August if I am not mistaken if not before that. I went up to meet the President at his official residence in Pretoria. Present at the meeting was the President, Mr Hulley and I think there was also the lady who – who I was later told that she was –
10 she was also the Legal Advisor to the President – Ms Bonisile Makhene.

ADV PAUL JOSEPH PRETORIUS SC: Spell that surname please.

MR MXOLISI SANDILE OLIVER NXASANA: Spelt M-A-K-H-E-N-E, Makhene.

ADV PAUL JOSEPH PRETORIUS SC: Okay, thank you.

CHAIRPERSON: Well based on what Mr Hulley said to you it seems that what you are saying is he said to you your peers suggested that you might be the right person.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

20 **CHAIRPERSON:** Hm – and you – you had not applied for any position?

MR MXOLISI SANDILE OLIVER NXASANA: No, no Chair.

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: Not.

CHAIRPERSON: Okay.

ADV PAUL JOSEPH PRETORIUS SC: Yes. What happened at that

meeting?

MR MXOLISI SANDILE OLIVER NXASANA: At that meeting - before I went to the meeting Mr Hulley assured me that I was not going to an interview of any sort. The President wanted just to see me, interact with me and I should relax and that is exactly what happened. It was not an interview. It was an interaction and what I remember quite vividly what the President asked me of was that did I have courage to take up that position. To which I responded by saying yes I do and I even said to him that knowing that he has been through hardships I
10 thought that he meant that I would be able to take decisions independently and firmly. Then I said yes I have that courage and also I remember he even said something in isiZulu that it is like that position might be like the people stabbing you with arrows something like that.

CHAIRPERSON: Well you can say it ...

MR MXOLISI SANDILE OLIVER NXASANA: In isiZulu.

CHAIRPERSON: In isiZulu and then seek to translate – interpret it for

MR MXOLISI SANDILE OLIVER NXASANA: Okay.

CHAIRPERSON: People who might not understand isiZulu.

MR MXOLISI SANDILE OLIVER NXASANA: Okay.

20 **CHAIRPERSON:** *Ja.*

MR MXOLISI SANDILE OLIVER NXASANA: I think if I remember well he said that position is like (isiZulu) which I understood him to be saying that it was a – a very difficult task to handle and he described it as like a – arrows ...

CHAIRPERSON: A position where ...

MR MXOLISI SANDILE OLIVER NXASANA: A position where ...

CHAIRPERSON: Spears would be directed at you.

MR MXOLISI SANDILE OLIVER NXASANA: Spears would be directed at you yes.

CHAIRPERSON: That is – that is the isiZulu part.

MR MXOLISI SANDILE OLIVER NXASANA: Literally yes, yes.

CHAIRPERSON: It is a position where spears could be directed at you.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Okay.

10 **MR MXOLISI SANDILE OLIVER NXASANA:** *Ja.*

ADV PAUL JOSEPH PRETORIUS SC: Is there anything else about the meeting that you wish to tell the Chair?

MR MXOLISI SANDILE OLIVER NXASANA: Then Chair as about I was leaving – about I was leaving the meeting - I think the meeting lasted for not more than 30 minutes because I remember it coincided because I had to wait there. It was a date when I think the former Deputy President of the country – Ms Mlambo-Ngcuka - was there I think to meet the President before she was going to take up the position in the – in – I think was it in The Hague if I am not mistaken - had a long
20 meeting then I had to wait. There were also other Ministers there that were waiting to see the President. As I was leaving I think it was Mr Hulley who asked if the – I had anything to – to say and my response was that my father who is now late was a trade unionist and I know that he would mention that the President - Jacob Zuma – was his comrade at the time. I felt that was necessary to bring that to the – to

their attention. I think that was because – I think that was prompted by a question that – I think the question was – was I related to Sizwe Nxasana if I remember well. Then I said to them Sizwe is my – is my brother in isiZulu. Well in English he is my cousin.

CHAIRPERSON: Is he – I know what you are talking about when you say in isiZulu and in English because in the Zulu culture – you know – if you are of the same surname – you know – there – there is some kind of connection that you – that is recognised even though you might not be related in any way in the English sense. I think that is what you are
10 talking about.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: With him are you related in any way in the English sense?

MR MXOLISI SANDILE OLIVER NXASANA: No we are blood relatives. Our – our ...

CHAIRPERSON: You are blood relatives?

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Oh, okay.

MR MXOLISI SANDILE OLIVER NXASANA: Our grandfathers are
20 brothers.

CHAIRPERSON: Okay, alright.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Thank you.

ADV PAUL JOSEPH PRETORIUS SC: What happened then on 30 August 2013 pursuant to this meeting? Did you ...

MR MXOLISI SANDILE OLIVER NXASANA: Oh the 30th ...

ADV PAUL JOSEPH PRETORIUS SC: Have further contact with Mr Hulley?

MR MXOLISI SANDILE OLIVER NXASANA: *Ja.* 30 August 2013 I remember I was running a trial at Umlazi Court in the civil trial then I received a call from Mr Hulley who then asked me to send – to send him my CV which I then did.

ADV PAUL JOSEPH PRETORIUS SC: Did he tell you anything of the President's intentions?

10 **MR MXOLISI SANDILE OLIVER NXASANA:** Yes. He told me that the President was under pressure to appoint and he intended to appoint – to announce my appointment.

ADV PAUL JOSEPH PRETORIUS SC: Was your appointment subsequently announced by the President?

MR MXOLISI SANDILE OLIVER NXASANA: Although Mr Hulley had told me that the – the President was going to announce the appointment probably over the weekend or on a Monday I think circumstances – he told me that circumstances forced him because the information leaked from the President's office which then precipitated
20 the President to make the announcement the next day which was 31 August 2013.

ADV PAUL JOSEPH PRETORIUS SC: Right. Do you know whether the position prior to your appointment of National Director of Public Prosecutions was advertised in anyway?

MR MXOLISI SANDILE OLIVER NXASANA: No I do not know. I had

not seen any advertisements myself.

ADV PAUL JOSEPH PRETORIUS SC: And apart from what you have told the Chair are you aware of any more formal or any other - for that matter – selection process?

MR MXOLISI SANDILE OLIVER NXASANA: No Chair. I have no idea if there were other selection processes or whether there were other candidates interviewed but Chair I think I must pause to mention that later on I discovered that Advocate Jiba as she was acting she was promised by the then Minister of Justice and Constitutional
10 Development – Minister Jeff Radebe – that she was going to be appointed on a permanent basis.

ADV PAUL JOSEPH PRETORIUS SC: Yes. We deal with that later. For the moment though were you ever subjected to an interview in the formal sense where you were asked questions about your own history, your own qualifications your professional history?

MR MXOLISI SANDILE OLIVER NXASANA: Except for the meeting?

ADV PAUL JOSEPH PRETORIUS SC: Your attitude?

MR MXOLISI SANDILE OLIVER NXASANA: Except for the meeting that we had on the – when I met President Zuma, Mr Hulley and
20 Ms Bonisile Makhene – nothing.

ADV PAUL JOSEPH PRETORIUS SC: Right. So there was no interview that one could describe as a formal job application interview in relation to your appointment?

MR MXOLISI SANDILE OLIVER NXASANA: Unless they were to ascribe that meeting as the formal interview - none.

ADV PAUL JOSEPH PRETORIUS SC: Well did it have the characteristics to your knowledge of what one would expect in the ordinary sense a job interview to entail?

MR MXOLISI SANDILE OLIVER NXASANA: What I can – what I can say Chair is that recently there has been an – an interview to appoint the direct – the National Director of Public Prosecutions. If that is what you mean that was not done.

ADV PAUL JOSEPH PRETORIUS SC: Right.

MR MXOLISI SANDILE OLIVER NXASANA: That process was not
10 done.

ADV PAUL JOSEPH PRETORIUS SC: Were you required to fill in any application form setting out your personal history, your details and similar matters?

MR MXOLISI SANDILE OLIVER NXASANA: No Chair.

ADV PAUL JOSEPH PRETORIUS SC: You did however complete a security clearance application?

MR MXOLISI SANDILE OLIVER NXASANA: Yes I did. I completed it only after I was appointed and I was in the office. I think it was around December 2013.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Did you sign any other document apart from your security clearance application prior to being employed?

MR MXOLISI SANDILE OLIVER NXASANA: I would have signed the – my employment contract as well as the oath of office before Judge – Judge President Mlambo.

ADV PAUL JOSEPH PRETORIUS SC: Alright.

CHAIRPERSON: You – you did of course as you said you were asked to furnish your CV which you did?

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: *Ja*, okay.

ADV PAUL JOSEPH PRETORIUS SC: You then would have arrived at the NPA during October. Is that correct?

MR MXOLISI SANDILE OLIVER NXASANA: That ...

ADV PAUL JOSEPH PRETORIUS SC: Of 2013?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct – excuse
10 me – that is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: What did you find on your arrival?

MR MXOLISI SANDILE OLIVER NXASANA: Chair I received a warm welcome from the personnel at NPA. At one stage the Minister of Justice – Mr Radebe – also came to the Head Office to introduce me and I can say I was warmly received.

ADV PAUL JOSEPH PRETORIUS SC: Right.

CHAIRPERSON: Prior to your assumption of duty but after the announcement of your appointment had you been in touch with the
20 Acting National Director of Public Prosecutions who was acting before you came to arrange for what would happen when you arrived or there was no communication?

MR MXOLISI SANDILE OLIVER NXASANA: Chair there was no communication. I did not know anyone at – at the – at the Head Office except that when I arrived there I – identified the person that I knew in

the leadership as Advocate Pinky Mokgatla because she – she attended – I think – the university in KZN – in Durban – and she qualified there and she practiced there as an advocate and she was also my colleague in the Black Lawyers Association. That is where I knew her from.

CHAIRPERSON: Okay.

MR MXOLISI SANDILE OLIVER NXASANA: But to answer the question there was a time when the – the CEO at the time – Advocate Karen Van Rensburg – and the Deputy CEO that was Ms Beryl Sisulu they phoned me and they wanted to come and meet
10 with me just to give me a briefing of what I would – I should expect when I get to the NPA. They came down to Durban and we met I remember in one of the hotels in Umhlanga. Then as we were in the meeting I then subsequently get – received a call from a person who introduced herself as Advocate Jiba who was acting who wanted to see me as well and she then appeared to be around Durban. I had to hastily go and meet her. I did not know how – whether it was a coincidence that she knew that they had come down the CEO and the Deputy CEO but I later learnt that they – they got a hiding because they came down to see me from – from Advocate Jiba. We met - when I met
20 Advocate Jiba she was in the presence of the Director of Public Prosecutions in KZN – Advocate Moipone Noko – and the gentleman that I knew very well from KZN in Durban who at the time was Colonel BW Mahlangu – Colonel Mahlangu – at the time. We exchanged pleasantries with him because he is a Mahlangu and my late mom's surname is Mahlangu and we used to call each other cousins

until his involvement in all of this thing and which I did not know then we stopped having that relationship.

ADV PAUL JOSEPH PRETORIUS SC: You deal with some of those issues in due course.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Perhaps we should take it step by step. The Acting National Director of Public Prosecutions at the time of your appointment was Advocate Jiba?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

10 **ADV PAUL JOSEPH PRETORIUS SC:** Was there any formal or even informal handing over process where the two of you sat down and exchanged details of the state of the NPA, the prosecutions current policies and the like?

MR MXOLISI SANDILE OLIVER NXASANA: No Chair.

ADV PAUL JOSEPH PRETORIUS SC: Did you instruct Advocate Jiba to conduct a formal hand over process with your appointment?

MR MXOLISI SANDILE OLIVER NXASANA: I did Chair and she did not comply.

20 **CHAIRPERSON:** In relation to the date of your assumption of duty when would that have been? In a week's time or when you asked for her to do a hand over – a week's time, two weeks' time or much later?

MR MXOLISI SANDILE OLIVER NXASANA: Chair I – there were a lot of things happening Chair because when I – I would think it was around December – if I am not mistaken – December 2013.

CHAIRPERSON: Okay, thank you.

ADV PAUL JOSEPH PRETORIUS SC: At the time we know from other evidence and the Chair will be informed perhaps in relation to these matters in more detail in due course but we have heard that at this time there were investigations being conducted in regard to the conduct of General Booyesen in KwaZulu-Natal. What has been called the Cato Manor death squad investigations?

MR MXOLISI SANDILE OLIVER NXASANA: Yes Chair.

ADV PAUL JOSEPH PRETORIUS SC: Were you given any information about those investigations on your assumption of office?

10 **MR MXOLISI SANDILE OLIVER NXASANA:** No Chair. I was not given any information.

ADV PAUL JOSEPH PRETORIUS SC: How did you learn of the investigations – if at all?

MR MXOLISI SANDILE OLIVER NXASANA: Apart from the fact that coming from Durban I knew that there was an investigation whilst I was still in private practice because the matter was at the court that I appear frequently. That is the Durban Court but when I assumed office I did not know what the status of that matter was and I was not informed about it. I only learnt about it when I read the newspaper. I
20 cannot remember where I was coming from but I was travelling. I was on plane – on the plane reading if I remember a – the Business Times. Then I saw that there was a decision by Judge Gorven in KZN.

ADV PAUL JOSEPH PRETORIUS SC: G-O-R-V-E-N.

