JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

***IN RE*:** **RECORDAL OF THE VERSIONS OF DR JACOBUS PETRUS PRETORIUS ("*DR PRETORIUS*"), ADVOCATES GEORGE BALOYI ("*BALOYI"*), KHEHLA MASENYANI ANDREW CHAUKE ("*CHAUKE*"), GLADSTONE SELLO MAEMA ("*MAEMA*"), KHULEKANI RAYMOND MATHENJWA ("*MATHENJWA*"), ANTHONY MOSING ("*MOSING"*), MARSHALL MOKGATLHE ("*MOKGATLHE*"), AND MICHAEL MASHUGA ("*MASHUGA"*) ("THE IMPLICATED PROSECUTORS"), IN RESPONSE TO ALLEGATIONS IMPLICATING THEM IN STATE CAPTURE MADE TO THE COMMISSION BY WITNESSES WHO CAN NO LONGER BE CROSS EXAMINED DUE TO THE COMMISSION'S OPERATIONAL CONSTRAINTS.**

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A. INTRODUCTION

1. The implicated prosecutors' applications for the condonation of the late filing of the Rule 3.4 Statements submitted as well as their applications for the cross examination of the witnesses who implicated them in state capture were set down for hearing on 15 and 16 June 2021.

2. Dr Pretorius' application for condonation of the late filing of his supplementary affidavit, leading of his evidence and cross-examination as well as the cross-examination of Booysen and McBride was set down for 25 and 28 June 2021.

3. At the hearing of 15 June 2021, the implicated prosecutors were informed by the Chairperson that he was inclined to refer matters falling under the Law Enforcement work stream, including the implicated prosecutors' matters, to other agencies for further investigation as the related investigations were not finalised and also due to time constraints. It is in light of these operational constraints of the Commission, that the implicated prosecutors asked for and were granted leave to record their versions regarding evidence implicating them in hearings of the Commission.

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

5. The notion of “State Capture” is new globally and locally. It is not yet legally defined in South African law. In dealing with submissions already made to the Chairperson alleging that the implicated prosecutors are implicated in state capture, it is important that all the relevant and available information be placed before the Chairperson for consideration. This is pertinent to the development of State Capture law in the South African legal system.

6. In light of the above, it is pertinent that the implicated prosecutors present their versions in the Commission so that the public may know why all the suspects were prosecuted or decisions were made to decline to prosecute[1] so that same forms part of the report of the Commission, considering that operational constraints preclude them from exercising their right to cross-examine those that implicated them.

B. GENERAL OVERVIEW

(a) Opening remarks

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

[1] *Zuma v DA* (836/2013) [2014] ZASCA 101 (28 August 2014) at para 35

8. The Constitutional Court in the judgment of *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma*, with regard to the public interest in the Commissions of Inquiry stated as follows:

> "*In addition to the function of advising the President, a commission of inquiry may also serve the purpose of holding a public inquiry in respect of a matter of public concern. The purpose of a public hearing under those circumstances is to restore public confidence in the institution in which the matter that caused concern arose. Here the focus is not what the President decides to do with the findings and recommendations of a particular commission.* ***Instead, the objective is to reveal the truth to the public pertaining to the matter that gave rise to public concern***."[2] (own emphasis)

9. Similarly, the Constitutional Court in the judgment of *Minister of Police and Others v Premier of the Western Cape and Others*, explained the purpose of an Investigative Commission and the requirement of public purpose as follows:

> "*In addition to advising the executive, a commission of inquiry serves a deeper public purpose, particularly at times of widespread disquiet and discontent. In the words of Cory J of the Canadian Supreme Court in Phillips v Nova Scotia:*
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> *'One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover the truth…In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation*

2 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* (CCT 295/20) [2021] ZACC 2; 2021 (5) BCLR 542 (CC).

> *investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public*."[3] (Footnotes omitted) (own emphasis)

10. In the matter of *The Chairperson of the Judicial Commission of Inquiry into State Capture v President of the Republic of South Africa*,[4] the Commission's Chairperson, in motivating for an extension of the period for the Commission to complete its work, is said to have explained that the outstanding work yet to be conducted includes; the investigation and or completion of investigations of allegations that the law enforcement entities such as the National Prosecution Authority ("*NPA*"), the Directorate for Priority Crime Investigation ("*DPCI*" or "*HAWKS*") or the Special Investigation Unit ("*SIU*") may have also been 'captured'.

11. With regard to the functions of the NPA and the obligations on how its officials are to conduct their duties, the Supreme Court of Appeal ("*SCA*") in the judgment of *Zuma v DA*[5] stated as follows:

> "*The first respondent [NPA], as an organ of state, has a duty to prosecute without fear, favour or prejudice by upholding the rule of law and principle of legality. It is also a constitutional body with a public interest duty. It behoves its officials to operate with transparency and accountability. It has a duty to explain to the citizenry why and how it arrives at the decision to quash the criminal charges against the accused persons, particularly where the matter involves very senior state officials. In pursuance of its constitutional obligations it is incumbent upon the NPA to pass the rationality test and inform the public why it quashed the*

3 *Minister of Police and Others v Premier of the Western Cape and Others* (CCT 13/13) [2013] ZACC 33; 2014 (1) SA 1 (CC) at para 45.
4 *State Capture v President of the Republic of South Africa* (94785/2019) [2020] ZAGP (24 February 2020).
5 *Zuma v DA* (836/2013) [2014] ZASCA 101 (28 August 2014) at para 35.

charges. In view, the converse would make the public lose confidence in the office of the NDPP." (own emphasis)

12. There is no doubt that the comments of the Chairperson made during the evidence of Sesoko[6] and Nxasana[7] were to the effect that, due to the grave and serious nature of the allegations levelled against the implicated prosecutors, he would request the evidence leaders and the investigators to obtain the relevant dockets and/or information that the prosecutors had before them when they made decisions to either prosecute or decline to prosecute. The reason is that this will enable the Commission to determine whether the implicated prosecutors had good reasons to recommend and institute prosecutions or decline same.

13. The above sentiments expressed by the Chairperson have been overtaken by time, and more particularly the operational constraints of the Commission. As such, the Chairperson, as indicated in the introductory portion of these summaries will no longer afford the implicated prosecutors an opportunity to appear before him and take him through the dockets and/or any information they had before them in making decisions whether to prosecute or decline same.

14. The allegations that the implicated prosecutors are captured either for political or corrupt reasons, are based on conjecture and speculation. Conjecture and speculation are not sufficient to establish what is imputed to the implicated prosecutors.

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6 Transcribed record of 25 September 2019, Day 170, page 62, line 17 to 25; and page 63, line 1 to 14.

7 Transcribed record of 12 June 2019, Day 111, page 63, line 9 to 25; page 64, line 1 to 7.

15. Similarly, there is no justification to infer wrongdoing on the part of the implicated prosecutors.

16. In **S v Mtsweni** [8] the court referred to trite legal principles pertaining to conjecture and speculation, which are different from inferences, and stated that: -

> *"…Inference must be carefully distinguished from conjecture or speculation. <u>There can be no inferences unless there are objective facts from which to infer the other facts which it is sought to establish</u>. In some cases, the other facts can be inferred with such practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inferences can be made, the method of inference fails and what is left is mere speculation or conjecture.*
>
> *…*
>
> *(1) The inferences sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.*
>
> *(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."*

(b) <u>Role players and how some of the matters are interlinked</u>

i. Rendition matter

8 1985 (1) SA 590 (AA) at 593 E - 594

17. Mosing guided the investigation into allegations of the illegal extradition of Zimbabwean Nationals, who were killed and or tortured after being handed over to Zimbabwean Police by Maluleke of the DPCI and other members of the SAPS.

18. Initially the investigation, into the unlawful extradition of the Zimbabwean nationals, was conducted by Moukangwe, a detective at the Detective Services: Mpumalanga and JJ Mahlangu, attached to the Stock Theft Unit: Middleburg.

19. Two months later, Innocent Humbulani Khuba ("*Khuba*"), of the Independent Police Investigating Directorate ("*IPID*") joined Moukangwe and Mahlangu and appointed other members of IPID and led the investigation.

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

21. On 3 March 2014, McBride was appointed the Executive Head of IPID. On 6 March 2014, McBride instructed Khuba and Angus to retrieve the docket from the DPP:SG. Khuba and Angus uplifted the docket on 7 March 2014.

22. McBride instructed Khuba and Sesoko to review the evidence and on 18 March 2014, the IPID prepared a second report which recommended that Maluleke

together with other junior police officers be charged with kidnapping and defeating the ends of justice. It no longer included Dramat and Sibiya.

23. In April 2014, on the instructions of McBride, the docket and the report dated 18 March 2014, were delivered to Nxasana who kept the docket unallocated until 13 January 2015, a period of approximately 8 months.

24. In December 2014, the then Minister of Police, Nathi Nhleko ("*Nhleko*") suspended General Anwa Dramat. Sometime in 2015, Nhleko appointed Werksmans to investigate the issue of the two IPID reports with different recommendations.

25. A case docket of defeating the ends of justice and fraud was opened against McBride, Khuba and Sesoko.

26. In February 2016, Maema recommended that McBride, Khuba and Sesoko be prosecuted. Dr Pretorius agreed with Maema's recommendation. Dr Pretorius, in line with the checks and balances envisaged section 24(3) of the National Prosecuting Act,[9] 1998 ("*NPA Act*") consulted with DPP, North Gauteng (DPP:NG), Advocate Sibongile Mzinyathi, who agreed with the recommendation.

27. Sometime in 2016, after the rendition docket had gone on a merry go round, explained in the relevant portion of this recordal, the docket was allocated to Baloyi who finally took a decision to prosecute Dramat, Sibiya and Maluleke. In

9 National Prosecuting Act No. 32 of 1998.

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

28. The prosecutors involved in the Rendition matter and the defeating of the ends of justice were Mosing, Baloyi, Mzinyathi, Maema and Dr Pretorius, who are now accused of enabling state capture.

ii. Cato Manor

29. The Cato Manor matter deals with the racketeering authorisations and predicate offences that were preferred against Booysen and members of the Cato Manor SVC Unit. Amongst others, the charges were preferred for the extrajudicial killings of suspects and other person who were not suspects.