MR MXOLISI SANDILE OLIVER NXASANA: G-O-R-V-E-N, yes – criticising the manner in which Advocate Jiba handled herself in the

matter but of particular concern was also that the NPA was appealing the decision of Judge Gorven. Then I became worried because as the Head of the institution and taking into consideration the – the seriousness of that matter I thought that it was appropriate that I be familiarised with what was happening. I immediately summoned the – I think it was Advocate Jiba – and asked her to tell me what was happening in the matter and summon the prosecuting team. They came over to my office in Pretoria and we went through the evidence there and then I got the impression - Chair I think the matter – I think they
10 have spoken about the matter previously but ...

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: Of particular importance is that what I also found in the matter is that when Advocate Jiba authorised the racketeering certificate but perhaps I must explain that the racketeering certificate can only be authorised by one person in the whole country that is the National Director of Public Prosecutions himself or herself and the National Director of Public Prosecutions cannot delegate that authority to anyone.

CHAIRPERSON: That is in terms of the National Prosecuting Authority
20 Act?

MR MXOLISI SANDILE OLIVER NXASANA: Hm.

CHAIRPERSON: Or in terms of the legislation (intervenes) ...

MR MXOLISI SANDILE OLIVER NXASANA: In terms of the legislation.

CHAIRPERSON: To – to ...

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Racketeering?

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Yes, okay.

MR MXOLISI SANDILE OLIVER NXASANA: In terms of the legislation to racketeering. Then in this matter what I found is that Advocate Jiba authorised the racketeering – she signed the racketeering certificate and authorised the – that – that General Booyen be charged with racketeering which was then the subject matter in court. Judge – General Booyen challenged the – challenged that and Judge Gorven
10 found in his favour that there was no evidence justifying the authorisation of the racketeering charges against General Booyen but when I questioned Advocate Jiba why she had to sign that obviously bearing in mind that she was exercising her authority at the time before I – I came there. Her – her response was that she relied – if I quote her she said – I relied on these so called experts – racketeering experts and then I pointed out to her that it is ...

CHAIRPERSON: Was she pointing to certain specific people as experts?

MR MXOLISI SANDILE OLIVER NXASANA: Yes. She pointed at
20 people – the prosecution team who were present.

CHAIRPERSON: Yes, okay.

MR MXOLISI SANDILE OLIVER NXASANA: Then I said to her perhaps it would have been better. I did not expect – I would not have expected her to go through the – the bundles and bundles – in fact it was the boxes of evidence but if I were her I said I would have asked them to

point me to the relevant evidence that points to racketeering – to the relevant evidence that implicates General Booyesen and to my surprise what they then produced ...

CHAIRPERSON: I am sorry. When you say she said she relied on ...

MR MXOLISI SANDILE OLIVER NXASANA: The so called ...

CHAIRPERSON: The persons that she referred to as experts in racketeering.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Was she saying that in relation to concluding whether
10 or not a racketeering charge should be one of the charges against General Booyesen?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

CHAIRPERSON: So she was saying as to whether there was enough evidence or not to justify ...

MR MXOLISI SANDILE OLIVER NXASANA: Her ...

CHAIRPERSON: A charge of racketeering she had relied on them?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

CHAIRPERSON: That was your understanding (intervenes)?

MR MXOLISI SANDILE OLIVER NXASANA: That was my
20 understanding Chair.

CHAIRPERSON: Yes, okay.

MR MXOLISI SANDILE OLIVER NXASANA: Yes. Then Chair I think it is – it is on record that what was there in the – in the file – in the docket was a – a mere unsigned statement not commissioned from one witness who left the country as in Greece – he is in Greece - and also

the other statements were statements of – were hearsay statements which were not only hearsay but twice removed hearsay statements and Your Worship my feeling was that there is no way I then took them through and I explained to them, I convinced them that there is no way that you would succeed in appealing the decision of Judge Gorvan and I then instructed them to withdraw the notice of appeal which, they then did.

CHAIRPERSON: You made a comment earlier on about who has power to authorise or sign racketeering certificate or authorise that a person
10 be charged with racketeering and as I understand your evidence you were saying that it's only the National Director of Public Prosecutions, in the whole country who can authorise that a person be charged with racketeering, is that correct?

MR MXOLISI SANDILE OLIVER NXASANA: That's correct Chair.

CHAIRPERSON: And to show that authorisation he or she signs a certain certificate, is that correct?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

CHAIRPERSON: Now I thought there was a point you wanted to make about that, I assume that Ms Jiba had signed that certificate if she did
20 sign it at a time when she was acting National Director of Public Prosecutions?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct and because of – because she was acting National Director, she had the power.

CHAIRPERSON: She had the power.

MR MXOLISI SANDILE OLIVER NXASANA: She had the power to sign.

CHAIRPERSON: So there is no issue about that?

MR MXOLISI SANDILE OLIVER NXASANA: The issue is that, Chair, the point I'm making is, before she signed the racketeering certificate she had to satisfy herself that there was evidence to justify her to sign the racketeering certificate and I found her response to my question, really puzzling that she could only rely to the – she could only rely upon what she has been – she was told by the so-called experts, the
10 prosecutors who were leading the matter because – I think that was the reason why the legislature made that provision that it must only be the National Director of Public Prosecutions, that is the – the National Director of Public Prosecutions is given the responsibility to satisfy himself or herself that because of the – of the consequences flowing from being charged with racketeering.

CHAIRPERSON: With racketeering.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: So part of the point you are making is, there must be a reason why the legislation said only one person in the whole country
20 can make the decision whether a person should be charged with racketeering.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

CHAIRPERSON: And that must be because of the seriousness of the charge of racketeering and its consequences on a person.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: And that although any prosecutor and any Director of Public Prosecutions should satisfy themselves or himself or herself before deciding on any charge against anybody. This one is particularly serious...(intervention).

MR MXOLISI SANDILE OLIVER NXASANA: It's very serious yes.

CHAIRPERSON: And the NDPP must take care to satisfy himself that there is – or herself that there is proper and sufficient evidence before authorising it, that's part of the point you are making.

MR MXOLISI SANDILE OLIVER NXASANA: That's the point I'm
10 making Chair.

CHAIRPERSON: Okay thank you.

ADV PAUL JOSEPH PRETORIUS SC: You mentioned to the Chair, Mr Nxasana that during the course of the conversation with Advocate Jiba you suggested that she might have considered actually examining the evidence and asking the prosecutors to point out the evidence to her on which she based her decision.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: What – do you recall her response to that intervention by yourself?

MR MXOLISI SANDILE OLIVER NXASANA: Chair her response was
20 that she relied on the – even if I quote her verbatim, she said, "I relied on these so-called experts - racketeering experts".

CHAIRPERSON: I understand you to say the persons to whom she referred as experts were in the same room, in the meeting.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

CHAIRPERSON: What was their response when she said that, did they say anything about whether there was evidence or were they conceding that there wasn't evidence?

MR MXOLISI SANDILE OLIVER NXASANA: Chair the team as far as I can recall, the team appeared to be divided on the issue but they were of the opinion, I don't know, because they were quiet, they did not respond to when she said she relied on what they had told her.

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: But then we went
10 through the matter and I made it clear – it became very clear that there was no evidence before in the docket to justify the racketeering, in fact, Chair, I went as far as to - if I may be allowed this latitude, I went as far as to advise them that, you see I come from Durban and most of the – and some of the victims of the so-called Cato Manor death squad were people that I knew personally, I even told them at that meeting and I told them that perhaps I was trying to display any feeling that I might be taking sides, I wanted to display to them that if there was any person that is really very close to what is happening in KZN, it's myself other than them because even the people who died under the so-called
20 – the alleged death squad, are the people that I knew and I counted to them, the names of those people that I knew very well. I was trying to convince them and I said to them, you see I understand that you mustn't be carried away by this racketeering charges, you may also consider the predicate charges, predicate offences, murder, accessory to murder, conspiracy to murder if there is any but really in the docket

there is none – there is no evidence of racketeering against General Booyesen and if the docket still remains the same as I left it, my view is still the same.

CHAIRPERSON: Thank you.

ADV PAUL JOSEPH PRETORIUS SC: Right. So in summary you learnt from sources other than sources in the NPA that Judge Govern had issued a judgment in which he was critical of the NPA stance in relation to charges against General Booyesen.

10 **MR MXOLISI SANDILE OLIVER NXASANA:** I read from the newspapers.

ADV PAUL JOSEPH PRETORIUS SC: You read from the newspaper?

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: You then instituted your own inquiries within the office as Director of National Public Prosecutions.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: You called Advocate Jiba who had signed the racketeering certificate to account basically.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

20 **ADV PAUL JOSEPH PRETORIUS SC:** You suggested to her that it would have been appropriate for her to satisfy herself directly by reference to witness statements and other evidence that there was indeed a basis for issuing the certificate.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: You then understood from her responses that she hadn't had direct access or required direct access

to evidence but had rather relied on the opinions of others.

MR MXOLISI SANDILE OLIVER NXASANA: That is absolutely correct.

ADV PAUL JOSEPH PRETORIUS SC: You then conducted the exercise yourself.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct sir.

ADV PAUL JOSEPH PRETORIUS SC: And you came to a different conclusion.

MR MXOLISI SANDILE OLIVER NXASANA: That is so sir.

10 **CHAIRPERSON:** You see some of the witnesses who have come before me have suggested that what has happened in some of the cases is that people who were fighting corruption were being charged by the NPA with various crimes in circumstances where there was no evidence to support those crimes. The suggestion being that they are being the decisions to charge certain people may have been influenced by reasons other than legitimate legal reasons. Now I have to ask you this question, were you - did the persons that Ms Jiba referred to as experts in racketeering, did they at any stage say to you, here are certain documents which supported our opinion that General Booysen
20 should be charged, either on that day at that meeting or at any stage afterwards, did they ever say to you, no, no, no our decision or recommendation to the acting NDPP was justified because of this and that and that and that?

MR MXOLISI SANDILE OLIVER NXASANA: Chair I did ask them to produce at least evidence – at least *prima facie* evidence against

General Booyesen but they then referred to the statement of – I don't know if I may mention the witness by name?

CHAIRPERSON: I think you may, I think we may have been told.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: I think we have been told yes.

MR MXOLISI SANDILE OLIVER NXASANA: They then produced the statement of a Mr Danikus he was a Greek national, it was an unsigned statement.

ADV PAUL JOSEPH PRETORIUS SC: Won't you spell that name
10 please?

MR MXOLISI SANDILE OLIVER NXASANA: It's D-A-N-I-K-U-S, Danikus, Chair that was an unsigned statement, then when I asked for any other statement implicating General Booyesen they then produced a statement, I cannot remember the name but I will try to recollect it was a person who apparently was a security guard for a Stanger Taxi Association who, in his statement, was alleging that a Mr Mhlongo who was a member of the executive committee of Stanger Taxi Association was – had collected monies from the Association and told the Association in this security guard's presence that, that money was
20 required by the General and that he was present when Mhlongo and the Chairperson at the time was Mr Zondi of the Stanger Taxi Association went to meet with the General at the gateway. Chair that is the General it doesn't even describe that it was General Booyesen, that is the problem but he doesn't say that he overheard the conversation between even that General and Mhlongo, that was the only evidence

that they said that it implicated General Booysen.

CHAIRPERSON: So this person who had signed this statement, you say he was a security guard simply said, he was present when somebody collected money and said it was for a certain General or the General...(intervention).

MR MXOLISI SANDILE OLIVER NXASANA: Wanted the money.

CHAIRPERSON: Wanted the money yes- wanted by the General.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: He did not mention who the General was is
10 that...(intervention).

MR MXOLISI SANDILE OLIVER NXASANA: No.

CHAIRPERSON: Yes and that he was present also – or that the Chairperson of the Taxi Association took it to ...

MR MXOLISI SANDILE OLIVER NXASANA: To meet with the General.

CHAIRPERSON: To meet with the General.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: And that he was present when he met with the General or that didn't come out clearly?

20 **MR MXOLISI SANDILE OLIVER NXASANA:** It didn't come out clear but I think he was in the vehicle as the VIP protection.

CHAIRPERSON: Yes but also he didn't say who the General was?

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Are those the only two documents they produced?

MR MXOLISI SANDILE OLIVER NXASANA: At the time yes.

CHAIRPERSON: And they did that in that meeting?

MR MXOLISI SANDILE OLIVER NXASANA: In that meeting.

CHAIRPERSON: In Ms Jiba's presence?

MR MXOLISI SANDILE OLIVER NXASANA: In Ms Jiba's presence.

CHAIRPERSON: And Ms Jiba didn't point to anything else she might have been told or shown in regard to what evidence there was.

MR MXOLISI SANDILE OLIVER NXASANA: No.

CHAIRPERSON: Okay thank you.

MR MXOLISI SANDILE OLIVER NXASANA: Perhaps Chair, that is why
10 if I follow the matter, I think when it came before you, if I'm not
mistaken, I think that is why then subsequently I heard that Advocate
Shaun Abrahams re-instated the charges, but I understand that people
were sent to Greece to obtain a statement, again I'm told that, that
statement is written in Greece and it was translated by someone here.