30. There were various interlocutory applications, including review applications against the issuing of racketeering authorisations issued by Advocate Nomgcobo Jiba ("*Jiba"*), the then Acting NDPP, on 17 August 2012 and Advocate Shaun Abrahams ("*Abrahams*") on 13 February 2016.

31. The review application against the racketeering authorisation issued by Jiba culminated in the judgment by Gorven J.[10] Booysen has relied on the findings of Gorven J judgment before this Commission and ignored the fact that in the

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[10] *Booysen v Acting National Director of Public Prosecutions and Others* (4665/2010) [2014] ZAKZDHC 1.

judgment of GCB v Jiba and Others[11] Legodi found that Gorven J did not have the full facts before him, the findings made by Legodi J were supported in the SCA judgment[12] when the matter went on appeal. Similarly, the Mokgoro Inquiry also found that, had the full facts been placed before Gorven J, he may have come to a different conclusion regarding the finding of "*mendacity*" against Jiba.

32. The current NDPP, Advocate Shamila Batohi ("Batohi") appointed the De Kock panel to reconsider the racketeering authorisations issued by Jiba and Abrahams. This resulted in the "De Kock report". The implicated prosecutors are of the considered view that the report is flawed in many respects, as set out in their affidavits.[13] For example, they point to the failure of the panellists to consult and solicit the views of the prosecution team to the questions that they stated they could not find answers to. Another example is that their summary of the evidence is in most respects patently incorrect. All of this is pointed out in Maema and Mathenjwa's affidavits.

33. As a result of the De Kock report, the racketeering authorisations were withdrawn by Batohi. Whilst the predicate charges were withdrawn by the current DPP KZN. The implicated prosecutors who formed part of the prosecution team are of the considered view, and have demonstrated in their affidavits,[14] that the withdrawal

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11 *General Council of the Bar of South Africa vs Jiba and Others* 2017 (2) SA 122 (GP)

12 *Jiba and Another vs GCB and Another* 2019 (1) SA 130 (SCA)

13 Maema affidavit, paras 217 to 265, pages SEQ 29/2021-165 to 182; Mathenjwa affidavit, paras 194 to 380, pages SEQ 30/2021-194 to 210.

14 Maema affidavit, paras 223 to 230, pages SEQ 29/2021-165 to 167; Mathenjwa's affidavit, paras 334 to 342, pages SEQ 30/2021-194 to 196.

was irrational having regard to the decision of the SCA in the matter of *Zuma v Democratic Alliance and Others*[15] where the SCA, amongst others, held that:

"…*The exclusion of the prosecution team from the final deliberations leading up to the decision to discontinue the prosecution appeared to have been deliberate, and was in itself irrational. They were senior litigators steeped in the case, acquainted with the legal issues and had a critically important contribution to make regarding the ultimate decision to terminate the prosecution…"* (own emphasis)

34. In the relevant portions of this recordal, we set out the summaries of the implicated prosecutors.

iii. Amigos case[16]

35. Advocate Anton Steinberg was the Prosecutor assigned to deal with the matter at its inception. He then left the NPA to join the International Criminal Court, and Advocate Cyril Simphiwe Mlotshwa ("Mlotshwa") who became the Acting Director of Public Prosecutions, KwaZulu Natal ("DPP:KZN"), assembled a prosecution team led by Advocate Ncedile Dunywa ("Dunywa"), and consisted of Advocates Nomfundo Sipunzi ("Sipunzi"), Vincent Ntanjana ("Ntanjana") and Makhosini

15 2018 (1) SA 200 (SCA)

16 Due to time constraints a supplementary summary pertaining to this matter will be filed during the course of the day, 27 June 2021.

Mthembu (“Mthembu”). Sipunzi and Ntanjana later left the NPA and were replaced on the team by Advocate Bulelwa Vimbani (“Vimbani”).

36. Mlotshwa signed the indictment in respect of the predicate charges on 31 August 2011, although the formulation of the charges in the indictment was said to be defective by Advocate Johan Kruger (“Kruger”). Kruger was the head of the Special Projects Division (“SPD”), and his responsibility was to process the racketeering charges before they got authorised by the NDPP in terms of section 2(4) of POCA. On the same date, Advocate Menzi Simelane (“Simelane”) issued an authorisation certificate in respect of racketeering charges.

37. Mosing succeeded Kruger as head of the SPD and in that position, he was mandated together with Advocate Lawrence Mrwebi (“Mrwebi”) to assist the prosecution team in amending the indictment as Kruger’s queries relating to the charges therein had still not been attended to.

38. Mlotshwa was still the DPP at the time but was later replaced by Advocate Moipone Noko (“Noko”).

39. Upon finalisation of amending the indictment, a decision was taken by Noko to withdraw charges against some of the accused where it was found that the evidence available does not support the charges laid against them.

iv. SARS related matters

(aa) The interception of communication at the Directorate of Special Operations ("DSO") and the NPA offices

40. The above case relates to the unlawful installation of surveillance equipment and unlawful interception of communication at the offices of the DSO and NPA by SARS High-Risk Investigating Unit (widely known as the "Rogue Unit").

41. The existence of the Rogue Unit became public after it was widely publicised in the media.

42. The publication referred to above also revealed that the Rogue Unit was formed and operated in contravention of the law.

43. The investigation that ensued resulted in criminal proceedings being instituted against certain SARS officials.

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

(bb) Early retirement of Ivan Pillay

45. During the investigation of the Rogue Unit case, a correspondence relating to Pillay's early retirement was discovered.

46. Perusal of the correspondence revealed that the early retirement in question might have been granted in circumstances that are contrary to the applicable legal prescripts.

47. The prosecutors who were guiding the investigation in the Rogue Unit case directed that the early retirement issue should also be investigated.

48. The investigation resulted in criminal proceedings being instituted against Oupa Magashula ("Magashula"), Ivan Pillay ("Pillay"), and Pravin Gordhan ("Gordhan").

49. This too led to the prosecutors involved being labelled as enablers of the state capture, also by McBride and Booysen.

(cc) *The refusal to charge Brig Sicelo Xaba ("Xaba") and others: Mr. Vlok Symington ("Symington") matter (Brookyln CAS790/10/2016)*

50. This matter is a sequel to the matter relating to Pillay's early retirement.

51. After having been criminally charged, Magashula and Pillay made section 179(5) representations to the NDPP for charges against them to be withdrawn.

52. Amongst others, in their representations they mentioned that the manner in which Pillay's early retirement was handled, was based upon an opinion that was prepared by Symington.

53. When the members of the investigating team went to obtain a statement from Symington, a standoff between Symington and the members of the investigating team ensued, in relation to a PCLU memorandum that Symington was in possession of.

54. Flowing from the standoff, Symington laid criminal charges against the members of the investigating team and the bodyguard of the SARS Commissioner.

55. When the matter ultimately came before Baloyi, in his capacity as the Acting DPP: North Gauteng, he declined to prosecute.

56. His refusal to prosecute led to him being accused of enabling state capture by McBride and Booysen.

v. Kameeldrift CAS12/01/2017: Role players

57. Paul O'Sullivan ("O'Sullivan"), Sarah J Trent ("Trent"), Temane Binang ("Binang"), and Mandlakayise Mahlangu ("Mahlangu") went to the home of the then Acting Police National Commissioner, General Phahlane ("Phahlane") and O'Sullivan falsely identified himself to the Security officer and Estate Manager as a member of the IPID, a claim which Mahlangu and Binang failed to correct.

58. Security details relating to Phahlane's home and motor vehicles were asked for by O'Sullivan, and he also threatened the Estate Manager and architect of Phahlane's house with arrest if they did not co-operate with him.

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

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

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

C. STANDALONE MATTERS

(a) <u>Withdrawal of charges against Mdluli</u>

62. Mdluli was charged with kidnapping and murder of Mogibe. The docket was taken to the DPP:SG for a decision. The possibility of referring the murder charges for an inquest was raised and a view expressed that it is prudent to rather refer the murder for inquest and depending on the outcome of the inquest, then proceed with kidnapping and murder charges in one prosecution.

(b) PCLU involved in matters outside its mandate

63. The PCLU dealt with matters referred to it in terms of Proclamation No 46, 2003 published in the Government Gazette No 24876 of 23 May 2003 ("the Proclamation") which set out matters that fell within its purview as well as any other matters referred to it by the NDPP.

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

(c) Reference group ("RG")

65. With the permission of the Minister of Justice and Constitutional Development, Mathenjwa was seconded to the Reference Group ("*RG*") that was assembled by the Minister of Police, Nathi Nhleko to advise him on diverse matters within his Ministry. The reference group had terms of reference which defined its scope. Amongst the items falling under the scope, was the alleged involvement of police members in illegal renditions.

66. Mathenjwa was tasked to look into documents that contained allegations relating to rendition and brief members of the group on that. In the process of dealing with those documents, Mathenjwa realised that the Rendition matter was being

investigated by the IPID and the investigating officer was Mr Innocent Khuba ("Khuba"). The group felt the need to meet with Khuba, and requested Hadebe, who was the convener of the RG to arrange same.

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

68. Members of the reference group were made to sign confidentiality clauses.

(d) <u>Secondment of Maema and Mathenjwa to PCLU vis-à-vis Nxasana's evidence before the Commission</u>

69. Maema and Mathenjwa, at the time that they were seconded to the PCLU, they were still dealing with the Cato Manor matter. They both gainsay the allegations made by Nxasana at the Commission, that Nxasana told them that there was no evidence against Booysen.