CHAIRPERSON: No I think it's important that, while you are here, we
get as much evidence as you have to inquire into these things – these
matters because it's quite a serious suggestion or allegation when it is
said that the NPA or certain people within the NPA abused their powers
to charge people who should – against whom there was no evidence
20 and that they were motivated by certain illegitimate considerations
because if there is no evidence to support those allegations against
those people or against the NPA then let us know but if there is
evidence then let us know, the nation deserves to know exactly what
the position is because the NPA is a very important institution in the
country and in the fight against crime and the nation needs to know

exactly what the position is and if there are people who did that, we must know if there is evidence that shows that that's what they did and they will come before the Commission, put their side of the story and the Commission will make decisions and findings in due course and it was important that somebody like you comes before the Commission because you were – for a certain period of time occupying this very important position of NDPP and you left under certain circumstances and in the public domain there are all kinds of things that are said but also there are judgement, Court judgements that I have dealt with
10 there. It's important that somebody like you comes and tells the Commission exactly what you know and what happened while you were NDPP so that the Commission can have as full a picture as possible before, in due course, it makes findings.

MR MXOLISI SANDILE OLIVER NXASANA: Yes I appreciate that. Sir – Chair can I make also this observation because – so that my evidence here is not taken out of context.

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: I haven't suggested that there was no evidence at all against General Booyesen's co-accused.

20 **CHAIRPERSON:** Yes, yes.

MR MXOLISI SANDILE OLIVER NXASANA: That – just to make that one very clear.

CHAIRPERSON: Yes, yes.

MR MXOLISI SANDILE OLIVER NXASANA: Yes
because...(intervention).

CHAIRPERSON: But you are saying with regard to the...(intervention).

MR MXOLISI SANDILE OLIVER NXASANA: To the racketeering charge against Booysen,

CHAIRPERSON: Racketeering charge.

MR MXOLISI SANDILE OLIVER NXASANA: Chair there was not a shred of evidence.

CHAIRPERSON: Yes. Are you saying anything in regard to any other charges I can't remember whether that was the only charge he was facing, are you saying anything about any other charges he may have
10 been facing other than the racketeering charge, I just can't remember if it was just racketeering charges.

MR MXOLISI SANDILE OLIVER NXASANA: Because in the main Chair, perhaps just to unpack this matter Chair, you know I even suggested Chair that if I was prosecuting that matter or directing that matter I was going to – I said to them, you could have approached one of the co-accused and turn him a 204 witness because most of the evidence I said to them, you know, I'm based in Durban and come from Durban and all that you are telling me here is what is in the public domain in Durban. We hear a lot of things about Cato Manor at the
20 time and I told them that we would hear that when the members of the Cato Manor Unit had killed a person, they would plant a firearm and then General Booysen would come and take over the scene, so to say. Those were the allegations but then I said to them, these are just allegations and without the evidence in the docket you cannot prosecute because we don't prosecute with emotions and I tell you this

is what I would also hear about the Cato Manor Unit and Chair, there was also evidence also, in the – there were allegations, not evidence in the docket that one member of the Cato Manor Unit shot and killed a teenager at, I think, Empangeni (indistinct) when they were looking for a suspect, I don't know whether the suspect was related to this young man but I think they recklessly opened fire and killed an innocent young man. That's a simple investigation, I've never been an investigator in my life but, I mean you can take – collect evidence, match cartridges, spent cartridges, take the firearms for ballistic examination purposes and link the person or even use the adoption of common purpose to charge whoever, that is why I pointed out to them that they mustn't get carried away by this racketeering charge but of particular importance which I brought to their attention that, if you want to charge a person with racketeering you have to prove that there has been a pattern and this pattern has been continuously happening for a particular period and I said, if they want to allege that Cato Manor as the unit which was based in Cato Manor, Chair knows where Cato Manor is, in Durban, and my difficulty was that at the time General Booyesen was not even a member of that unit because he was the head of the Hawks in Durban based at the now called Servamus building in Durban and then to allege that he was managing the enterprise when he was based there, they were not going to succeed.

CHAIRPERSON: Okay thank you.

MR MXOLISI SANDILE OLIVER NXASANA: Thank you.

ADV PAUL JOSEPH PRETORIUS SC: Just to explain the reference

you made to Section 204, Section 204 is a Section of the Criminal Procedure Act, I understand, that is used to enable a co-accused to assist the prosecution and perhaps receive indemnity in the Court's discretion as a result.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: And that's what you were referring to.

MR MXOLISI SANDILE OLIVER NXASANA: That is what I was referring to.

10 **ADV PAUL JOSEPH PRETORIUS SC:** Earlier as having been as step that could and perhaps should have been taken.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair that is what I was suggesting.

ADV PAUL JOSEPH PRETORIUS SC: The time at which you took office, October 2013 was a time when the former President Zuma was still being investigated, is that correct?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair

ADV PAUL JOSEPH PRETORIUS SC: Were you briefed on the status of that investigation?

20 **MR MXOLISI SANDILE OLIVER NXASANA:** Not at all Chair, in fact Chair I've never even touched the docket relating to the former President Jacob Zuma. I understand that the docket was still in the possession of Advocate Jiba and Mr Hofmeyr, if I'm not mistaken.

ADV PAUL JOSEPH PRETORIUS SC: Alright.

CHAIRPERSON: Was – is it correct that the investigation was still

going on at that time because remember in 2009 charges were withdrawn, did the investigation continue after they had been withdrawn?

MR MXOLISI SANDILE OLIVER NXASANA: Chair my response for the question of the investigation, I understand quite clearly that the investigations had ceased to – by then but I understand that the matter was pretty much very alive because there were challenges at the time. Then my response is in regard to that, that there were people still challenging the decision to withdraw charges against the former
10 President Jacob Zuma.

CHAIRPERSON: Okay. So in other words you are not necessarily saying there were investigators who were still continuing to investigate...(intervention).

MR MXOLISI SANDILE OLIVER NXASANA: No, no.

CHAIRPERSON: That you do not know?

MR MXOLISI SANDILE OLIVER NXASANA: No I'm not – I don't know
Chair.

CHAIRPERSON: Ja.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

20 **CHAIRPERSON:** You simply know that the matter...(intervention).

MR MXOLISI SANDILE OLIVER NXASANA: There were Court challenges.

CHAIRPERSON: There were Court challenges relating to the dropping of the charges.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

CHAIRPERSON: Okay.

ADV PAUL JOSEPH PRETORIUS SC: Yes perhaps my question should have been re-phrased to more accurately reflect what you say in paragraph 29 Mr Nxasana where you say you were not briefed on the status of the investigation rather than on whether the investigation itself was continuing.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

ADV PAUL JOSEPH PRETORIUS SC: Alright if we can move on then please to the events leading up to your own suspension. During your
10 first year in office, it was not much more than a first year in office, but during that year, did you learn anything about the attitude towards you and the conduct towards you on the part of Advocates Jiba and Mgwebi, that's Laurence Mgwebi and Nomgcobo Jiba?

MR MXOLISI SANDILE OLIVER NXASANA: Yes Chair, Chair as I pointed out that I was appointed on the 31st of August 2013 with effect from the 1st of October 2013. In a sense it means that I had this whole month of September still in Durban to wrap up before I took office. Chair I started to learn that during that period of September, because the announcement was made by the President that, there were people
20 that were running around, driving around in the township where I grew up from that is Umlazi in my area and that these people, many people were stopping people, asking them about me, about my history especially about my involvement in a matter that was publicised of murder around 1985. It didn't puzzle me at first because I thought that it was part of the vetting process but this thing gained its momentum

until I got to the office. I then learnt that there were members within NPA who were very much responsible also for that. I then subsequently received unsolicited statement in the form of an affidavit from one member of the NPA by the name of Terrence Joubert who was, at the time, I don't know if he still is a risk specialist at NPA he was based in Durban. He sent me an email and in the email there was an affidavit that affidavit forms part of the bundle here where he then – where he was basically telling me that there was a campaign by Advocate Jiba that – to dig the dirt about me so that the intention, the whole purpose was to embarrass me so that the President will then remove me as the National Director of Public Prosecutions and she would then stand a chance of being considered to either continue to act or to be appointed permanently, it is there but it also – this affidavit – in this affidavit he also states that there were police – two police members that were assigned to the DPP, that's Deputy – the Director of Prosecutions in KZN, Advocate Noko who was stationed there at his office who had received vehicles from the provincial office at the time the Commissioner was – Commissioner Mmamonye Ngobeni and that those people that were there, those two gentlemen they were then tasked with going around finding any dirt about me but he also went as far as recording this Colonel Mahlango. Yesterday I tried to get this recording, I only managed to get it very late because it happened in – I think 2013 or 2014 where basically I could hear the voice of Colonel Mahlango and Terrence Joubert, Joubert was playing along. He did not – Colonel Mhlongo did not know that he was recording him. He was

basically saying that Jiba had mandated him to go about digging dirt about me. They went so far as doing that recording saying that I think Terence Joubert had undertaken to hook him up with people from the Road Accident Fund because the allegation was that because I was practising as an attorney they were alleging that I had embezzled clients monies when I handled the Road Accident Fund claims and also I do not know how they got it from and it is true that my wife at some stage was also – was employed at the – at the Road Accident Fund office in Durban. All of that it is there that my wife was also employed
10 there and that Terence Joubert was going to hook him up with the gentleman at Road Accident Fund so that they could give them evidence implicating me in all of that. They also refer in the murder charge that Terence Joubert could hear him saying that that murder charge that you have in your position referring to Colonel Mhlongo that was – it is there – it is there I have it in the record here.

ADV PAUL JOSEPH PRETORIUS SC: Because these are serious allegations perhaps we should do you the favour of allowing to go through your evidence in the sequence you have settled it in your statement. You talked about people in Umlazi informing you.

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** That is...

ADV PAUL JOSEPH PRETORIUS SC: This was before your appointment actually became confirmed or...

ADV MXOLISI SANDILE OLIVER NXASANA: It was confirmed.

ADV PAUL JOSEPH PRETORIUS SC: Before you took office.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes, yes.

ADV PAUL JOSEPH PRETORIUS SC: After its confirmation but before you took office trying to as you put it dig up information about your past.

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: That is the one set of facts that you place before the Chair.

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct.

ADV PAUL JOSEPH PRETORIUS SC: You also mentioned earlier in your evidence the approach to you of two NPA officials.

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** Yes Chair.

ADV PAUL JOSEPH PRETORIUS SC: Now what did they tell you? That is in paragraph 33 of your statement.

ADV MXOLISI SANDILE OLIVER NXASANA: That is the one that I am referring to. That approach I meant the – the affidavit that I received from Mr Terence Joubert.

ADV PAUL JOSEPH PRETORIUS SC: And the other person?

ADV MXOLISI SANDILE OLIVER NXASANA: The other person was Ms Queen Mhlongo who was stationed at the – the NPA offices attached to the Asset Forfeiture Unit in Durban.

20 **ADV PAUL JOSEPH PRETORIUS SC:** What did she tell you?

ADV MXOLISI SANDILE OLIVER NXASANA: She told me that Colonel Mhlongo was bragging saying that – in fact she also had recorded him unfortunately we have lost the phones now and the recordings but I listened to the recording myself. And in that recording he was bragging that he claimed to know me very well and he made a lot of false

allegations about me in that recording but of importance is that he was saying that he had been promised the appointment of the Brigadier – he was accusing me of wanting to charge General Mdluli and that General Mdluli if he is not charged General Mdluli was going to make sure that he is appointed as the – he was going to be promoted as the Brigadier.

ADV PAUL JOSEPH PRETORIUS SC: Let us just take that slowly because that is a lot of information.

CHAIRPERSON: Maybe before you proceed Mr Pretorius just one line. At the time going back to Mr Joubert's affidavit – at the time you got
10 that affidavit was Mr Joubert known to you?

ADV MXOLISI SANDILE OLIVER NXASANA: Chair no he was not known to me.

CHAIRPERSON: So you received an affidavit from somebody that you had never met, that you did not know?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes but he is an employee of the NPA.

CHAIRPERSON: Yes.

ADV MXOLISI SANDILE OLIVER NXASANA: And my details are there for them.

20 **CHAIRPERSON:** Yes. Okay.

ADV MXOLISI SANDILE OLIVER NXASANA: Because I received on the ...

CHAIRPERSON: On the email.

ADV MXOLISI SANDILE OLIVER NXASANA: Official NPA email.

CHAIRPERSON: Okay, Thank you.

ADV PAUL JOSEPH PRETORIUS SC: Right. So you have said in your statement that almost immediately after you were appointed two NPA officials approached you. We will deal with Mr Joubert in a moment. The other person how do you spell her name?

ADV MXOLISI SANDILE OLIVER NXASANA: It is Queen. Queen Mhlongo. Mhlongo it is Mhlongo.

ADV PAUL JOSEPH PRETORIUS SC: Ngo. Right. Did she tell you anything about Advocates Jiba and Mrwebi?

ADV MXOLISI SANDILE OLIVER NXASANA: Chair except that – I just
10 see if I can refresh my memory.

ADV PAUL JOSEPH PRETORIUS SC: Yes please do. Look at paragraph 33 of your statement.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes. Yes Chair this is – that is the – that is the evidence that I have just given that paragraph 33 talks to that about the plot to oust me. That Colonel Mhlongo was the main person that was used by Advocate Jiba to run the campaign.

ADV PAUL JOSEPH PRETORIUS SC: And Advocate Mrwebi?

ADV MXOLISI SANDILE OLIVER NXASANA: Both of them Chair.

ADV PAUL JOSEPH PRETORIUS SC: Alright.

20 **CHAIRPERSON:** Hm you talk about two officials of the NPA one of them I understand to have been Mr Joubert.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: That you are talking about. Was the other one the person that you refer to as Queen Mhlongo?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

CHAIRPERSON: Okay.

ADV MXOLISI SANDILE OLIVER NXASANA: She was – she was attached to the Asset Forfeiture Unit based in Durban at the time. But she is no longer with the NPA. She is the private...

CHAIRPERSON: Okay. Thank you.

ADV MXOLISI SANDILE OLIVER NXASANA: Sector now.

ADV PAUL JOSEPH PRETORIUS SC: Did they approach you together as a team or did they approach you separately?

10 **ADV MXOLISI SANDILE OLIVER NXASANA**: No independent of each other Chair.

ADV PAUL JOSEPH PRETORIUS SC: These were two separate independent...

ADV MXOLISI SANDILE OLIVER NXASANA: Separate incidents.

ADV PAUL JOSEPH PRETORIUS SC: Approaches to you?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Right.

CHAIRPERSON: Around about the same time?

ADV MXOLISI SANDILE OLIVER NXASANA: Around about the same time Chair.

20 **CHAIRPERSON**: Hm.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: During the month of September before you – no, no after you had commenced your duties as NDPP?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes after I had commenced my duties yes.

CHAIRPERSON: Okay ja.

ADV MXOLISI SANDILE OLIVER NXASANA: And Chair I think I must also mention that both – I think they were – Terence Joubert and – although he was a Risk Officer Specialist. I think his office was also in the same building as the office where – of the Asset Forfeiture Unit of the NPA in Durban. That is the ...

CHAIRPERSON: Where Ms Queen Mhlongo...

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Was working as well.

10 **ADV MXOLISI SANDILE OLIVER NXASANA**: Yes it is – yes – it – at – is it 185 Building, Southern Life Building.

CHAIRPERSON: Hm. Okay.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Alright. These approaches to you at whose instance were they made? Did you call on them to speak to you? Did they come of their own accord? What was the case?

ADV MXOLISI SANDILE OLIVER NXASANA: No Chair they came of their own accord.

ADV PAUL JOSEPH PRETORIUS SC: And separately?

20 **ADV MXOLISI SANDILE OLIVER NXASANA**: And separately.

ADV PAUL JOSEPH PRETORIUS SC: Alright.

ADV MXOLISI SANDILE OLIVER NXASANA: In fact Chair what I have not mentioned here in the affidavit is I have referred earlier to an incident when I said I was warmly welcomed at the NPA and during that – I referred to a – to the day when Minister Radabe came to introduce

me. I gave a speech also there. We were at the auditorium. Chair I then said – I remember saying that Minister I am no – NDPP has ever finished his term of office and I can assure you that I will finish my term of office. In fact the NPA Act even permits me to take an extra period of not more than two years and I am sure that I will be here for the period of 12 years. I was saying that in jest.

CHAIRPERSON: Yes.

ADV MXOLISI SANDILE OLIVER NXASANA: But what then happened is that later on I – a lady was then seconded to my office as my
10 secretary and at a very late stage she then said to me that she related her story to me that she said she was present at the – when I gave that – at that welcoming event. Then she said there was a gentleman she was standing by the door and a second gentleman immediately passed a comment after I made those remarks and said you will be surprised that you will not even last for a period of three months. As we continued working together then in the office and she then happened to meet and know that apparently that person who made those comments was Mr Lawrence Mrwebi.

CHAIRPERSON: So – so this lady who was employed by the NPA said
20 a person who was standing behind her.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: At...

ADV MXOLISI SANDILE OLIVER NXASANA: Or next to her.

CHAIRPERSON: Oh next to her?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: At the time when you made the speech.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: After being introduced by Minister Jeff Radabe at the NPA to the NPA staff.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: Said you will be surprised that you will not even finish three months?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

CHAIRPERSON: And then that same lady later came back to you and
10 said that person was Mr Lawrence Mrwebi?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes when she got to see him when we had interactions with them in my boardroom.

CHAIRPERSON: Yes. Okay.

ADV MXOLISI SANDILE OLIVER NXASANA: And she identified him as Lawrence Mrwebi.

CHAIRPERSON: Okay thank you.

ADV PAUL JOSEPH PRETORIUS SC: Alright. You have spoken then about the two NPA officials who approached your unsolicited and separately?

20 **ADV MXOLISI SANDILE OLIVER NXASANA**: Yes.

ADV PAUL JOSEPH PRETORIUS SC: With information.

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: About what other people in the NPA were doing to unseat you?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Is that more or less an accurate summary I do not want to put words in your mouth unnecessarily. We are going to go to the detail in a moment.

ADV MXOLISI SANDILE OLIVER NXASANA: Ja but again also Chair perhaps this might also become relevant I – also during the – just to go back. During the – that September period of 2013 when the announcement had been made before I took office I received – I remember I received a call from Advocate Mdladla commonly known as Advocate Sthembiso Mdladla commonly known as Sticks Mdladla. I
10 know that he was then subsequently one of the members of the Cassim Commission of Inquiry he was also a member. He phoned me in the morning and said to me apparently he made mention of a Mr Mrwebi. He said he understand Mr Mrwebi wanted to speak to me because he fears or hears told him that – he has been told that when I came to NPA I will deal with him. Chair it took me by surprise as I pointed out earlier on that I did not even know him. I did not even met him I did not know anyone except the person that I later identified as Advocate Pinkie Mokgatle.

CHAIRPERSON: The information that the lady gave you about the
20 gentleman that was standing next to her was that information solicited?

ADV MXOLISI SANDILE OLIVER NXASANA: No Chair.

CHAIRPERSON: Hm. Okay.

ADV PAUL JOSEPH PRETORIUS SC: Right. You said that Mr Terence Joubert gave you an affidavit that is part of the bundle?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: In summary what did Mr Joubert tell you in that affidavit? Or what did that affidavit say? You deal with that in paragraph 36.

ADV MXOLISI SANDILE OLIVER NXASANA: In summary Chair apparently Advocate Jiba was going to Durban. I think it was on the day that I met her. And the protocol is that Terence Joubert as the Risk Specialist in Durban is – was responsible for security and risk. I think he was the head in Durban. He was the one who was going to fetch Advocate Jiba from the King Shaka International Airport and drive her
10 to her destination. But then Mr Joubert says that he then subsequently when he had made arrangements to go and fetch Advocate Jiba he received a phone call from the Advocate Jiba’s secretary advising him that he was not – he was no longer going to be – it was not going to be him who was going to fetch Advocate Jiba and it was now going to be Colonel Mhlongo. And then he said he found that very strange because he talks about the security, the protocol and the security risk attached to all of that. And then he made mention of a situation where – he then made mention of these two police officers that were deployed to the DPP’s office in Durban Advocate Noko and that is when he challenged
20 that because of the security risk and that they were not vetted apparently his boss from the head office a Mr Ramahana flew down and came down and castigated him for that. Then he in this affidavit he then talks about the – the plot now that apparently Jiba was running a campaign to get me removed as the – he said to Mhlongo – or he said Mhlongo told him that ...

ADV PAUL JOSEPH PRETORIUS SC: Mhlongo told who?

ADV MXOLISI SANDILE OLIVER NXASANA: Oh sorry Mhlongo told Joubert.

ADV PAUL JOSEPH PRETORIUS SC: Yes.

ADV MXOLISI SANDILE OLIVER NXASANA: That Jiba said to him – Jiba does not trust this guy the – who is the new NDPP Mr Nxasana and that Mhlongo must go out and get some – and dig some dirt about him. So that...

ADV PAUL JOSEPH PRETORIUS SC: That is you?

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** About me?

ADV PAUL JOSEPH PRETORIUS SC: Yes.

ADV MXOLISI SANDILE OLIVER NXASANA: The whole intention was to embarrass me and that she did not know me but the whole intention was to embarrass me so that the President will remove me or will fire me as the National Director and she will then be considered to either continue to act or to be considered on a – to be appointed on a permanent basis.

ADV PAUL JOSEPH PRETORIUS SC: So the affidavit of Mr Joubert talks of a conversation between Colonel Mhlongo and Mr Joubert?

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** Yes that is correct.

ADV PAUL JOSEPH PRETORIUS SC: And relates what was told to Mr Joubert in that conversation by Colonel Mhlongo?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct.

ADV PAUL JOSEPH PRETORIUS SC: And you have related some of that?

ADV MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Was anything mentioned in that conversation according to Mr Joubert about the Road Accident Fund?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: And you have – is that what you have just told the Chair about?

ADV MXOLISI SANDILE OLIVER NXASANA: That is what I have just told the Chair and also the – the issue about the cases that I had faced in about 2015.

10 **ADV PAUL JOSEPH PRETORIUS SC:** Alright.

ADV MXOLISI SANDILE OLIVER NXASANA: Sorry 1985.

ADV PAUL JOSEPH PRETORIUS SC: And what – was anything said about the example prior example of Mr Stanley Gumede would you explain that briefly to the Chair.

ADV MXOLISI SANDILE OLIVER NXASANA: Oh yes. Chair yes. In that affidavit also Mr Joubert refers to – he says that Colonel Mhlongo also told him that Mr Stanley Gumede who is the Regional Magistrate in Durban was the person who was considered for the position before myself. But that Advocate Jiba ran the campaign to discredit him and
20 one of the things in that affidavit that which Joubert alleges is that Jiba or – Jiba then – they convinced a one advocate here – they call him Makosi in Durban to – to complain about the manner in which Mr Gumede had treated her in court as a result Mr Gumede had to face a lot of complaints and he was investigated by the Magistrates Commission. The matter was all over the media and the President that

precipitated the President not considering him as the candidate. Then he says that they were using the very same tactic that they used against – and he was responsible Mr – Colonel Mhlongo in that campaign authorised by Jiba.

ADV PAUL JOSEPH PRETORIUS SC: Now you have told the Chair that this conversation between Mr Joubert and Colonel Mhlongo was recorded?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: You informed the investigators
10 that it had been recorded but as of yesterday we had not been or the investigators had not been able to obtain the recording?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: You managed to obtain the recording?

ADV MXOLISI SANDILE OLIVER NXASANA: Yesterday after I had left you.

ADV PAUL JOSEPH PRETORIUS SC: Okay. And you now have that recording?

ADV MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Chair we have not had an opportunity firstly to hear the recording, secondly and importantly to transcribe the recording. I am not averse to playing the recording should you require Chair in fact happy to do so but on the assumption that we have not been able to precognize the witness in relation to the recording.

CHAIRPERSON: How long is the conversation in the recording?

ADV MXOLISI SANDILE OLIVER NXASANA: Chair I think it is less than eight minutes if I am not mistaken or five minutes ja.

CHAIRPERSON: Yes. Maybe during lunch break I do not know if there could be a chance for you to hear it I would not be insisting that it be heard today if you would rather let it be heard some other time but...

ADV PAUL JOSEPH PRETORIUS SC: Well it is just perhaps inconvenient for you Chair to hear the recording which may be unclear in part without it being properly transcribed. But without a transcription
10 the...

CHAIRPERSON: If you ...

ADV PAUL JOSEPH PRETORIUS SC: It is not up to us to preconize the witness in the sense that we...

CHAIRPERSON: Ja. No I would prefer that you hear it first so that you have an idea about its value.

ADV PAUL JOSEPH PRETORIUS SC: Indeed Chair we will do that over the...

CHAIRPERSON: Before I allow it...

ADV PAUL JOSEPH PRETORIUS SC: Long adjournment.

20 **CHAIRPERSON**: If – once you have heard it and if you say you take the – your submissions that it can be heard then we can look at hearing it but if there are circumstances that justify that it be heard on another day then that should be arranged. I am sure Mr Nxasana would make himself available. But obviously to the extent that it is possible we would like to try and finish his evidence.

ADV PAUL JOSEPH PRETORIUS SC: Today.

CHAIRPERSON: And so it is just a balance to be struck.

ADV PAUL JOSEPH PRETORIUS SC: Yes. Indeed Chair.

CHAIRPERSON: Thank you.

ADV PAUL JOSEPH PRETORIUS SC: Is this a convenient time then?

CHAIRPERSON: Yes. We will take the lunch adjournment now it is one o'clock we will resume at two. We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

10 **INQUIRY RESUMES**

CHAIRPERSON: Yes Mr Pretorius.

ADV PAUL JOSEPH PRETORIUS SC: Chair we have had a polite request from counsel representing Advocate Jiba to place opposition or an argument before you. I am trying to get hold of counsel concerned – Advocate Ngalwana. May we stand down for five minutes so I can establish where his whereabouts are?

CHAIRPERSON: Okay. We will stand down for about five minutes.

ADV PAUL JOSEPH PRETORIUS SC: Thank you.

CHAIRPERSON: We adjourn.

20 **REGISTRAR:** All rise.

HEARING ADJOURNS

HEARING RESUMES

CHAIRPERSON: Mr Pretorius you - do you want to deal with the fact that we only resume now?