70. In fact, when the prosecution team briefed Nxasana about the Cato Manor matter, after he had summoned them to his office, he informed them that whilst still in private practice and representing clients who were being investigated by Cato Manor SVC, Nxasana told Peter George (Accused 23) and Nico Crause (Accused 18) that "*the whole story would eventually catch up with them*."[17]

17 Mathenjwa affidavit, para 309.1, page SEQ 30/2021-181.

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

(e) Prosecution of Paul O'Sullivan

72. All matters involving O'Sullivan were referred to the PCLU because most of them were complex, difficult, and needed prosecutors that understood the modus operandi of O'Sullivan. The matters are the following:

72.1. Kempton Park CAS679/3/2015, which involved the threat to and the publication of the banking details of Ms Dudu Myeni;

72.2. Rosebank CAS47/05/2016, which involved the threat made to Van der Merwe; and

72.3. Alberton CAS799/11/2013, which relate to the extortion and intimidation of Neil Diamond.

(f) Refusal to charge Kgamanyane: Pretoria Central CAS868/11/2016

73. This matter relates to a case that was opened by McBride alleging that Mr Israel Kgamanyane ("Kgamanyane"), whilst the Acting Head of IPID, mismanaged

funds of the IPID. The matter was referred to Advocate Elbie Leonard SC ("Leonard"), who declined to prosecute Kgamanyane to which Baloyi concurred.

(g) <u>Kidnapping, defeating the ends of justice, contempt of court charges against police officers who arrested O'Sullivan and Trent: Colonel I Dawood ("Dawood") and Others</u>

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

(h) <u>Prosecution of Glynnis Breytenbach ("Breytenbach")</u>

75. The NDPP received a complaint from a complainant in a criminal matter where Breytenbach was the prosecutor. The complaint was that she was influenced by the legal representative of the accused. Disciplinary charges were preferred against Breytenbach. She was placed on suspension and required to handover her work laptop to the NPA investigation team, which she refused to do. She then appointed a computer specialist to format (permanently delete) the contents of the laptop which amounted to the contravention of section 40A of the NPA Act.

76. Breytenbach was then charged with contravening sections 40A and 41 of the NPA Act. During the trial, Mathenjwa directed a request to Dr Pretorius for the calling of certain witnesses identified as crucial to the State's case and who are in the employment of the NPA. Such a request was not granted, which led to

Mathenjwa closing the State case. Breytenbach unsuccessfully applied for an acquittal in terms of section 174 of the CPA. Breytenbach took the stand in her defence, and she was acquitted on the charges.

(i) <u>The prosecution of Jiba</u>

77. Mokgatlhe drafted an opinion and refused to prosecute Jiba for defeating the ends of justice and fraud, which charges were premised on the finding made by Gorven J when he found that by failing to respond to allegations made in the affidavit of Booysen, she was mendacious. Mokgatlhe was of the view that the state will not be able to prove the element of intention which is an element for both charges.

78. Mokgatlhe's opinion was premised on the fact that when Jiba deposed to the affidavit filed in the review application instituted by Booysen, the prosecution team had furnished counsel for the NPA with all the necessary facts. The prosecution team, in turn, made statements to the effect that when they read the affidavit of Booysen, they prepared a memorandum for NPA's counsel to prepare a supplementary affidavit to deal with issues raised in Booysen's affidavit. For reasons not known to the prosecution teams, the NPA's counsel did not prepare the supplementary affidavit and thus the full facts were not placed before Gorven J.

79. The failure to prepare a supplementary affidavit was also considered by Smit SC, the DPP: North West who also declined to prosecute Jiba on the basis that

Gorven J did not have the full facts before him and that Jiba had no intention to mislead the court and thus did not perjure herself. Despite coming to the same conclusion as Mokgatlhe, Smit is not label part of the core group of captured advocates.[18]

80. Thenga, the then DPP: Northern Cape also declined to prosecute Jiba on the grounds that the process to issue the racketeering charges was procedural. Despite this fact, Thenga formed part of the De Kock Panel that criticised Jiba's decision to issue the racketeering authorisations. The report does not show whether Thenga disclosed that she had furnished an opinion contrary to the findings made in the de Kock report.[19]

81. Thenga is not referred to as part of the prosecutors that are captured for either political or corrupt reasons in respect of the Cato Mano matter. The only criticism levelled against her is that she chaired the disciplinary hearing of the IPID's spokesperson, Moses Dlamini.

D. CATO MANOR

82. Various newspaper articles reported on the extrajudicial killings of suspects and other persons by the Cato Manor Serious Violent Crimes Unit ("SVC Unit"). Later on, the media reports were severely criticised by those who were implicated and

18 Mokgatlhe affidavit, para 37, page SEQ 34/2020-20.
19 Mokgatlhe affidavit, para 34, page SEQ 34/2020-019.

various non-governmental organisations to the extent that the media retracted what they had published.

83. An investigating team comprised of the members of the DPCI and IPID was constituted in order to reinvestigate the reported killings. It was established that there was a feud between Stanger Tax Association and Kwa Maphumulo Taxi Association which led to a number of killings of members of the two Taxi Associations.

84. Mathenjwa had a meeting with Mlotshwa, the then KZN Acting DPP. A prosecution team was constituted to guide the investigating team. The prosecution team consisted of:

84.1. Adv G S Maema, DDPP North West Division (team leader);

84.2. Adv K R Mathenjwa, DDPP South Gauteng Division (co-team leader);

84.3. Adv M Ntlakaza, Senior State Advocate based at South Gauteng Division (“Ntlakaza”);

84.4. Adv J J Mlotshwa, Senior State Advocate based at South Gauteng Division (“Mlotshwa”);

84.5. Adv P Futshane, Senior State Advocate based at South Gauteng Division (“Futshane”) and

84.6. Adv P Moleko, Senior State Advocate, based at South Gauteng Division (“Moleko”).

85. Despite the fact that Ntlakaza, Mlotshwa, Futshane and Moleko were part of the prosecution team, Booysen did not refer to them as part of the core group of NPA officials that was captured for political or corrupt reasons.

86. Likewise, the persons that compiled the postmortem and crime scene reconstruction reports were not referred to by Booysen as part of the law enforcement group who were captured for political or corrupt reasons.

87. The prosecution team reviewed approximately 50 (fifty) murder dockets and came to the conclusion that 23 (twenty-three) of the dockets warranted further investigations to determine whether the killings were justified.

88. The investigation team was directed by the prosecution team to trace witnesses and call for ballistic crime scene reconstruction reports. It was established that the killings were committed by members of the Cato Manor SVC Section under the command of Senior Superintendent Aiyer (“Aiyer”).

89. However, Aiyer made a statement to the effect that Booysen side-lined him and that in fact members of the Cato Manor SVC Section reported directly to Booysen. As such, Booysen was in fact in charge and managed the members of the Cato Manor SVC Section. It is this conduct that, *inter alia*, led to him being charged.

90. Chauke was kept abreast of the developments and he, in turn, briefed Jiba.

91. As a result of the evidence uncovered, the prosecution team formed the view that the suspects committed the on-going, planned killings, repeating a similar pattern. The prosecution team came to the conclusion that members of the SVC Section and Booysen ought to be prosecuted for committing offences in terms of Section 2(1)(e) and (f) of POCA, which resulted in Adv Noko, the then DPP:KZN, making an application for authorisation of racketeering charges against the suspects.

92. The killings took place between the period 2008 to 2011. Despite the fact that 28 people were killed, Booysen did not institute an internal investigation to determine whether the killings were justified or not.

93. In preferring the charges against Booysen and members of the SVC Section, the prosecution team had at their disposal the undermentioned evidence:

93.1. The eyewitness statements;

93.2. Ballistic crime scenes reconstruction reports;

93.3. Ballistic crime scene evidence;

93.4. Post mortem reports;

93.5. The KZN provincial structure;

93.6. Statements from Durban Organised Crime Unit Commander, Aiyer;

93.7. Statements from the KZN Provincial Head of Detectives, Assistant Commissioner Brown ("Brown");

93.8. The urgent application papers under case number 13759/2008 instituted by Bongani Mkhize ("Mkhize") wherein he successfully interdicted the Cato Manor SVC unit from unlawfully killing him.

93.9. Draft statement of Danikas, a former police reservist at the Cato Manor SVC. The draft statement is admissible in terms of hearsay rule. It has been established that the allegations levelled against Maema that he superimposed Danikas' signature on the statement is disingenuous. This matter was dealt with by the Department of Justice who arranged for the translation of Danikas' Greek statement. Maema, in his affidavit, extensively deals with his trip to Greece and his interaction with Danikas and his legal representative. The allegations sought to be imputed to Maema in this regard, demonstrate the extent to which Booysen can go in placing untruthful information before the Court.

93.10. Motivation for monetary and non-monetary awards which demonstrate that Booysen and members under his command, excluding Aiyer, received monetary and non-monetary awards for the alleged successful arrest of people who were suspected in the killing of Superintendent Choncho;

93.11. Statement of Mathonsi which explains how the plan to eliminate members of the KTA was hatched and orchestrated;

93.12. Statement of Dlondlo (Mthiyane) which explained the role of STA in the killing of KTA members by the members of the Cato Manor SVC Section; and

93.13. Statement of Mkhize which singles out the incident of the killing of Kopolota Ntuli and Nathi Mthembu who were members of the KTA.

93.14. Statement of Assistant Commissioner Brown, KZN Provincial Head of Detectives;

93.15. Urgent application Case number 13759/2008;

94. In the 23 dockets, 28 killings had occurred. As tragic as these killings are to members of the victims' families, the two most heart-breaking killings are the killing of a 16 year old boy, Kwazi Ndlovu and, Boysie Sibusiso Mbonambi. With regard to the two victims the legal team decided to include in this recordal the full summary surrounding the circumstance of their death as set out in the affidavits of Maema and Mathenjwa.

95. Kwazi Ndlovu, according to his father, fell asleep while watching television. It was there that he was shot whilst lying down on the couch. The ballistic report, beyond reasonable doubt, demonstrates that the killing was unjustified. The victim's father indicated that the criminal justice system failed him, and he has still not recovered from the gruesome killing of his child.

96. Boysie Sibusiso Mbonambi was killed whilst hiding in a wheelie bin, by the members of the Cato Manor SVC Section. Some of the shots were fired through the closed lid of the dustbin, which dispels the self-defence notion sought to be relied upon by the members of the Cato Manor SVC Section.

97. It is appropriate that the names of the victims should be set out in this recordal, as they are not merely numbers.

97.1. Counts 3 to 7: KwaDukuza CAS 39/09/2008 - Lindelani Buthelezi, killed on 3 September 2008;

97.2. Counts 8 to 12: Howick CAS 106/09/2008 – Magojela Timson Ndimande and Sibusiso Thokozani Tembe, killed on 16 September 2008;

97.3. Counts 13 to 18: Mandini CAS 76/09/2009 – Nzameni Ntuli (Kopolota) and Nkosinathi Mthembu, killed on 18 September 2008;

97.4. Count 19: Umkomaas CAS 235/10/2008 - Mduduzi Mkhize, killed on 18 October 2008;

97.5. Counts 20 to 24: Durban Central CAS 185/02/2009 - Bongani Mkhize, killed on 3 February 2009;

97.6. Counts 25 – 30: Pinetown CAS 1000/05/2009 - Sibongiseni Badumile Ndimande, killed on 23 May 2009;

97.7. Counts 31 to 34: Rustenburg CAS 1098/09/2009 - Sifiso Ndimande, killed on 20 September 2009;

97.8. Counts 35 to 38: Berea CAS 288/05/2008 - Thabo Sunshine Msimango, killed on 24 May 2008;

97.9. Counts 39 to 52: Melmoth CAS 142/11/2008 - Bongani Velaphi Biyela and Khayisani Biyela, killed on 23 November 2008;

97.10. Counts 53 to 57: Kwa-Mashu CAS 629/4/2009 - Gladwell Thokazani Njapha, killed on 27 April 2009;

97.11. Counts 58 to 61: Phoenix CAS 377/08/2009 - Phillip Lindokuhle Nzuza, killed on 10 August 2009;

97.12. Counts 62 to 65: Kwa-Mashu CAS 698/11/2009 - Prince Sakhile Thabede (Mtako), killed on 26 November 2009;

97.13. Counts 66 – 69: Esikhawini CAS 3/4/2010 - Kwazi Ndlovu, 16-year-old boy, killed on 1 April 2010. On 1 April 2010 at about 02:00 the deceased, a 16-year-old student, who had likely fallen asleep whilst watching television, was shot at whilst in a lying position on a couch with an R5 rifle. A 9mm Norinco Star pistol was placed under his left arm. After the shooting incident, Mostert instructed the deceased's father, Sibusiso

Wiseman Ndlovu ("Wiseman") to go and point out other suspects. On the way to where the pointing out was supposed to be made, Mostert enquired from Wiseman as to who the person is that was sleeping in the tv room, referring to the deceased. Wiseman responded and said "that is my son" to which Mostert exclaimed and responded "Was it your son?". A copy of Wiseman's statement is attached to Mthenjwa's affidavit, marked as annexure **"CM35"**. All cartridges on the scene are 5.56mm compatible with an R5 assault rifle that was used by Padayachee (Accused 2). The 9mm Norinco Star pistol cannot be linked with any cartridges found on the scene. The ballistic crime reconstruction report dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted. Captain Mangena, a seasoned expert, reconstructed the scene and confirmed after studying the post-mortem report, damages on the wall, the couch on which the deceased was lying and the wounds sustained, that the deceased was lying when shot at and posed no danger to the police. This firearm was clearly placed on the scene after the shooting. This house belonged to Tilili's family, but at the time of this killing, it was rented by the deceased's family. They murdered a wrong person as the police were looking for a prison escapee called Tilili, and were taken to this house by the informer. A copy of Captain Mangena's statement is attached to Mathenjwa's affidavit as annexure **"CM36"**. Photos of the deceased, marked as annexures **"CM37.1"** to **"CM37.3"** are attached to Mathenjwa's affidavit.

97.14. Counts 70 to 79: Bhekithemba CAS 44/05/2010 - Musawenkosi Aubrey Ngcobo, Xolisani Allen Ngcobo and Simphiwe Sydney Shozi, killed on 10 May 2010;

97.15. Count 80: Durban North CAS 67/07/2011 - Jabulani Camson Bhengu, killed on 4 July 2011;

97.16. Count 81: Durban North CAS 69/07/2011 - Dumisani Blessing Mgobhozi, killed on 4 July 2011;

97.17. Count 82: Durban North CAS 71/07/2011 - Boysie Sibusiso Mbonambi, killed on 4 July 2011. On 4 July 2011 the deceased was found seated and shot dead in a closed dustbin. Mgobhozi, the deceased in Count 81, visited the deceased. On Mgobhozi's departure, the police stormed into the deceased's garage and shot Mgobhozi. On hearing the gunshots, the deceased ran out of the house away from the police and hid in a dustbin. The deceased opened and closed the dustbin's lid, which was seen by a witness, Goodness Sosibo ("Sosibo"), who drew the attention of the police to the deceased's hiding place. The police shot at the deceased whilst the deceased was hiding in the dustbin. The police alleged that the deceased opened the lid of the dustbin and pointed a firearm at them, at which stage the police spontaneously reacted with an R5 rifle. The photo album shows a firearm under the deceased's body in the dustbin. Having regard to the seated position the deceased was found in the dustbin, compared to the police's version

that the deceased pointed the firearm at them, the firearm would not have been under the deceased's body. The photo album indicated that at the time of the shooting, the dustbin lid was closed, demonstrating that the shooting must have occurred through the closed lid of the dustbin.The witness who pointed out the deceased's hiding place, saw the deceased climbing over the wall, dressed in shorts and a t-shirt and he had nothing in his possession. The deceased's sons, Wandile and Tshepiso Mbonambi, aged 12 and 17 respectively, saw the deceased running from the house and he had nothing in his possession. A firearm was placed underneath the deceased in the dustbin. The above evidence of Wandile and Tshepiso dispels the notion or version that the prosecution team was wrong to conclude that the aforestated firearm was planted. The photos, marked as annexures **"CM43.1"** to **"CM43.2"** are attached to Mathenjwa's affidavit. A statement of Sosibo, marked as annexure **"CM44"**, a statement of Wandile dated 28 October 2011, marked as annexure **"CM45.1"** and a statement dated 7 January 2012, marked as annexure **"CM45.2"** and a statement of Tshepiso, marked as annexure **"CM42"**, are attached to Mathenjwa's affidavit.

97.18. Counts 94 to 97: Esikhawini CAS 50/09/2011 - Qinisani Philangenkosi Gwala, killed on 4 September 2011;

97.19. Counts 98 to 101: Kwa-Mashu 116/8/2008 - Mfanafuthi Armstrong Zwane, killed on 31 July 2008;

97.20. Counts 102 to 103: Estcourt CAS 34/08/2008 - Muzi Sanele Majola, killed on 6 August 2008;

97.21. Counts 104 to 108: Kwa-Mashu CAS 314/11/2008 - Nhlanhla Nkuthu Masondo, killed on 12 November 2008;

97.22. Counts 109 to 112: Tongaat CAS 356/03/2009 - Dan Chester Phiri, killed on 6 March 2010;

97.23. Counts 109 to 112: Tongaat CAS 356/03/2009 - Dan Chester Phiri, killed on 6 March 2010.

98. Crime scene reconstruction reports were compiled. The post-mortem and reconstruction reports revealed that the killings were unjustified and contrary to section 49 of the Criminal Procedure Act, 51 of 1977 read with the Police Standing Orders.

99. The evidence revealed that:

99.1. Members of the Cato Manor SVC Section had ample opportunity of arresting the persons that were killed without resorting to killing them, as the victims had been subdued and were under their control;

99.2. The persons who were in the company of the victims would be separated and taken to another room so that they should not witness

the killing. Such was meant to enable the members of the SVC Unit to plant firearms which were referred to “mbombay” by Mostert.

99.3. High calibre weapons were used to kill the victims, which is a demonstration that disproportionate violence was used as it was intended to kill the victims.

99.4. The cause of death was caused by more than one bullet per victim. Most of the injuries sustained were on the upper body and on the head which was consistent with an intention to kill and not to arrest.

99.5. On the supposition that all the persons that were killed were suspects, it is concerning that not a single one of them was arrested with the view that a prosecution should unfold.

100. During all these incidents that led to the killings, despite the allegations by members of the SVC Section, none of the members of the SVC Section sustained the slightest injury, nor were any of their vehicle damaged. To compound matters, is that no spent cartridges were retrieved from any of the police vehicles.

101. The evidence is that it was the *modus operandi* of the members of the SVC Section to plant firearms at some of the crime scenes to create the impression that the victims were armed and posing a danger to the members of the SVC Unit. The planted firearms were referred to as mbombay by Mostert.

102. As luck would have it for some of the victims, the ballistic reports of some of the crime scenes proved that the mbombay were not functional, and therefore, incapable of discharging any ammunition.

103. Members of the Cato Manor SVC Unit and General Booysen ("Booysen") were charged with racketeering and predicate offences as more fully set out below.

104. The Prevention of Organised Crime Act,[20] (POCA) provides as follows:

104.1. In Section 1 under the definitions, "enterprise" is defined as follows: -

> *"includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity"*

104.2. The relevant portions of section 2 provides:

> *"**2 Offences***
>
> *(1) Any person who-*
>
> *(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;*
>
> *(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the*

[20] 1998 Act No. 121 of 1998

conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

(2) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.

(4) A person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorised in writing by the National Director."