ADV PAUL JOSEPH PRETORIUS SC: Yes thank you Chair. You – you

will recall this morning prior to the witness being called and sworn and giving testimony it was drawn to your attention that in all the circumstances which were placed before you Rule 3.3 Notices to implicated parties had not been given but would be given immediately after the conclusion of the witness' testimony. On that basis you were requested to allow the witness' evidence and you did so. Since then Advocate Ngalwana on behalf of Ms Jiba has approached the Commission and made certain requests of the Commission. In essence that any evidence concerning Ms Jiba be excluded pending the issue of

10 a notice to allow Ms Jiba to consider her position and take legal advice. Now Chair the purpose of the Rule certainly as we understand it or at least the principle purpose of the Rule is to give an implicated person an opportunity to place a version before the Commission and to make application to cross-examine. In other words to contest the evidence given by a witness and in any approach that you will be requested to make that principle should remain sacrosanct. There is another potential purpose of the rule and that is that if there is any prospect of unlawful and I stress unlawful as opposed to inadmissible evidence being given perhaps of a confidential nature or of a top secret nature

20 then that implicated person would have an opportunity to deal with it. I do not believe we are dealing with that category of issue in this matter. Certainly not in the evidence that the witness intends to give. So that is the principle purpose of the Rule to allow a version to be put and to allow cross-examination to take place and it should be respected at all times. So there can be no doubt about that. The Rule maybe departed

from in appropriate circumstances and our submission is such circumstances existed this morning and you Chair accepted that. There are two principles embedded in the rules of fairness with which this Commission is obviously bound and in the rules which give expression to those principles of fairness. The one is that no party may because that party implicated or otherwise disagrees with the evidence that a person is going to give and who has received notice of that evidence hold a trial or a contest outside the Commission's proceedings and say you cannot lead that evidence because it is wrong or I disagree with it
10 or because it is false. The proper place for that contest to take place is in this forum in public and indeed that is what the law requires of this Commission to take place in public. So a witness gives evidence that. That evidence is contested after that witness has been – had given evidence. There cannot be a trial outside which would influence that witness' evidence. That is the first principle. The second principle is that – and it is also sacrosanct – is that any implicated person must be given a full and fair opportunity to contest the evidence of a witness and to cross-examine subject to the rules and the discretion that you have embedded in those rules Chair. So those are the two sacrosanct
20 principles. The question is can they be met in this case. If there are circumstances which indicate that the evidence that this witness is about to give is somehow unlawful or cannot be lawfully put before a Commission that is one set of issues. I do not believe those exist here. If however it is merely a matter of managing a fair opportunity to respond either by way of putting up a version or by way of allowing

cross-examination then that can be managed in any order that you might make Chair and the rules provide expressly for such a circumstance. I think that is Rule 3.6. There are two options then having considered the position that I would suggest require consideration. The one is to allow the evidence - but to exclude any reference to any implicated party because of course all implicated parties must be treated in the same manner not only Ms Jiba – to allow that evidence to be given without reference to any implicated party and then to recall the witness at a later stage once notice has been given.

10 That is the one option. It may not be entirely practical. It is the cautious option. The second option is to allow the witness to testify subject to appropriate arrangements being made on representations by Mr Ngalwana either now or at a later stage to ensure that there is a full opportunity to place a version before you and to cross-examine in due course. The tape that we mentioned earlier may possibly fall into the category of that evidence that may not be led at all and perhaps representation should be allowed on that before the tape is played but that concession we are happy to make but otherwise Chair the stark choice and the approach to adopt is left with you.

20 **CHAIRPERSON:** Well I said in the morning when you mentioned that Mr Nxasana was called in – or pursuant to my directions one of the things I said was that I wanted to hear his evidence in regard to his departure from the NPA and I said of course then his tenure at the NPA because he having been National Director of Public Prosecutions at a certain stage and there been suggestions and allegations and some

evidence that there may have been interference with the NPA and that some people in the NPA may have used their powers to charge and not to charge certain people in an unlawful way or they may not have been motivated by proper reasons. It would be important to hear his evidence. So one, I confirm that Mr Nxasana was called pursuant to my direction. That is the first point. The second point, you did raise in the morning the issue that Rule 3.3. Notices were not given in advance – were not sent out in advance because the legal team only got a signed statement of the witness yesterday or last evening. I was concerned

10 about that but I indicated that in terms of my focus it was – I expected the witness to deal with largely matters that have been the subject of judgments and some litigation that would be – that would have been in the courts but of course when a witness gives evidence he gets asked questions and he gives evidence and he may elaborate and so on. So – and – and I was prepared to let him continue and in doing so the provisions of Rule 3 – of the Rules of the Commission make – they provide that where a party who – an implicated person believes that he has not been given enough – enough notice that party may approach the Commission for such order as may in effect give redress to the

20 situation. Of course this is a situation where the notices were not given in advance at all. Now that is important to look at. I think what should happen is I should allow Mr Ngalwana to say something if he wishes to say something. He represents Ms Jiba and then we take it from there but it may well be that where notice has not been given at all. It may be that that must be looked at carefully as opposed to

where notice was given but there is a complaint that it is inadequate – the notice given is inadequate or – so maybe subject to whatever you might wish to say I would like to hear what Mr Ngalwana has to say but maybe that we should see what can be done. The idea is always to try and be as fair as possible to everybody but taking into account practicalities that we have to deal with. Mr Ngalwana.

ADV VUYANI NGALWANA: Thank you Deputy Chief Justice. Thank you for the indulgence.

CHAIRPERSON: Hm.

10 **ADV VUYANI NGALWANA:** Of the two options or perhaps should I confirm that I ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: I stand here on the instructions of Majavu Incorporated ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: For Ms Jiba.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: None of the legal – members or the legal team ...

20 **CHAIRPERSON:** Hm.

ADV VUYANI NGALWANA: Are in Johannesburg.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: So I am the only one who is here. So I have been asked to make these representations.

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: Of the two proposals made by the evidence leader ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: I have not taken instructions but I would imagine the one that would endure itself to Ms Jiba and the legal team might be the first one which is to allow the witness to testify further because he is quite right. We cannot stop the witness from giving evidence in a public domain but then not to give evidence that would implicate Ms Jiba and all the – and the other persons whom – who are
10 not represented by me.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: Now Mr Pretorius referred to what he terms the principle of Rule 3.3.

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: Just briefly I wish to deal with this.

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: Can I take us to Rule 3.3 itself and with your indulgence DCJ I just want to briefly read it because it is important to understand the text of the Rule so that one can appreciate
20 the textual context and the principles ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: That lies behind it.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: It reads as follows:

“If the Commission’s legal team intends to present

to the Commission a witness whose evidence implicates or may implicate another person it must through the Secretary of the Commission notify the implicated person in writing within a reasonable time before the witness gives evidence.”

I stress on the word “before”.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: 3.3.1:

10 “So must be given reasonable time before the witness gives evidence that he or she ...”

These are the things about which notice had to be given to the implicated person.

“...that he or she is or maybe implicated by the witness’ evidence.”

I understand that the evidence leading team only learnt last night about the content of Mr Nxasana’s evidence and so there would not have been an opportunity to give prior notice. Two:

20 “In what way he or she is or may be implicated and furnished with him or her with the witness’ statement or relevant portions of the statement.”

Three:

“Of the date and when - and the venue when the witness will give evidence.”

Four:

“That he or she may attend the hearing at which the

witness gives evidence.”

Five:

“That he or she may be assisted by legal representative when the witness gives evidence.”

Six:

“That if he or she wishes to give evidence himself or herself to call any witness to give evidence on his or her behalf or to cross-examine the witness then he or she must within two weeks from the date
10 of notice apply in writing to the Commission for leave to do so and that the Chairperson will decide the application.”

3.4 then says:

“An application in terms of in terms of Rule 3.3.6 must be submitted in writing to the Secretary of the Commission within 14 calendar days from the date of the notice referred to in Rule 3.3. The application must be accompanied by a statement from the implicated person responding to the
20 witness’ statement insofar as it implicates him or her. The statement must make it clear what parts of the witness’ statement are disputed or denied and the grounds upon which those parts are disputed or denied.”

And lastly this is the last part I am going to read.

“If an implicated person believes ...”

And this is the part that I understand the DCJ was dealing with.

“If an implicated person believes that the Commission’s legal team did not give him or her notice referred to in Rule 3.3 within a reasonable time before the witness could or was to give evidence and that this may be prejudicial to him or her he or she may apply ...”

That is the implicated person.

10 “...may apply to the Commission for such order as will ensure that he or she is not seriously prejudiced.”

That is why I am here.

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: There is nothing in Rule 3.5 that says that application must be in writing ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: And of course since the legal team ...

20 **CHAIRPERSON:** Well you might wish to look towards the end of the Rules ...

ADV VUYANI NGALWANA: Yes.

CHAIRPERSON: For something that might say any application provided here needs to be substantive application.

ADV VUYANI NGALWANA: Yes.

CHAIRPERSON: I seem to think there is something along those lines

but ...

ADV VUYANI NGALWANA: Yes.

CHAIRPERSON: Anyway you – you ...

ADV VUYANI NGALWANA: I – I appreciate that DCJ ...

CHAIRPERSON: *Ja.*

ADV VUYANI NGALWANA: But given ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: Circumstances ...

CHAIRPERSON: *Ja.*

10 **ADV VUYANI NGALWANA:** When one learns of ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: Evidence that might implicate a person ...

CHAIRPERSON: *Ja.*

ADV VUYANI NGALWANA: On the morning effectively five minutes ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: Before the beginning ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: It is impossible ...

CHAIRPERSON: Hm.

20 **ADV VUYANI NGALWANA:** That one would be able to put that in writing.

CHAIRPERSON: *Ja.*

ADV VUYANI NGALWANA: Now this – the Rule as I have read it talks about the statement ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: Of the witness likely to implicate the implicated person.

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: Notice of the statement being given.

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: It does not say notice of evidence ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: Being given.

CHAIRPERSON: Hm.

10 **ADV VUYANI NGALWANA:** So it is to the statement ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: That the implicated person is to respond.

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: The reason I make this submission is this Mr Pretorius in his second option that Mr Nxasana may testify on all and sundry including evidence - as I understand it – evidence that may implicate Ms Jiba subject to Ms Jiba been given an opportunity in due course to come and place her own version before the Commission. Now the Rules 3.3 to 3.5 as I have read it does not seem to me to
20 countenance such a proposition because it deals with statement. It does not with evidence and if a witness is permitted to make or to give evidence that implicates a witness who has not been given notice and then is given an opportunity to come and place evidence later the damage is long done because as we all know we are all members of society. We watch television. We read newspapers. Whatever is said

by a witness especially in this Commission - at least it has been my observation – is any allegation - not even proven evidence - any allegation that is made against a person is taken by society to be the truth before it is even tested and so by the time in due course Ms Jiba comes to test that evidence it is too late. Now Chairperson there is a fear that the legal team and Ms Jiba has and I appreciate your explanation of how Mr Nxasana came to testify today. It is the timing of the evidence the concern is that the President has relieved Ms Jiba of her duties as the Deputy National Director of Public Prosecutions but

10 that that decision still needs to be considered by the National Assembly. Now there is a debate about whether the National Assembly needs to approve the President's decision or it is simply a rubber stamp. I have not studied that but it certainly has to be considered by the National Assembly and so the fear is that any evidence that implicates Ms Jiba without her having been given prior notice may colour those considerations by members of the National Assembly. We do not know yet when the National Assembly will consider this. We have the State of the Nation Address coming up in a couple of days' time. I do not imagine that is a platform for this sort of thing to

20 happen. So in short Deputy Chief Justice we without having taken instructions but I imagine this might be a practical way to go about it. The first option that Mr Pretorius suggested which is to lead Mr Nxasana in evidence except the evidence of the implicated people who have not been given notice. There was one last thing which I forget now. Well if I forget it could not have been that important.

CHAIRPERSON: *Ja.*

ADV VUYANI NGALWANA: DCJ unless there are ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: Other questions that you want to put to me those are my submissions for now.

CHAIRPERSON: Yes. No, I just want to confirm again that as far as I know the only reason Mr Nxasana is here is because I gave directions that a number of witnesses be called and he was among those and – and it was not the first time that I said he should be called. Already
10 last year I had said he should be called and I think some attempts were made but it did not happen.

ADV VUYANI NGALWANA: Yes.

CHAIRPERSON: Early this year I had said he should be called and some attempts may have been made and did not succeed.

ADV VUYANI NGALWANA: Yes.

CHAIRPERSON: So he might have had nothing to do with ...

ADV VUYANI NGALWANA: Yes.

CHAIRPERSON: Him being here and Ms Jiba maybe or his evidence been at – at a particular time nor would the legal team really of the
20 Commission have anything to do with that and from my side as I indicated earlier on and you were not here with all the allegations about what has been happening at the NPA this Commission cannot finish its work in regard to the law enforcement agencies what has been happening without hearing evidence of somebody like Mr Nxasana.

ADV VUYANI NGALWANA: Yes.

CHAIRPERSON: So I just – I just want to clarify that.

ADV VUYANI NGALWANA: Yes. No thank you DCJ. Deputy Chief Justice that thought has come back to me while you were addressing (intervenes).

CHAIRPERSON: Yes, yes.

ADV VUYANI NGALWANA: It is in the extent of the evidence that Mr Nxasana now maybe led on by Mr Pretorius. There has been a suggestion that if the evidence covers matters that are already in the public domain or matters that have already been dealt with in ...

10 **CHAIRPERSON:** In judgment.

ADV VUYANI NGALWANA: Affidavits and in judgments.

CHAIRPERSON: *Ja.*

ADV VUYANI NGALWANA: That Ms Jiba would have had an opportunity to deal with those in any event. So there should be no impediment to Mr Nxasana testifying to those issues. The difficulty with that ordinarily I have – I would have no difficulty with it but the difficulty in these circumstances ...

CHAIRPERSON: Hm.