105. Section 78 provides:

"78. Liability

Any person generally or specifically authorised to perform any function in terms of this Act, shall not, in his or her personal capacity, be liable for anything done in good faith under this Act."

106. The process of obtaining the racketeering certificates is set out in the affidavits of Maema, Mathenjwa, Mosing, and Chauke, who are the implicated prosecutors in this regard.

107. Booysen challenged the decision to authorize the racketeering charges and this culminated in the Gorven J judgment.

108. The Gorven J judgment culminated in charges of perjury being preferred against Advocate Nomgcobo Jiba ("Jiba") due to the alleged mendacity in her answering affidavit in the review application.

109. The racketeering principles and summaries of the contents of the various dockets are fully discussed in the affidavits of both Mathenjwa and Maema.

110. That the process of obtaining the racketeering certificate was properly followed, is supported by the opinion of Adv I Thenga ("Thenga").

111. Abrahams requested an opinion from Mokgatlhe who declined to charge Jiba on the basis that the State would not be able to prove the element of intent required for perjury. Mokgatlhe was condemned by Booysen for declining to prosecute Jiba. Mokgatlhe, in his affidavit gives full reasons for his decision to decline prosecuting Jiba.

112. Abrahams also requested the opinions of Advocates Thenga and Smit SC who also declined to charge Jiba for reasons set forth in their opinions. Smit is not referred to as part of the core group of prosecutors who are captured for either political or corrupt reasons.

113. The General Council of the Bar ("the GCB") instituted proceedings to have Jiba's name struck off the roll of Advocates, relying on, amongst others, the perjury charges preferred against Jiba.

114. The application to strike Jiba and Mrwebi off the Advocates' roll served before Legodi J and Hughes J. With regard to the allegation of mendacity, Legodi J stated that Gorven J did not have the full facts before him. An analysis of the Legodi J judgment is set out in the affidavits of Maema and Mathenjwa. Legodi

J's findings were not disturbed by the SCA, and the Mokgoro J Inquiry also found that Gorven J did not have the full facts before him.

115. The De Kock panel reconsidered the POCA authorisations and made recommendations to the current National Director of Public Prosecutions ("NDPP") that proper process was not followed in issuing the authorisations. As a result of this report, the NDPP withdrew the POCA authorisations and the charges against Booysen and members of the SVC Unit. The view of the prosecution team is that the withdrawal of the POCA authorisations and the charges is irrational and unlawful. The prosecution team analysed the de Kock report and pointed out the flaws and irregularities in the report.

116. The DPP withdrew the predicate offences preferred against Booysen and the members of the SVC Unit. The prosecution team is also of the view that this withdrawal is irrational and unlawful.

117. In August 2013, effective the 1st of October 2013, Nxasana was appointed NDPP. Nxasana held the view that since Mlotshwa was no longer acting as DPP, and Noko, who was unknown to the Cato Manor SVC, was appointed as DPP of Kwazulu-Natal, there was no longer a need for Chauke to manage the prosecution team, and he was thus removed.

118. Reasons have been advanced as to why an appeal was not pursued relating to the Gorven J judgment.

119. On the strength of this finding, the prosecution team held the initial view that an appeal would not be necessary, and, in any event, the Court stated that the NDPP is not precluded from issuing fresh authorisations. In order to enable Chauke to brief the NDPP, the prosecution prepared a memorandum dated 5 March 2014, wherein the prosecution team advised Chauke that, based on the incorrect concession made by Hodes SC, the team's view was that the judgment should be appealed. A copy of this memorandum, marked as annexure **"KRM33"**, is attached to Mathenjwa's affidavit.

120. On Nxasana becoming aware of the application for leave to appeal, he summoned Chauke and the prosecution team to his office. Chauke, Dr. Ramaite ("Ramaite") and the prosecution team attended a meeting with Nxasana on 25 March 2014. At this meeting, Nxasana expressed his dissatisfaction that he was not briefed on such a high profile matter and yet, a decision to institute an application for leave to appeal was taken without his knowledge. At this meeting, the 7th of April 2014 was arranged as a date for Nxasana's full briefing on the matter.

121. The prosecution team was not aware that Nxasana had not been briefed by his deputies, on the Cato Manor matter when he assumed office as the NDPP, as part of the handing over process. In the meeting, Chauke informed Nxasana that he had briefed Ramaite on the prosecution team and Chauke's decision to bring an application for leave to appeal and the urgency attached thereto to be within the *dies induciae*.

122. In preparation for the meeting of 7 April 2014, the prosecution team prepared a PowerPoint presentation with the intention to utilise the presentation for purposes of briefing Nxasana on the matter. However, as far as Maema's recollection goes, the prosecution team did not go into the details of the presentation as Nxasana derailed the presentation and informed them, amongst others, of the following:

122.1. Whilst practising as an attorney and representing clients who were being investigated by Cato Manor SVC, he told Peter George (Accused 23) and Nico Crause (Accused 18) that "*the whole story would eventually catch up with them*";

122.2. It was necessary that he disclose that Bangizwe Mhlongo ("Mhlongo"), a member of the Executive Committee of the STA, is his cousin;

122.3. They should prepare a prosecution memorandum for presentation to request the issuing of authorisations in terms of POCA, and when this prosecution memorandum is presented, he would delegate the decision making function on this matter to Ramaite and recuse himself.

123. Nxasana also informed the prosecution team that he was of the view that it was not necessary to appeal the judgment because paras 39 and 40 of the judgment indicated that the NDPP is not prohibited from issuing fresh authorisation certificates. Paras 39 and 40 of the judgment read as follows:

"[39] It is important to note that the above findings do not amount to a finding that Mr Booysen is not guilty of the offences set out in counts one and two and eight to twelve. ***That can only be decided by way of a criminal trial****. Setting aside the authorisations and decisions to prosecute also does not mean that fresh authorisations cannot be issued or fresh decisions taken to prosecute if there is a rational basis for these decisions.*

[40] Prayer (e) in paragraph 3 of this judgment seeks to interdict the ***NDPP*** *from issuing fresh authorisations in the absence of the NDPP having before her facts under oath implicating Mr Booysen. A final interdict is thus sought. The requisites for a final interdict are well established. A clear right must be shown, an injury actually committed or reasonably apprehended and an absence of an alternative remedy.*[21] *Mr Booysen has a clear right to a lawful decision making process. He certainly* ***has no right at all*** *to such a decision* ***being taken only if affidavits connecting him to offences are in the possession of the NDPP****. I have mentioned above, for example, that hearsay and similar fact evidence is admissible under certain circumstances in respect of offences under s 2(1) of POCA…"*

124. It was as a result of the above briefing and discussion with Nxasana that the Govern J judgment was not appealed.

125. Nxasana directed that a full prosecutorial memorandum be presented by the end of May 2014. It must be noted that, at the time of the briefing to Nxasana, the only person against whom the racketeering certificate was declared unlawful, was Booysen. The racketeering certificates in respect of the others remained

21 *Setlogelo v Setlogelo* 1914 AD 221.

valid at that stage. Therefore, the evidential analysis of Nxasana or of that person to whom he would have had delegated the decision-making process would have been on whether to re-issue the certificate against Booysen.

126. In the affidavits of both Mathenjwa and Maema, evidence is set out, demonstrating the derailment making it impossible for the finalisation and presentation of the prosecution memorandum which was not presented to Nxasana.

127. The briefing that took place on the 7th of April 2014 was a PowerPoint presentation in order to inform Nxasana about the case without going into detail.

128. Due to the interrupting factors as alluded to in the affidavits of Mathenjwa and Maema, the prosecution memo could not be placed before Nxasana to make a decision whether to issue the racketeering certificate. Nxasana vacated office in May 2015 and the prosecution memo was later presented to Nxasana's successor, Abrahams on the 18th of August 2015.

129. Hence, Nxasana, during his tenure as NDPP, could not make a decision on the re-issuing of the racketeering authorisation certificate against Booysen. The evidence of Nxasana led on 12 June 2019 before the Commission, which is found on page 50 to 66 of his transcript, is to the effect that he informed the prosecution team that there was no case against Booysen.

130. With due respect, the evidence tendered by Nxasana in this respect is incorrect because Nxasana was in no position to express such a view without the indictment and the prosecution memorandum presented to him. In fact, Nxasana

said that the decision on this matter might be delegated to Ramaite due to the relationship he has with Mhlongo, a member of STA, and his previous expression to George and Crouse that their investigative approach was criminal.

131. When Abrahams was appointed, he took a decision that Maema, Mlotshwa, and Mathenjwa be seconded to the PCLU so that we could give undivided attention to the Cato Manor case other than being pre-occupied with our respective Divisions' operations.

132. Maema, Mlotshwa and Mathenjwa were seconded to the PCLU with the Cato Manor matter.

133. The prosecution team still holds the objective view that there is a *prima facie* case against Booysen and the members of the SVC Section for the heinous murders that they committed.

E. ANALYSIS OF THE DE KOCK REPORT

134. The De Kock report was compiled by De Kock, Thenga, Riley and Mamabolo. However, it was only signed by De Kock and Mamabolo. No explanation is given in the De Kock report as to why Thenga and Riley did not sign the report.

135. The view of the implicated persons is that Thenga should have recused herself from the panel, for the reasons set out below. Equally so, the implicated persons were advised that Mamabolo should have recused himself from the panel for the reasons set out below.

136. Thenga should have recused herself from the panel because on the 13th of August 2015, she compiled a legal opinion in the matter of *State v Jiba*, Silverton CAS 622/10/2014 to Abrahams where she had to comment on the prosecution of Booysen and processes followed therein. The said legal opinion is attached to Mathenjwa's Rule 3.4 Statement and marked as annexure **"CM76"**.

137. In paragraph A.3 of her opinion, Thenga correctly makes reference to Section 2.2 of POCA which provides as follows:

> *"The court may hear evidence including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair."*

138. This section provides that hearsay evidence is admissible in racketeering prosecutions. Yet, the De Kock report which she took part in compiling, criticises the State's case on the fact that the case is based on hearsay.