20 **ADV VUYANI NGALWANA:** Is I do not know what evidence he is going to testify to ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: That is already in the public domain.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: That is the one thing and so ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: One needs to do to perform this exercise of looking ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: At what is already in the public domain to which Mr Nxasana will testify to ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: And so one would not raise any objection.

CHAIRPERSON: *Ja.*

ADV VUYANI NGALWANA: So the exercise that needs to be performed
10 is look at what is in the public domain and what is new.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: Standing now here before you I do not know what is new what is in the public domain ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: And so ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: It seems to me ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: Reasonable and practical to allow the legal
20 team to perform that exercise.

CHAIRPERSON: *Ja.*

ADV VUYANI NGALWANA: Had we known that Mr Nxasana is going to be testifying today.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: We probably would have performed that

exercise already.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: We cannot now be ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: Penalised ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: And be expected to sit in the Commission.

I could sit ...

CHAIRPERSON: Hm.

10 **ADV VUYANI NGALWANA:** On a watching brief ...

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: To listen to what is been led to ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: But since I do not know what is already in the public domain I cannot stand up and object or tug my learned friend by the sleeve of his jacket and say well hang on a second.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: That is not in the public domain because I do not know ...

20 **CHAIRPERSON:** Yes, yes.

ADV VUYANI NGALWANA: And so Deputy Chief Justice I would request ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: That the first option that Mr Pretorius suggested ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: Which is and I would add this ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: That that evidence should subtract any evidence that implicates Mr Nxasana whether it is in the public domain or not.

CHAIRPERSON: Ms Jiba.

ADV VUYANI NGALWANA: Ms – did I say?

CHAIRPERSON: You say Mr Nxasana.

10 **ADV VUYANI NGALWANA:** Oh I am sorry. Mr Nxasana does not seem to here implicate. Any evidence that implicates Ms Jiba should be held back. I am not saying it should excised or not dealt with. It should be held back. The opportunity for dealing with such evidence at this forum will come. It may be next week. I do not know what the – what the schedule of the Commission is. It may be next week. It may be in two weeks' time.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: By that time ...

CHAIRPERSON: Hm.

20 **ADV VUYANI NGALWANA:** The legal team for Ms Jiba would have performed all these exercises ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: And therefore ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: The matter can continue without any

discomfort from ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: Ms Jiba's team.

CHAIRPERSON: As we speak what I am inclined to allow is Mr Pretorius first option which you – you have no problem with but when I say that I am inclined to say there should be no problem if the evidence includes evidence or it includes matters that have been dealt with in court judgments or affidavits filed in – in court on matters that are in the public domain already in respect of which whether it is
10 Ms Jiba or the former President or Mr Mrwebi where they would have had a chance to deal with. In regard to the point you make namely that as you stand there you do not know what those may be because you have not had a chance to have a look I am wondering whether there will be no problem if we proceed on the basis that Mr Pretorius would be cautious to look at – to deal – to lead the witness in regard to matters that fall with that - within that and you might not be aware of it as long as it can be shown that there – there are matters that are dealt within judgments or in affidavits that have been in court and so on and then to
20 the – and therefore that for now there should not be any new matters dealt with that implicate the persons that have not been covered in that way but that when Mr Nxasana comes back everybody who is implicated has had a chance then they can - he can cover all new matters. That is the inclination I have. What do you say about that?

ADV VUYANI NGALWANA: Yes Deputy Chief Justice far be it for me to doubt my learned friend Mr Pretorius' intentions ...

CHAIRPERSON: *Ja.*

ADV VUYANI NGALWANA: Or integrity – I even hesitate to bring in the word integrity.

CHAIRPERSON: *Ja.*

ADV VUYANI NGALWANA: I am quite confident that ...

CHAIRPERSON: *Ja.*

ADV VUYANI NGALWANA: He will do precisely that and steer off ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: Away from new matters.

10 **CHAIRPERSON:** Yes.

ADV VUYANI NGALWANA: Might it not be a sort of belt and racist job ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: To request Mr Pretorius to when he puts such questions to Mr Nxasana that have previously been or dealing with matters that are previously of reason ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: On affidavit or in judgments ...

CHAIRPERSON: Hm.

20 **ADV VUYANI NGALWANA:** Perhaps prefix the question. I know it may be a tough ask ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: Because he maybe he did not prepare it that way.

CHAIRPERSON: Yes.

ADV VUYANI NGALWANA: To prefix the question with Mr Nxasana in the matter of so and so in the judgment without citing a particular paragraph ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: This matter was dealt with can I ask you this question then ask him or ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: In a particular affidavit in a matter this was dealt with ...

10 **CHAIRPERSON:** Hm.

ADV VUYANI NGALWANA: So that when I keep my note ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: I know exactly which judgment to go to ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: To satisfy myself and the legal team ...

CHAIRPERSON: Hm.

ADV VUYANI NGALWANA: That that matter was indeed – had indeed been dealt with previously and that it is not new.

20 **CHAIRPERSON:** Hm. I – I think what would be important is that the witness' evidence is limited to those parameters.

ADV VUYANI NGALWANA: Yes.

CHAIRPERSON: Whether Mr Pretorius refers to which affidavit in which matter and so on and so on if he – if he can. I am sure there is no problem but if he is not able to as long as in due course you can be informed ...

ADV VUYANI NGALWANA: Yes.

CHAIRPERSON: To say that related to that. That related to that. So as long as that can be done it should be fine.

ADV VUYANI NGALWANA: No I am happy with that.

CHAIRPERSON: You are? You would be happy with that?

ADV VUYANI NGALWANA: Yes.

CHAIRPERSON: Okay, alright. I think we proceed. Mr Pretorius...

ADV VUYANI NGALWANA: Thank you Deputy Chair.

CHAIRPERSON: Thank you Mr Ngalwana. Mr Pretorius what do you ...

10 **ADV PAUL JOSEPH PRETORIUS SC:** Chair just ...

CHAIRPERSON: Say that is the inclination I have but you have (intervenes).

ADV PAUL JOSEPH PRETORIUS SC: Just a little more briefly than what has occurred so far. The first thing is you will make an order. I will abide by that order. I cannot abide by suggestions ...

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: In regard to what would be appropriate.

20 **CHAIRPERSON:** *Ja*, no, no but I want to hear what you have to say about suggestions.

ADV PAUL JOSEPH PRETORIUS SC: Yes. So let me do that then. Firstly it is important to place on record this issue of timing.

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: There is a suggestion that the witness' evidence has been timed intentionally or unintentionally ...

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: I do not know how you time evidence.

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: Evidence unintentionally ...

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: In order to prejudice Ms Jiba.

CHAIRPERSON: Hm.

10 **ADV PAUL JOSEPH PRETORIUS SC:** Let me state quite clearly that is not the case.

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: I can give the Chair an assurance and ...

CHAIRPERSON: *Ja.*

ADV PAUL JOSEPH PRETORIUS SC: And as you know Chair it was at your direction that this ...

CHAIRPERSON: Well I – I have made that quite clear.

ADV PAUL JOSEPH PRETORIUS SC: That this happened.

CHAIRPERSON: Hm.

20 **ADV PAUL JOSEPH PRETORIUS SC:** In any event the timing was not a choice of the witness.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: The timing was imposed ...

CHAIRPERSON: *Ja.*

ADV PAUL JOSEPH PRETORIUS SC: On the witness by the

Commission ...

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: At your request.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: He had nothing to do with it at all.

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: The third is that in any even the consequences of evidence being led under oath or under affirmation at
10 a public inquiry of this nature would inevitably affect other issues in other jurisdictions and that must be so. Those consequences can never be an excuse or a ground for not leading evidence that we are obliged to lead here by virtue of statute but that is not an issue that we need do any more than note for the present.

CHAIRPERSON: Yes, yes.

ADV PAUL JOSEPH PRETORIUS SC: The second point that we would like to emphasis as a legal team Chair is the very nature of a public inquiry. It involves encouraging witnesses to come forward, to give evidence within its terms of reference. It is inevitable the statute
20 contemplates that the terms of reference contemplated the regulations contemplated the rules contemplated that persons will be implicated by evidence adverse to that – to that persons interests. It is the very stuff of this inquiry that evidence would be led implicating other persons in many cases negatively or adversely. That principle cannot be undermined by any order that you would make Chair or anything that

the legal team could agree to. Provided witnesses are treated fairly and those rules are there for that purpose.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: So Chair all we submit ...

CHAIRPERSON: *Ja.*

ADV PAUL JOSEPH PRETORIUS SC: Is that the principle must remain sacrosanct.

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: That witnesses must not be
10 prevented from giving such evidence as they are entitled to give without fair prejudice (intervenies).

CHAIRPERSON: Yes but remember Mr Ngalwana also made it clear that they are not seeking to prevent the leading of evidence ...

ADV PAUL JOSEPH PRETORIUS SC: Well ...

CHAIRPERSON: It is just the timing.

ADV PAUL JOSEPH PRETORIUS SC: No that is – that is clear.

CHAIRPERSON: *Ja.*

ADV PAUL JOSEPH PRETORIUS SC: And then a solution that we will reach ...

20 **CHAIRPERSON:** Yes.

ADV PAUL JOSEPH PRETORIUS SC: That principle will be met but the public out there is listening to this argument.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: And it can never be the case that the public should be discouraged ...

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: From coming forward to give their evidence ...

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: In fear that prior to their giving evidence ...

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: They will somehow come under some sort of judicial or other attack and ...

10 **CHAIRPERSON:** Hm.

ADV PAUL JOSEPH PRETORIUS SC: Somehow their influence will – their evidence will be influenced in that way. So the principle that must remain sacrosanct – we submit – is that witnesses must believe that they are free to come here and give evidence whatever its consequences and however damaging it may be to other people and I believe in the solution we have reached that is sacrosanct. It is subject only to one duty and that is the duty of the Commission to act fairly and that we are trying to do in that case. The last point that I would like to make Chair is that I will obviously abide by your ruling but
20 the intention is not to deal with anything beyond the interactions that gave rise to the many court applications and decisions of the court and in fact insofar as a judgment deals with a particular issue one may assume that that is in the public domain. It is a matter very clear thank you Chair.

CHAIRPERSON: I just want to emphasise again that the Commission

seeks to strike a balance between various or among various interests and one of these is that it seeks to ensure fairness to all parties including implicated persons. I have made it clear over the past year or so both in media briefings and in this venue that implicated persons will be dealt with fairly as well. They must be dealt with fairly and that nobody will have findings made against them just because of what the media may be saying about them or against them. Any findings that will be made will be made on the basis of evidence led in the Commission and throughout we continue to try and be fair to everybody. I thought I

10 must just emphasise that and again to the extent that there may have been any thinking that Mr Nxasana – Mr Nxasana’s being here is timed by anybody to coincide with anything. Again I indicate that he was called because I gave directions that he and certain other witnesses whom we are not mentioning now be called and I have been told that some of them are not available. So they will – may have to be called later. So we will continue to have situations where a person who is implicated or not implicated but a person who in the view of the Commission has knowledge or information that may be helpful in the inquiry of the Commission may be called to come and give evidence.

20 So it is not the last time that a person is called to give evidence because the Chairperson so directs but fairness to all implicated persons is very important but as I say there is fairness that must be taken into account together with all practicalities and constraints that the Commission has – within which the Commission must operate. So what I am – these are just remarks that I consider important to make.

With regard to how we proceed I confirm that we are going to follow the option – option one that Mr Pretorius mentioned with which Mr Ngalwana does not have a problem subject to the remarks he made and on the understanding that I believe we – all three of us have achieved here in this open hearing in terms of also matters that may be in the public domain by way of court judgments and affidavits filed in court and Mr Pretorius in leading the evidence of the witness will be – will bear that in mind as he leads the evidence of the witness. Of particular importance in this case is that the legal team was not able to
10 give notice even to say Mr Nxasana would be giving evidence. Sometimes there may be a situation where notice was given of – in terms of Rule 3.3 of the Rules of the Commission but the 14 days did not lapse. That might fall under a different considerations. So Mr Nxasana will have to come back at – on a later date to finalise his evidence that would cover any matters that will fall outside of the parameters that I have indicated as discussed here at the open hearing with Mr Pretorius and Mr Ngalwana. That is how we are going to proceed.

ADV PAUL JOSEPH PRETORIUS SC: Thank you Chair.

20 **CHAIRPERSON:** I would like to take a five minute adjournment and then we will – we will continue. We will just take a five minute adjournment. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: You may proceed Mr Pretorius.

ADV PAUL JOSEPH PRETORIUS SC: Chair just a housekeeping matter, I've decided to deal with something that I had intended to deal with at the conclusion of the witnesses' evidence and that's the Constitutional Court judgment, one can safely assume that matters commented on by the Constitutional Court and contained in the judgement, particularly are matters in the public domain. They do not, in any event, implicate Ms Jiba or any other individual apart from the former President in any sense at all and those are merely comments.

CHAIRPERSON: Well you are, of course, not suggesting that what
10 you mean is whatever it is you are going to refer to is something that has been said by the Court and is in the public domain irrespective ... (intervention).

ADV PAUL JOSEPH PRETORIUS SC: And all parties concerned have had an opportunity to present their versions, argue fully and the result of all that process in the highest Court is what I'm going to refer to.

CHAIRPERSON: Yes okay.

ADV PAUL JOSEPH PRETORIUS SC: Chair in addition to that Mr Nxasana himself raises a concern that he's here at some personal cost and at the request of the Commission, volunteered to come forward and
20 given that his evidence may now stretch over to another day it's a matter of some concern and I would just wish to place that on record it was communicated to me during the recent short adjournment.