139. In paragraph E of her opinion, Thenga states that there were various consultations and briefings made by the prosecution team and investigating team to the NDPP. She further states that all the necessary consultations with the NDPP led to the written authorisation of the racketeering certificate by the NDPP, Jiba. Yet, the De Kock report states that proper processes leading to the authorisation of the issuing of the racketeering certificate by Jiba were not followed.

140. In paragraph G of her opinion, Thenga correctly stated that the Court in the Gorven J judgment had incomplete information. The information was unfortunately sitting with the legal representative and was not properly filed as it was supposed to be, and therefore, was not before the Court. She further stated that the NPA prevented Jiba from appealing the Gorven J judgment. She, in fact, had to remove papers already filed for the purpose of an appeal because the then NDPP instructed her that the matter must never be appealed. Yet, the De Kock report put more emphasis on the Gorven J judgment and does not mention that this was an appealable matter.

141. To compound matters, there is no indication in the De Kock report that Thenga disclosed the existence of her legal opinion to the other panellists.

142. It is the implicated prosecutors' considered view that, in the event that Thenga took part in the compilation of the report, it would have been professional for Thenga to disclose the above and recuse herself from the panel. Her serving on the panel as a panellist makes the report irregular, unfair, and prejudicial against the prosecution team.

143. The implicated prosecutors were advised by their legal team that based on what is set out in Mosing's affidavit, Mamabolo should also not have been part of the panel because of the close working relationship he had with Booysen in the past. This working relationship had previously caused Mosing to exclude Mamabolo from the decision-making process in the Cato Manor matter.

144. In the De Kock report, there is no indication that Mamabolo disclosed the fact that he was previously excluded by Mosing or that he had a previous working relationship with Booysen. To the best of the prosecution team's knowledge, there is no indication that Mamabolo deposed to an affidavit dealing with his involvement as a panellist.

145. At the time of consulting with their legal team and settling these papers, the implicated persons had not been provided with affidavits, if any, deposed to by De Kock, Mamabolo, Riley and Thenga, setting out the process that unfolded, which lead to the compilation of the report.

146. The failure of the panellists to consult with the prosecution team deprived itself of the opportunity or advantage to know the extent of the consultative processes and briefings between the prosecution team, the NDPP and the ANDPP, prior to the issuing of the authorisations. The prosecution team had briefings with the ANDPP on the Cato Manor matter on 15 May 2012, 23 May 2012, 12 June 2012, 9 July 2012 and 6 August 2012.

147. The briefings on 15 May, 23 May, 12 June and 9 July 2012 resulted in the prosecution team finalising a prosecution memorandum dated 10 July 2012. I attach hereto a copy of the prosecution memorandum, marked as annexure **"CM77"**, which application was in the name of Chauke.

148. This memorandum was queried, and the prosecution team was directed that the application must not be in the name of Chauke but it must be in the name of Noko, the DPP of KwaZulu-Natal. The prosecution team had to draft the application now in the name of Noko, which was then delivered by Maema to Mosing on the 16th of August 2012 and was signed on the 17th of August 2012.

149. It was not for the first time for the prosecution memorandum to be before Mosing and Jiba when it was delivered on the 16th of August 2012. The panel would have been made aware of this sequence of events had they consulted with the prosecution team. Instead, the De Kock report reflects that there was no consultation prior to the authorisation dated the 17th of August 2012.

150. In compiling the report, the panellists:

150.1. did not take into account the Judgment delivered by Legodi J in the matter involving the striking of Jiba from the roll of Advocates, which was launched by the GCB, where Jiba's conduct in deciding the Booysen matter was also one of the reasons for which the applicant sought her striking off the roll. In that matter, the Court found that, on the information that was placed before Jiba, which the Court considered, she properly exercised her prosecutorial discretion, and consequently found no fault against Jiba. The panellists' conduct as described above, clearly demonstrate lack of objectivity in that they put emphasis on the Govern judgment which was not favouring the issuing of the authorisation of the racketeering certificates and ignored the Legodi judgment which was

favouring the issuing of the certificates. They also failed to consider the Mokgoro J report;

150.2. did not indicate in the De Kock report whether they considered evidence as contained in the docket such as the ballistic crime reconstruction reports, photo albums, post-mortem reports, expert reports and statements of all witnesses who were present at various crime scenes. In this regard, the panellists did not objectively assess the evidential material as to whether or not there was a pattern and similar *modus operandi* by the Cato Manor SVC Section as a group of SAPS members associated in fact in killing their alleged suspects;

150.3. did not only conclude incorrectly that there are contradictions in the statements of Hurley, but also did not set out the alleged contradictions in the De Kock report. A careful perusal and analysis of the statements of Hurley demonstrates that:

150.3.1. Hurley saw Stoltz throw a firearm on the pillow at the side of the bed.

150.3.2. Stoltz further, after taking Hurley out of the room, asked Hurley where the deceased got the firearm from.

150.3.3. Hurley responded that the deceased had no gun and she saw Stoltz throw the gun on the pillow. Hurley stated in her statement (**"CM31.1"**) *"I swear he didn't have a gun.";*

150.3.4. In Hurley's second statement (**"CM31.2"**), she stated: *"Sakhile did not have any dangerous weapon or a firearm in his possession … He was not having anything on him."*. She further in the second statement stated: *"I saw the firearm being placed next to the deceased by the white guy."*

150.4. further pointed out to a contradiction between Hurley, on the one hand, and Nqaba Mdluli and Nkanyiso Ntenza, on the other hand, in respect of the presence of the firearm. The panellists are incorrect in that conclusion as Mdluli and Ntenza were outside the car when Hurley saw the police man throwing the firearm on the pillow next to the deceased;

150.5. did not indicate whether the panellists did consult with IPID and DPCI investigators in the process of analysing the evidential material and consequently finalising the said report;

150.6. did not indicate that they conducted inspections *in loco* and consulted with witnesses *vis a vis* what the prosecution team did;

150.7. did not indicate that they consulted with various ballistic experts, in particular, Mangena and the pathologists;

151. The panel criticised the State's case that it is based on hearsay evidence which is, according to them, not admissible. In this regard, the panel overlooked the fact that there is a difference insofar as hearsay is concerned in respect of the racketeering charges and in respect of the predicate offences. There is nowhere in the report where the panel has indicated that Section 2.2 of POCA has been considered. This section provides as follows:

> *"(2) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair."*

152. Furthermore, the panel overlooked the Constitutional Court decision on this aspect as pronounced in the matter of *Savoi and others v National Director of Public Prosecutions and others*[22] where the Court found that, regarding the potential unfairness of the admissibility of hearsay evidence to an accused person, the Court drew attention to the filter in the form of the proviso appended in Section 2(2) of POCA, namely that the admissibility of such hearsay evidence should not render the trial unfair. The Court further held that the section serves a twin purpose. Firstly, it effectively does away with the hearsay rule on the charges under Section 2(2) of POCA and, indeed, other exclusionary rules. In

22 2014 (5) SA 317 (CC)

this respect, this section differs from Section 3(1) of the Law of Evidence Amendment Act, 45 of 1988 ("LEA Act") which retains the exclusionary rule but permits the admission of hearsay evidence only under circumstances as set out in Section 3(1)(a) to (c) of the LEA Act, which provides as follows:

> *"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –*
>
> *(a) Each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
>
> *(b) The person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
>
> *(c) The court, having regard to –*
>
> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*
>
> *(iii) the purpose for which the evidence is tendered;*
>
> *(iv) the probative value of the evidence;*
>
> *(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
>
> *(vi) any prejudice to a party which the admission of such evidence might entail; and*
>
> *(vii) any other factor which should in the opinion of the court be taken into account,*
>
> *is of the opinion that such evidence should be admitted in the interests of justice."*

153. The panel failed to differentiate between the admissibility of hearsay evidence on racketeering charges, and predicated offences in the indictment which support the existence of a pattern of racketeering.

154. Section 3(1)(c) of the LEA Act is applicable only in predicated offences, and not on the racketeering charges. In this regard, the Commission is referred to the matter of *S v De Vries and others.*[23] The panel usurped the judicial powers of a court to pronounce on whether the admissibility of hearsay evidence will render the trial on the racketeering charges unfair, a pronouncement which could only be made by a court, having considered the cumulative effect of all the available evidence.

155. The panel relied on what they say is evidence of Nxasana to the Commission to the effect that he informed the prosecution team that there was no case against Booysen. The veracity and truthfulness of the evidence tendered by Nxasana in the Commission was not tested. This is one of the pointers of the flaws in the report. The prosecution team dispute that Nxasana ever informed the prosecution team that there was no case against Booysen. In fact, in a briefing which was held on the 7th of April 2014, Nxasana requested the prosecution team to bring a prosecution memorandum on Booysen by the end of May 2014. The prosecution team prepared a memorandum signed by Maema and the application was forwarded by Noko to Nxasana on the 4th of June 2014. As per protocol, such applications go through the Organised Crime desk which was Mosing, at the time.

23 2012 (1) SACR 186 (SCA)

156. On the 26th of June 2014, Mosing drafted an internal memorandum to Nxasana, confirming that he has received the application for the issuing of the racketeering certificates, but there are shortcomings which he has discussed with the team leader and consequently he returned the documents to be amended and for additional substance to the memorandum.

157. The prosecution team became pre-occupied with the voluminous request for further particulars which had been received on the 26th of May 2014, and furthermore team members were involved in other operational responsibilities and did not get to submit the amended memorandum before Nxasana vacated office. Nxasana did not get to decide on the application by the prosecution team due to the reasons as set out above and elsewhere in this affidavit.

158. Consequently, it is incorrect that Nxasana advised the prosecution team that there was no case against Booysen, as stated in the De Kock report and in his evidence in the Commission. There would have been no rational basis for the prosecution team to have submitted an application to Nxasana for his consideration and decision if he had informed the prosecution team that there was no case against Booysen, because he was, at the time, the repository of power to authorise racketeering certificates.