CHAIRPERSON: Yes maybe before you proceed let me talk to him. Mr Nxasana, it appears that it's inevitable that you may have to come back, now Mr Pretorius tells me that you are concerned about that. It

doesn't mean you'll come back tomorrow so you may have intended to spend only today at the Commission but in terms of when you would come back your availability would be looked at as well. Does your concern remain, notwithstanding?

MR MXOLISI SANDILE OLIVER NXASANA: Yes Chair it remains Chair, notwithstanding. Chair as I have explained that I run a practice and unfortunately I'm a sole proprietor of my practice, my practice is suffering as I am here. In fact, I've been here, not only today, two days already.

10 **CHAIRPERSON:** Including yesterday.

MR MXOLISI SANDILE OLIVER NXASANA: Including yesterday.

CHAIRPERSON: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: And they say that it is inevitable and it's anticipated that I'll have to come back.

CHAIRPERSON: Yes – no I think it's unfortunate that this is the situation and I appreciate what you are talking about when you are a sole practitioner in a legal firm when you are not there you are not earning income and there are people you have to pay at the end of the month, there are bills to be paid but the legal team may have to have a
20 look, I mean, if somebody goes to give evidence in Court, there's provision for witness fees and I would imagine that the Commission should have similar provisions that are applicable to it. I don't know what limits there are but I would have imagined that they should be – their rate should be such that it should, as far as personal, place the person – the witness in the position he or she would have been in if

she had not been called to come and give evidence but I think that probably at this stage there's nothing more one can say other than that, that avenue should be explored that might not fully cover your situation but it might go to a certain point, is that right?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

CHAIRPERSON: Yes I think that must be explored, I can see no reason why there wouldn't be a similar provision applicable to the Commission but the legal team can look into that and you can be in touch with them.

10 **MR MXOLISI SANDILE OLIVER NXASANA:** Thank you Chair.

ADV PAUL JOSEPH PRETORIUS SC: Well look at the applicable law.

CHAIRPERSON: Yes look at the applicable law ja, thank you.

ADV PAUL JOSEPH PRETORIUS SC: Thank you. Chair the final matter is that, Mr Nxasana is booked on a flight at 7 o'clock so if we may because we're going to come back another day anyway, adjourn at the normal time.

CHAIRPERSON: Ja that's fine.

ADV PAUL JOSEPH PRETORIUS SC: Thank you.

CHAIRPERSON: One second Mr Pretorius, thank you.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair. Mr Nxasana at page 11 of your statement you deal with the circumstances giving rise to your ultimate suspension by the President. For the moment we're not going to deal with the evidence that you intended leading concerning the circumstances which say – which you say would have explained or would explain the President's actions because those are

matters which implicate other parties.

MR MXOLISI SANDILE OLIVER NXASANA: Yes but just for correction I wasn't ultimately suspended, just for the record.

ADV PAUL JOSEPH PRETORIUS SC: Yes.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Yes there was an intention ...
(intervenes)

MR MXOLISI SANDILE OLIVER NXASANA: There was an intention.

ADV PAUL JOSEPH PRETORIUS SC: To suspend and that was the
10 subject matter of litigation.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct yes.

ADV PAUL JOSEPH PRETORIUS SC: I'm sorry if I put it that way. You also deal with the step that you took to ensure that in any process that occurred in relation to your employment you attempted to ensure that you would receive a fair hearing.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: You deal with the inquiry that was intended to be held under Advocate Nazeer Cassim.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

20 **ADV PAUL JOSEPH PRETORIUS SC:** We won't go into that for the moment simply because I'd like to keep the evidence in its proper sequence. You then deal with the situation at the NPA during your term of office which has been a subject of comment by the Courts and concerns the conduct of persons who are implicated by your statement.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: I'm not going to test the fine distinctions between what are facts within your knowledge that haven't been canvassed in Court and what evidence has been canvassed in Court, that's perhaps too fine a distinction to draw at this stage. So what I'd like to do is, just to place on record as is common knowledge that you ultimately entered into what has been termed, a settlement agreement.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: That settlement agreement
10 involved payment to you of a sum of money.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: That issue came before the Courts and what came before the Courts were not only the terms of the settlement agreement but the fact of the settlement agreement, the circumstances in which it took place and its lawfulness.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: That litigation of which you were a part but not the principle applicant finally found its way to the Constitutional Court.

20 **MR MXOLISI SANDILE OLIVER NXASANA:** That is so.

ADV PAUL JOSEPH PRETORIUS SC: And in a judgment of the Constitutional Court which is contained in the bundle at page 85 the Constitutional Court dealt with the evidence placed before it...(intervention).

CHAIRPERSON: One second Mr Pretorius, thank you, you may

proceed.

ADV PAUL JOSEPH PRETORIUS SC: The Constitutional Court dealt with the evidence that had been placed before it, dealt with the judgements of the Court below and came to its own findings in relation to the issues before it, principally matters relevant to the National Prosecuting Authority and in particular relevant to the eventual ending of your term of office.

MR MXOLISI SANDILE OLIVER NXASANA: That is so Chair.

ADV PAUL JOSEPH PRETORIUS SC: And I'd like to go there directly
10 if I may, to deal with, firstly some general comments made by the majority of the Court under the hand of Madlanga J, Justice Madlanga and if one can go to paragraph six. The Constitutional Court and its majority there says, and that's at page – I am sorry Chair, that's at page 92 of the bundle where the background is dealt with.

CHAIRPERSON: Thank you.

ADV PAUL JOSEPH PRETORIUS SC: Paragraph six reads,

20 "The event that are at the centre of these proceedings are in the public domain, the judgment of the High Court notes that it was common cause before that Court that since September 2007 the recent history at the NPA, and it quotes the judgment of the High Court, has been one of paralysing instability",

That is the quote, that judgment gives detail of that history. If we may go then to paragraph seven it reads,

"In July 2014 within about only nine months of his appointment, a process calculated to remove Mr Nxasana

from office commenced”,

That process would have been the substance of your evidence today.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct

ADV PAUL JOSEPH PRETORIUS SC: In the main at least,

“The then President, the judgment continues, Mr Jacob Zuma informed Mr Nxasana of his intention to institute an inquiry into his fitness to hold office, this was followed by a notice that the former President was considering suspending Mr Nxasana pending finalisation of the inquiry. The former President said that suspension was necessary in order to maintain the integrity and good administration of the NPA”,

10

Your evidence would have dealt with that contention in some detail because you, in your evidence, would have today, and will in the future give evidence regarding what you regard as the true reasons for what occurred.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct.

ADV PAUL JOSEPH PRETORIUS SC: The notice also specified that the inquiry sought to establish whether certain issues were consonant with the conscientiousness and integrity of an incumbent in the office of the National Director of Public Prosecutions as required by the NPA Act, we’ve referred to that section of the constitution already Mr Nxasana.

20

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: The issues were,

“Mr Nxasana previous criminal conviction for violent conduct allegedly unbecoming and divisive comments which had the effect of bringing the NPA into disrepute made by Mr Nxasana and reported in the media and alleged non-disclosure of facts and circumstances of prosecutions which Mr Nxasana had faced previously”.

Now in your evidence you will go into some detail in regard to these issues and in particular the lack of particularity that you alleged in Court proceedings you had been subjected to.

10 **MR MXOLISI SANDILE OLIVER NXASANA:** That is so.

ADV PAUL JOSEPH PRETORIUS SC: And in fact reference is made to that in the latter part of paragraph eight on page 94 of the bundle where the Constitutional Court says,

“Mr Nxasana approached the High Court seeking an order compelling former President Zuma to provide the required particularity and interdicting the former President from suspending him until he had furnished him with this particularity”,

20 That particularity, Mr Nxasana is that to which we have just referred.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: The application was not – that application was not pursued to finality, the former President changed tact in late 2014, he proposed that the dispute between him and Mr Nxasana be mediated, Mr Nxasana acceded to this proposal, is that

correct?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: Alright. And then paragraph nine which is on page 94 of the exhibit EE reads,

10 “It appears from a letter written on 10 December 2014 by attorneys acting for Mr Nxasana that former President Zuma had engaged Mr Nxasana to get him to agree to vacate office. In the letter Mr Nxasana made it plain that he did not want to vacate office as there was no basis for him to. He stated that he would, however, consider stepping down only if he was fully compensated for the remainder of the contract period”,

Is that a correct record of the facts as far as you are concerned, I will give you an opportunity to expand on it in a moment?

MR MXOLISI SANDILE OLIVER NXASANA: Yes that is a correct record.

20 **ADV PAUL JOSEPH PRETORIUS SC:** At issue in the litigation - in part at least was whether you had requested the former President to be allowed to vacate office or whether you were compelled to vacate office against your will but subject to certain conditions. If I put it correctly, it's now your opportunity to place the issues in dispute before the Chair.

MR MXOLISI SANDILE OLIVER NXASANA: Okay thank you, Chair, I at no stage did I make a request to vacate the office to the former President Mr Jacob Zuma and that letter of the 10th that is referred to

here, I was also involved in drafting that letter confirming the discussions that we'd had with the President and the company – President and Mr Hulley together with my legal representative, therefore the Court found, correctly, that I did not make any request, I never made that request.

ADV PAUL JOSEPH PRETORIUS SC: The position is summarised in paragraph 12 of the Constitutional Court judgment and that appears at page 95 of Bundle EE – Exhibit EE it reads,

10 “It must be noted that right from the onset and throughout the entire negotiation process that culminated in the settlement agreement, Mr Nxasana unequivocally stated that he did not wish to resign and that he considered himself to be fit for office, instead his preference was for former President Zuma’s allegation that he was no longer fit for office, to be tested in a formal inquiry as proposed by the former President”,

Is that the proposed Cassim inquiry?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: The summary of the judgment continues, or the judgment continues rather,

20 “Throughout he protested the existence of a factual or legal basis for him to vacate office, also he disavowed any invocation by him in Section 12 (8) of the NPA Act to voluntarily vacate office. It is so, of course that he did indicate that he would resign only if he was paid the full salary for the remainder of his term of office”.

Does that fairly summarise the position as far as you are aware?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct, it fairly summarises the position.

ADV PAUL JOSEPH PRETORIUS SC: Then there are some general comments Chair, which I think it is appropriate to place before you because the evidence that will be led by the legal team deals pertinently with these issues and these comments of the Constitutional Court are instructive and very important for the work of the Commission
10 and if I may place them on record.

CHAIRPERSON: Yes you may do so.

ADV PAUL JOSEPH PRETORIUS SC: At paragraph 18 the Constitutional Court says,

“The importance of the office of NDPP in the administration of justice is underscored and amplified by no less an instrument than the Constitution itself. Section 1794 of the Constitution requires that there be National legislation which guarantees the independence of the Prosecuting Authority. Lower down the paragraph it reads, Section 1794 provides that National
20 legislation must ensure that the NPA exercises its functions without fear, favour or prejudice, that legislation is the NPA Act. Predictably Section 32(1) A of the NPA Act requires members of the Prosecuting Authority to carry out their duties without fear, favour or prejudice and subject only to the Constitution and the law”.

Paragraph 19 reads,

“This Court has said of the NPA’s independence “there is a Constitutional guarantee of independence” and any legislation or executive action inconsistent therewith would be subject to Constitutional control by the Courts. The reason why this guarantee of dependence exists is not far to seek. The NPA plays a pivotal role in the administration of criminal justice with a malleable corrupt or dysfunctional Prosecuting Authority many criminals, especially those holding position of influence will rarely, if ever answer for their criminal deeds. Equally
10 functionaries within that Prosecuting Authority may, as CASAC submitted be “pressured” into pursuing prosecutions to advance a political agenda. All this is antithetical to the rule of law a founding value of the Republic. Also malleability, corruption and dysfunctionality are at odds with the Constitution and junction of prosecuting without fear, favour or prejudice. They are thus at variance with the Constitutional requirement of the independence of the NPA.

It continues, at the centre of any functioning Constitutional
20 democracy as a well functioning criminal justice system, in democratic alliance, Jacobus ADC J observed that the office of the NDPP “is located at the core of delivering criminal justice”, if you subvert the criminal justice system, you subvert the rule of law and Constitutional democracy itself. Unsurprisingly the NPA Act proscribes improper interference with the performance

of prosecutorial duties. Section 32 (1) B provides, subject to the Constitution and this Act, no organ of State and no member or employee of an organ of State nor any other person shall improperly interfere with, hinder or obstruct the Prosecuting Authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions”.

And then the Court makes some further comments relevant to your evidence Mr Nxasana and generally relevant to the evidence that will be led and the concerns raised by this Commission. At paragraph
10 21, which is on page 98 of Exhibit EE it reads,

“Improper interference may take any number of forms without purporting to be exhaustive it may come as downright intimidation, it may consist in improper promises or inducements, it may take the form of corruptly influencing the decision making or functioning of the NPA. All these forms and others are proscribed by an Act that gets its authority to guarantee prosecutorial independence directly from the Constitution. Paragraph 22 reads, another guarantee of the NDPP’s independence is provision for security of tenure. In
20 Section 12 (1) the NPA Act provides that the NDPP shall hold office for a ten year non renewable term of office. It is now well established in terms of this Court’s jurisprudence that security of tenure is an integral feature of the Constitutional requirement of independence. In justice alliance, and the reference is given to that case, this Court held that

“international standards acknowledge that guaranteed tenure and conditions of service adequately secured by law are amongst the conditions necessary to secure and promote the independence of judges”, these necessary conditions must of course be true of the independence of the NPA as well. In a unanimous judgment in McBride Bossialo AJ said, amongst fact said that amongst the factors that are relevant to the independence of offices or institutions which in terms of constitutional prescripts must be independent are “the method
10 of appointment, the method of reporting, disciplinary proceedings and the method of removal from office and security of tenure”,

And we’re here dealing with Mr Nxasana in your case with the removal of yourself from office and the circumstances in which that took place and the lawfulness of that set of events. There is further comment relevant to the previous comment in paragraph 23 which reads,

“The NPA Act has two other salient features that help shield the NPA from improper interference namely the non-
20 renewability of the ten-year term of office of the NDPP and certain safeguards on the removal of the NDPP from office”,

And then the various methods that provide for – are provided for termination of the office of the NDPP are dealt with. It goes on to say in paragraph 24 that, the manner in which your office was vacated Mr Nxasana was not constitutionally compliant and you recorded in the

judgment as having accepted that, is that correct?

MR MXOLISI SANDILE OLIVER NXASANA: That's is correct ja.

ADV PAUL JOSEPH PRETORIUS SC: And then paragraph 25 certain salient comments are made concerning the conduct leading up to your vacation of office and paragraph 25 reads, that is on page 100 of the judgment,

10 “The facts set out above point to one thing and one thing only; former President Zuma was bent on getting rid of Mr Nxasan by whatever means he could muster, his was an approach that kept on mutating, it was first a stick then a carrot a stick once more and eventually a carrot. There was firstly notification that Mr Nxasana would be subjected to an inquiry with a view to establishing whether he was still a fit and proper person to hold office. Concomitantly there was a threat of suspension pending finalisation of the inquiry albeit with full pay. This was followed by former President Zuma’s proposal that there be mediation. When there was no progress on this the inquiry was instituted, whilst the inquiry was in its preliminary stages the former President pursued a parallel process in which Mr
20 Nxasana was first offered in a draft settlement agreement ten million rand. As indicated earlier he did not accept it. What plainly evinces how desperate former President Zuma was to get rid of Mr Nxasana, is that this was followed by a draft settlement in which the amount was left blank. Mr Nxasana was being told to pick whatever figure, indeed Mr Hulley said

that he would “await the final amount from Mr Nxasana” and then the question is asked in paragraph 27, instead of settling for so huge an amount, why did the former President not simply pursue the inquiry, did he not believe that the evidence that had motivated him to come up with the idea of an inquiry was sufficiently cogent, if so why did he not just abandon the inquiry and leave Mr Nxasana in office, after all he was exercising his powers as President and not involved in a personal dispute which he could settle as he pleased. It is
10 difficult to comprehend why he would have settled on so huge an amount from public coffers to boot.”

It continues in paragraph 28, the inference is inescapable that he was effectively buying Mr Nxasana out of office, in my book conduct of that nature compromises the independence of the office of NDPP, it conduces to the removal of troublesome or otherwise unwanted NDPP’s through buying them out of office by offering them obscenely huge amounts of money”.

Then in addition to those comments, certain comments are made in regard to your own conduct in accepting the amount of the
20 settlement and I’ll come to that in a moment Mr Nxasana but as far as you know, is that a fair summary of the facts that were at least placed before – and I’m excluding any opinion now that may have emerged from the judgment, I’m just relating the facts.

MR MXOLISI SANDILE OLIVER NXASANA: Yes, it’s a fair remark that is contained here.

ADV PAUL JOSEPH PRETORIUS SC: I know that you are more empathic with the minority judgment.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Which we will come to in a moment and explain the differences, but your evidence then not only deals with the termination of your office as NDPP but the real reasons that you allege existed which caused your office to be ended.

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: And that evidence would
10 implicate certain individuals.

MR MXOLISI SANDILE OLIVER NXASANA: Certain individuals yes.

ADV PAUL JOSEPH PRETORIUS SC: And it is to those individuals that notice will be given and in relation to whom you will give the evidence in due course.

MR MXOLISI SANDILE OLIVER NXASANA: That is so Chair.

ADV PAUL JOSEPH PRETORIUS SC: But as I understand that evidence it is such that there is an explanation for the conduct which led to your, the termination of your services?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

20 **ADV PAUL JOSEPH PRETORIUS SC:** I must put before you the comments of Justice Madlanga in paragraph 85 of the judgment, those are clear on page 123 of the bundle Chair. In the latter part of paragraph 85 Justice Madlanga says the following:

“Effectively although Mr Nxasana strongly protested his fitness for office he was saying he was willing to be bought out of

offices if the price was right. As much as I sympathise with him I do not think that is the reaction expected of the holder of so high and important an office. An office the holder of which if he or she is truly independent is required to display utmost fortitude and resilience. Even allowing for human frailties, because Mr Nxasana is human after all, I do not think the holder of the office of NDPP could not reasonably have been expected to do better. His conduct leads me to the conclusion that a just and equitable remedy is not to allow him to return to office.”

10

Having decided as the Constitutional Court did that the termination of your services was unlawful the further question arose in relation to which the majority and the minority disagreed.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: And that was whether you should be allowed to return to office. In fairness you should be entitled to comment now that that evidence is on record, or that judgment is on record.

MR MXOLISI SANDILE OLIVER NXASANA: Yes Chair. Are you asking me to comment?

ADV PAUL JOSEPH PRETORIUS SC: Yes, if you wish to.

MR MXOLISI SANDILE OLIVER NXASANA: Yes, thanks.

ADV PAUL JOSEPH PRETORIUS SC: It's an adverse comment and therefore in fairness you should be allowed to put your own opinion before the court, before the judge, before the Chair.

MR MXOLISI SANDILE OLIVER NXASANA: Firstly Chair as things were going on and that have been going on after I left office I felt that had this matter come before the Constitutional Court after this Commission was constituted and after the other Commission of Inquiry had been constituted I strongly believe that the majority in the Constitutional Court would have come to a different conclusion. That is my view.

CHAIRPERSON: That is in relation to whether you should be reinstated or not?

10 **MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

CHAIRPERSON: Okay.

MR MXOLISI SANDILE OLIVER NXASANA: Perhaps ...(intervention)

CHAIRPERSON: Not in regard to the main issue in regard to remedy, in other words.

MR MXOLISI SANDILE OLIVER NXASANA: To remedy, Chair I felt that the ...(intervention)

CHAIRPERSON: Okay, I'm sorry, I may be confusing you.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

CHAIRPERSON: I just want to make sure that I understand where you
20 locate your comments, you have just said that you felt or feel that had the Constitutional Court considered that matter after this Commission and after the Mokgoro Inquiry ...(intervention)

MR MXOLISI SANDILE OLIVER NXASANA: Mokgoro Commission, inquiry yes.

CHAIRPERSON: They may have come to a different conclusion.

MR MXOLISI SANDILE OLIVER NXASANA: That's my view.

CHAIRPERSON: I'm just asking whether the conclusion you are talking about is with regard to whether you should be reinstated or not or are you talking about the main conclusion on the matter.

MR MXOLISI SANDILE OLIVER NXASANA: I believe that the conclusion would have been the same as the conclusion reached by the minority judgment that I should be reinstated.

CHAIRPERSON: Okay.

ADV PAUL JOSEPH PRETORIUS SC: If we have time we will get
10 there in a moment. Just to place the judgment of the majority in proper
context its reasoning at least in part is in paragraph 87 which appears
on page 124, bundle EE, EXHIBIT EE, it reads:

“The narrative at the beginning of this judgment shows that for
a few years there has been instability in the office of NDPP,
and therefore in the leadership of the NPA. With the Court
challenge to Mr Nxasana's vacation of office and to the
appointment of Advocate Abrahams that instability persist to
this day.”

The second judgment, that's the minority judgment, accepts correctly
20 that it would be open to the President to initiate an inquiry into whether
the manner in which Mr Nxasana vacated office renders him unfit to
hold office. The order proposed by the second judgment thus has the
effect of prolonging the instability. The second judgment proposed that
you should be allowed to return or as a matter of law that your contract
should continue, in fact that is effect of the judgment.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: Relying on the former President of the Labour Court reasoning that where a dismissal is invalid and unlawful nothing needs to be done, the employment contract just continues, Zondo, JA, I think.

CHAIRPERSON: (laughing) Well there has never been a Zondo , JA. Yes.

ADV PAUL JOSEPH PRETORIUS SC: President of the Labour Court.

CHAIRPERSON: Zondo, JP.

10 **ADV PAUL JOSEPH PRETORIUS SC:** JP yes.

CHAIRPERSON: Okay yes.

ADV PAUL JOSEPH PRETORIUS SC: The order proposed by the second judgment that has the effect of prolonging the instability, so it seems that part of the reasoning of the majority was that the instability by allowing you to return and the majority felt it had a discretion in that regard, which should be exercised in favour of the conclusion that you should not be allowed to return, the concern was one of stability at the NPA.

20 And then one of the further results of the judgment of the Constitutional Court is that the appointment of Advocate Abrahams was declared invalid and the President was directed to appoint a replacement for Advocate Sean Abrahams.

MR MXOLISI SANDILE OLIVER NXASANA: Yes.

ADV PAUL JOSEPH PRETORIUS SC: If I may then just briefly go to the order, you were ordered then to repay the amount received by

yourself less tax, is that correct?

MR MXOLISI SANDILE OLIVER NXASANA: That is correct Chair.

ADV PAUL JOSEPH PRETORIUS SC: And then in the minority judgment after a long debate over the consequences of a declaration of invalidity in regard to termination of an employment contract the conclusion is reached at paragraph 112 by the minority, which is at page 134 of the bundle Chair, where Justice Jaftha stated:

10 “In the present matter there is nothing exceptional or extraordinary that warrants the exercise of remedial power to prevent Mr Nxasana from returning to office. His return will certainly not cause a constitutional crisis or a national crisis. On the contrary his return would enable the President to follow the law if he wishes to remove him from office and Parliament would play a vital part in that process, and more importantly preventing Mr Nxasana from returning to office without pronouncing on the validity of his employment contract would not only be unfair to him, but would also create considerable uncertainty on the parties rights and interests. This would be antithetical to the Rule of Law which promotes certainty.”

20 And in relation to a just and equitable order the Court found at paragraph 128, in the minority page 140:

 “As mentioned allowing Mr Nxasana to go back to his job would also meet the objectives of the Constitution and the Rule of the Law if he his involvement in the impugned settlement agreement brought his fitness to hold office into question he

may be removed in Section 12 of the NPA Act.”

For all these reasons says the minority:

“I do not support the conclusion that Mr Nxasana ought not to resume office following the setting aside of the invalid and unlawful termination of his appointment.”

That is in summary what the Constitutional Court found after all the evidence had been placed before it, had been considered by the lower courts and was finally considered by it and we all know the result.

What remains is for your evidence to clarify the circumstances
10 which led to steps being taken to remove you from office, and those will be the subject of the further evidence of Mr Nxasana.

Is this a convenient time Chair?

CHAIRPERSON: Yes it is, subject to just mentioning that the last part that you talked about in regard to the judgment comes from the minority judgment.

ADV PAUL JOSEPH PRETORIUS SC: Yes.

CHAIRPERSON: And what you said at the end might be misunderstood as if you are saying that’s what the Court said but what you intended is to say some of the things you have said come from the majority
20 judgment and the last bit comes from the minority judgment.

ADV PAUL JOSEPH PRETORIUS SC: Yes the last quotes were all from the minority judgment.

CHAIRPERSON: Yes, yes. Okay yes we can adjourn now, so Mr Nxasana we will adjourn, and it’s on the basis that you would be asked to come back and the legal team and yourself liaise with them with

regard to what witness fees or what fees is maybe payable when a witness has come to the Commission and because of that he is not able to work and earn income. For somebody who is self-employed it is quite important, I am hopeful that there is a provision that would – should take care of that, but – you will be asked to come back.

MR MXOLISI SANDILE OLIVER NXASANA: Thank you Chair, I will

CHAIRPERSON: Yes, but other than that thank you for availing yourself and then arrangements will be made as to when you will come back and the legal team of the Commission will make sure that
10 implicated persons are given Rule 3.3 notices.

ADV PAUL JOSEPH PRETORIUS SC: Yes, I might just add Chair that the Commission's Act under which we operate was passed at the time that the currency was still in pounds, so that may favour the witness.

CHAIRPERSON: (laughing). Ja so he might prefer that the remuneration be in the currency as stipulated in the Commissions Act of 1947.

ADV PAUL JOSEPH PRETORIUS SC: I think the Interpretation Act may have something to say about that, but we did examine it.

CHAIRPERSON: Yes, yes, no thank you very much once again, you are
20 excused.

MR MXOLISI SANDILE OLIVER NXASANA: Thank you Chair.

CHAIRPERSON: We adjourn, and tomorrow we will start at – what time should we ...

INQUIRY ADJOURNS TO 13 MAY 2019

**TRANSCRIBER'S CERTIFICATE FOR COMMISSION OF INQUIRY INTO STATE
CAPTURE
HELD AT
PARKTOWN, JOHANNESBURG**

DATE HELD : 2019-06-12

DAY: : 111

TRANSCRIBERS : B KLINE; M NETTA; D STANIFORTH

Audio's are typed verbatim, as far as audible/possible



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