159. This further explains the shortcomings in the De Kock report caused by the lack of consultation with the prosecution team because had the panellists confronted

the prosecution team with the evidence of Nxasana, the explanation as set out above would have been placed before them, before compiling the report.

160. With regard to Danikas' statement, Mathenjwa refers the Commission to Maema's explanation where he states as follows:

160.1. The Greek version of Danikas's statement was received in 2018 through diplomatic channels which are in existence between the Republic of Greece and the Republic of South Africa. Maema received a copy of the Greek statement from Luckson Mgiba ("Mgiba") of the Extradition desk in the office of the NDPP. Knowing that Danikas is fully conversant in English, Maema was surprised that the statement was in Greek. On realising this fact, Maema requested Mgiba to have the statement translated to English. He informed Maema that the Department of Justice will be dealing with the translation by going out on tender to secure the translators who will then deal with the translation of the statement into English.

160.2. After approximately six weeks Maema received a statement from Mgiba which was the translated version in English. The statement was translated by one Marilena E M Piperides on the 12th of October 2018. Mathenjwa and Maema attach a copy to their Rule 3.4 Statements, of the English translation, with the Greek version of the statement attached to it, marked as annexure **"CM74"**.

160.3. Maema contacted Danikas' Greek lawyer, Spiros Spirobulous in writing. Maema furnished the lawyer with both the Greek statement and the English translation and informed him that, in terms of South African law, the statement has to be discovered and made available to the defence team, and that Maema will forthwith do so.

160.4. Danikas contacted Maema through WhatsApp and pointed out certain translation mistakes in the English translation. Maema requested Danikas to address him in a formal way through his attorneys to bring his concerns to Maema's attention.

160.5. Some weeks later, Danikas, through his attorney, brought to Maema's attention a number of translation mistakes in the English translation. Maema then, in writing, informed Mgiba of the translation mistakes, and asked him to bring such mistakes to the attention of the translator.

160.6. A few days later, Thabisile Ngidi ("Ngidi") contacted Maema and enquired whether a new translator should be appointed or whether the translation mistakes should be referred back to the translator. Maema told Ngidi that it is the Department of Justice's decision what to do but that he would suggest that the existing translator be used.

161. The prosecution team was removed from the matter. Ngidi contacted Maema after his removal from the matter and enquired about the translation with him.

Maema informed Ngidi that he has been removed from the matter and that she must enquire from the prosecutors appointed to the matter.

162. Had the panellists contacted Maema, he would have given them the explanation set out above. There are also no reasons furnished as to why Danikas and the translator of the statement, whose details are clearly displayed on the translation certificate, were not contacted. The aforesaid clearly demonstrate that the allegations levelled against Maema that he superimposed the signature of Danikas on the statement is mischievous.

F. KAMEELDRIFT: CAS123/11/2016 AND CAS12/01/2017

163. Under this topic, the two matters referred to above are addressed separately below.

(a) Kameeldrift: CAS123/11/2016 – Baloyi

164. This matter was dealt with by Van Rensburg, Coetzer, and Baloyi. It is once more interesting that Van Rensburg and Coetzer, despite their involvement in the matter, have not been labelled as part of the core group of the NPA officials who are captured for political and corrupt reasons. In particular, Coetzer in his memorandum is scathing in his criticism about the involvement of O'Sullivan and Trent in the investigation against Phahlane.

165. This matter relates to a complaint of defeating the ends of justice against Phahlane which was laid by O'Sullivan. Van Rensburg requested Coetzer to provide and memorandum regarding the reasonable prosects of successfully prosecuting Phahlane.

166. Coetzer prepared a memorandum dated the 2nd of December 2016 which is marked as annexure "**MMM4**" to Mashuga's affidavit. In conclusion, the memorandum reads as follows:

> "*The writer is therefore of the opinion that taking into account the factors supra 4 -6 that there is not a reasonable prospect of a successful prosecution in this matter.*
>
> *Consequently it is submitted that the docket be closed as "nolle prosequi.*"

167. Despite the involvement of both Coetzer and Van Rensburg in this matter, who took a decision not to prosecute Phahlane, Coetzer and Van Rensburg are not condemned and labelled as part of the cabal of prosecutors who are captured for either political or corrupt reasons.

(b) <u>Kameeldrift matter: CAS12/01/2017 – Mashuga</u>

168. The Chairperson indicated his concern regarding the allegations that law enforcement officers were not carrying out their duties in terms of the applicable legal prescripts. In the affidavit of Mashuga, it is clearly demonstrated that the

Independent Police Investigative Directive ("IPID") was not independent, as it was expected to be.

169. The investigating team was led by General Mabula, who was the Deputy Provincial Commissioner: Crime Investigation and Detection, North West.

170. The implicated prosecutor has demonstrated that IPID was captured by Paul O'Sullivan ("O'Sullivan") and Sarah J Trent ("Trent") in order to threaten people into submitting to their unlawful demands of arresting and/or investigating people that O'Sullivan and Trent wanted to be arrested, investigated, or settle a score with. This is borne out by a plethora of e-mails which, *inter alia*, O'Sullivan sent to General Phahlane ("Phahlane"),[24] Dr Pretorius, Mashuga[25] and Mokgatlhe. The implicated prosecutors' legal team does not intend to dwell onto the merits and demerits of the charges levelled against Phahlane.

171. This matter relates to security breach that occurred at the home of General Phahlane ("Phahlane"). Van Rensburg enquired from Mashuga about his availability to take on a new case. Mashuga confirmed that he was available and was called to a meeting by Mzinyathi where Advocate Vernon Nemaorani in consultation with Mzinyathi, allocated the matter to Mashuga.

172. Mashuga was the prosecutor who was charged with the responsibility of guiding the investigating team, and ultimately preferred charges against Paul O'Sullivan

24 Annexure "MMM18", paginated page 051, para 123
25 Paginated page 074 – 090, paras 190 to 192
Annexures "MMM30" to "MMM42"

("O'Sullivan"), Sarah J Trent ("Trent"), Temane Binang ("Binang"), and Mandlakayise Mahlangu ("Mahlangu")

173. Maema strongly denies the allegations imputed to him by Advocates Van Jaarsveld and Van Rensburg regarding his improper involvement in the Kameeldrift matter. Maema's version is corroborated by Mashuga.

174. The *modus operandi* that was employed by both Trent and O'Sullivan was the sending of various emails to various recipients, demanding that the recipients should conduct investigations and/or that people should be arrested or be prosecuted, failing which Trent and O'Sullivan threatened them that they would deal with them (i.e., persons who should implement their threats/demands, be it prosecutors or police officers). This is borne out by a plethora of e-mails which, *inter alia*, O'Sullivan sent to Phahlane,[26] Dr Pretorius, Mashuga[27] and Mokgatlhe.

175. In the portion that is headed "IPID was captured by Paul O'Sullivan" in this recordal, it is demonstrated how O'Sullivan and Trent abused IPID in the investigation of Phahlane.

176. The charges levelled against O'Sullivan, Trent, Binang and Mahlangu and the evidence on which the charges are based, is found in Mashuga's affidavit.[28]

177. The charges levelled against O'Sullivan and Trent are the following:

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26 Annexure "MMM18", paginated page 051, para 123
27 Paginated page 074 – 090, paras 190 to 192
Annexures "MMM30" to "MMM42"
28 Paginated pages 041 to 055, paras 101 to 133

177.1. Intimidation;

177.2. Contravention of Section 33(5) of the IPID Act and conspiracy to commit such offence;

177.3. Fraud;

177.4. Extortion;

177.5. Attempted Extortion;

177.6. Contravention of Section 18(b)(v) of PRECCA;

177.7. Contravention of Section 3 and 4 of PRECCA;

177.8. Defeating the Course of justice;

177.9. Crimen Injuria; and

177.10. Perjury, alternatively contravention of Section 9 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963.

178. In Mashuga's affidavit, it is submitted that the evidence therein contained demonstrate that there was *prima facie* evidence to charge O'Sullivan, Trent, Binang and Mahlangu with the charges levelled against them. The criminal charges are still pending.

179. Any allegations that the prosecution in this matter was done because Mashuga was captured for either political or corrupt reasons, is not correct.

G. CHARGES PREFERRED AGAINST O'SULLIVAN

(a) SAA - Kempton Park CAS 679/3/2015

180. This is the first matter relating to Paul O'Sullivan ("*O'Sullivan"*) that was properly, lawfully and legitimately referred to the PCLU. In this regard Dr Pretorius refers to annexure **"JPP52"** attached to his affidavit.

181. In this matter O'Sullivan and his two co-accused were charged with extortion and criminal defamation. In this matter O'Sullivan wrote an email addressed to the then Chairperson of the SAA Board, Dudu Myeni ("*Myeni"*) and copied the State President Cyril Ramaphosa and others demanding that Myeni must resign from the Chairmanship of SAA, discontinue the disciplinary hearing of Kalawe and reinstate Kalawe as the CEO of SAA lest he make available to the public the information about Myeni's bank statements which he alleged were monies from the E-Toll contracts.

182. After leaking the information to Sunday Times, which ran a story about the bank accounts, O'Sullivan realised that the bank statements were false. Pursuant thereto, O'Sullivan wrote to SAA's attorneys, Edward Nathan and Sonnenberg ("*ENS*") offering to pay R50 000.00 to Myeni if she undertook not to pursue criminal charges or a civil claim against him. He also offered to pay R25 000.00 to SAA for their costs in investigating the allegations that were made against Myeni.

183. Although the charges were withdrawn and remain withdrawn, Dr Pretorius submits that there is a *prima facie* case to answer against O'Sullivan, if regard is had on the fact that O'Sullivan made the offers referred to above. The levelling of the charges was justified in the circumstances.

184. Arising from the aforesaid case, a determination was made prioritising the matters involving O'Sullivan. It was deemed prudent to centralise all matters involving O'Sullivan and refer them to the PCLU.

185. In a further memorandum dated 12 April 2016, the NDPP referred to the PCLU all matters relating to O'Sullivan. In terms of the memorandum, Dr Pretorius, as the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit, was enjoined to manage and direct all investigations and prosecutions in relation to O'Sullivan. A copy of the memorandum is attached to Dr Pretorius' affidavit and marked as annexure **"JPP49"**. The referral was based on paragraph (a) of Proclamation No. 46 of 2003 published in Government Gazette No.24876 on 23 May 2003. Thus, PCLU was properly mandated to deal with the matters relating to O'Sullivan.

186. Matters relating to O'Sullivan were referred to PCLU because most of them were complex and difficult. These cases were referred to the PCLU because of the following reasons:

    186.1. The cases were difficult and complex;

    186.2. O'Sullivan, who is a very difficult person, has the *modus operandi* to intimidate prosecutors and witnesses;

186.3. O'Sullivan's strategy, whenever any charges are levelled against him, is to ensure that witnesses and prosecutors buckle under the pressure of his intimidation, with the aim of having such charges collapse.

186.4. Dr Pretorius has personally been subjected to O'Sullivan's *modus operandi*. He received a plethora of intimidating e-mails from O'Sullivan. In substantiation of his assertion and for the benefit of the Commission, and to avoid prolixity, Dr Pretorius only attaches a selection of such e-mails in his affidavit, marked as annexures **"JPP50.1"** to **"JPP50.5**". The balance of the e-mails are available for inspection in the event that it is required. Dr Pretorius is aware that JJ Mlotshwa was also subjected to threats by O'Sullivan.

186.5. Because of the experience of the members of the PCLU, they are best suited to deal with persons of O'Sullivan's rogue character. It is logical that the cases of O'Sullivan, having been declared priority crimes, should be referred to PCLU.

187. Below are some of cases that O'Sullivan was charged with.

(b) **Rosebank CAS 47/05/2016**

188. In this matter O'Sullivan was charged with kidnapping, extortion and intimidation. The complainant, Cora Van der Merwe, an employee of a firm of attorneys was

accused by her employer of having leaked information about malpractice of her employer in handling their clients' MVA claim matters.

189. Van der Merwe's employer instructed O'Sullivan to "investigate" the allegations against Van der Merwe. In the process of the "investigation", O'Sullivan allegedly intimidated Van der Merwe and extorted information from her threatening her with arrest and being sent to jail if she did not confess to "stealing" confidential office information and furnishing it to outsiders.

190. It was alleged that O'Sullivan with the assistance of his employee took Van der Merwe to his office against her will. O'Sullivan released Van der Merwe after the intervention of Adv van Schalkwyk.

191. The matter was heard at the Randburg Regional Court. Amongst others, the court held that Van der Merwe acted illegally in furnishing the information to the journalists and acquitted O'Sullivan despite the Protected Disclosures Act, Act 26 of 2000 specifically stating that it is legal for a whistle blower to provide such information to journalists.

192. The state filed an appeal against the court's decision on a question of law and the appeal is pending.

193. The trial in this matter proceeded beyond the application in terms of section 174 of the Criminal Procedure Act, 1977 (CPA). Thus, there was a *prima facie* case

to be answered by O'Sullivan in this matter and therefore charging him in the circumstances was justified.

(c) **Alberton CAS 799/11/2013**

194. In this matter O'Sullivan together with his co-accused were charged with extortion and intimidation. The complainant in the matter was Neil Diamond ("Diamond").

195. The charges were withdrawn against the accused as a result of the request of the complainant. Diamond requested that the charges be withdrawn at that time as he was busy at work and preparing himself to be re-interviewed for a post of the manager of the City of Mbombela. O'Sullivan had already approached him and threatened to expose his dirt in order to jeopardise his chances of being re-appointed as the city manager.

196. Although the criminal charges against O'Sullivan and his co-accused remain withdrawn for now, Dr Pretorius submits that there is a *prima facie* case against O'Sullivan. He says so because in a related application for interdict against O'Sullivan in the matter of Neil Diamond v Paul O'Sullivan, based on the same facts, the court found as set out below.

> "*58. I have already concluded that O'Sullivan's conduct, properly construed amounted to this: O'Sullivan was not interested in anything that Diamond had to say. Whenever Diamond attempted either to ascertain further facts or to convey his own knowledge of the facts, O'Sullivan threatened to walk out of the meeting. The clear implication of that threat was that Diamond*

would shortly thereafter be arrested, based on information (the precise import of which O'Sullivan refused to share with Diamond) which he would convey to the police. That in my view is a substantial threat and one which Diamond could not guard against short of giving in to O'Sullivan's demand that he admits to misappropriation and pays back an as yet unspecified amount.

59. I find that O'Sullivan's conduct is unlawful and amounts to attempted extortion.

62. ……...Under the circumstances, it is clear to me that O'Sullivan acted with the requisite mens rea.

65. ……To apply the sort of illegitimate pressure on Diamond to make concessions in response to the threats issued in the manner described above, amounts in my view to O'Sullivan taking the law into his own hands. ……..."

A copy of the judgment is attached to Dr Pretorius' affidavit and marked as "**JPP51**".

197. In view of the above, Dr Pretorius submits that charging O'Sullivan with extortion and intimidation was justified.

H. SUMMARY OF FACTS RELATED TO THE RICHARD MDLULI MURDER CASE AND RELATED CHARGES

198. The office the DPP:SG received representations from Richard Mdluli regarding the criminal cases which he was facing. The representations are annexed to Chauke's affidavit and marked **"AC3"**.

199. In the said representations various allegations were raised about the decision taken to prosecute and conspiracy by various parties as well as that there was no evidence of the commission of any offence by the accused.

200. Chauke studied the relevant case docket and the report of the prosecution team. He attached copies of both the case docket and the report of the prosecution team to his affidavit. The docket is marked as annexure **"AC4",** and the report is marked as annexure **"AC5"**. Chauke was fully satisfied with the evidence regarding all the charges except the murder and attempted murder charges.

201. In April 2012, Chauke accordingly decided that an inquest should be held in respect of the murder charge. He referred the matter to the Boksburg Magistrates' Court having jurisdiction with a request that a formal inquest be held. A copy of the request is attached to his affidavit and marked as annexure **"AC6"**.

202. The charges were provisionally withdrawn pending the conclusion of the inquest proceedings. This was done in order to prevent the fragmentation of trials.

203. The magistrate conducted a formal inquest hearing into the death of Ramogibe and in September 2012 concluded that the death of Ramogibe was brought about by unknown persons and cleared Richard Mdluli and others identified. Chauke attached the record of the inquest, including the finding of the Magistrate, in his affidavit, marked as annexure **"AC7"**.

204. Chauke then requested and instructed the prosecution team to enrol the matter in respect of the remaining other charges in which he was satisfied that there is *prima facie* evidence against the accused. The prosecution team through its lead prosecutor, Adv Z J van Zyl SC ("van Zyl") informed Chauke that the team has been informed that Chauke's decision to refer the matter to the formal inquest and the findings of the inquest will be or has been taken on review. van Zyl proposed that in view thereof the prosecution team is of the view that we should await the decision of the High Court on review must be awaited as, if Chauke decision is found to be irrational the trial will have to include the murder and attempted murder charges. Chauke acceded to this proposal and the matter was not enrolled. A copy of the email emanating from van Zyl dated 19 June 2014 is attached to Chauke's affidavit and marked as annexure **"AC8"**.

205. The High Court made a finding that Chauke's decision was irrational. This decision was appealed against by the NPA. Counsel for the NPA at the SCA, Adv L Hodes SC ("Hodes") called Chauke whilst arguing the matter in that court, asking him when the matter could be enrolled in accordance with Chauke's decision were the court to find that the decision was not irrational. Chauke indicated to Hodes that such could be done within a month given that a notice must be served on the accused persons to appear in court.

206. The SCA found that Chauke's decision was rational and indicated that such decision if irrational should be reviewed by the NDPP. To this end a memorandum was prepared and submitted to the National Director to consider the matter. In line with the directive of the SCA, the NDPP, after reviewing

Chauke's decision, came to the same decision that he earlier made. In this regard, the Commission is referred to a letter addressed to Cliffe Dekker by the NDPP dated 17 June 2014, marked as annexure **"AC9"**, attached to Chauke's affidavit.

207. Chauke contends that it is clear that any criticism directed at him, and imputing the decision under discussion to him, is both misplaced and wrong, as the final decision was made by the NDPP. Chauke further contends that if any person should be criticised, it should be the NDPP. He is of the view that is clear that the unfounded criticism levelled against him is done for nefarious reasons.

208. The matter was subsequently enrolled in the High Court as previously decided. The accused were convicted as per Mokgoatlheng J. Chauke attached a copy of the judgment to his affidavit, marked as annexure **"AC10"**. The Judge did not criticise the decision that Chauke took.

209. On 29 September 2020, the accused were each sentenced to an effective five (5) years imprisonment.

I. **IPID CAPTURED BY O'SULLIVAN**

210. IPID, during the investigation of the charges that were levelled against Phahlane, was not independent as it should have been or as it was supposed to be. Any investigation that is being conducted by IPID should be within the confines of the Law.

211. In carrying out its investigations, the members of the IPID are expected to be objective and should at all costs avoid being improperly influenced by any person, even a complainant. The *modus operandi* that was employed by O'Sullivan was to write emails to persons and in this regard, reference is made to Phahlane, Dr Pretorius, and Mashuga. The various emails contained threatening messages which were meant to ensure that the recipients gave in to his unlawful demands. The demands were that the recipients of the emails ("recipients") should either investigate, arrest, and/or prosecute persons that O'Sullivan wanted to settle scores with. The emails further indicated that, in the event that the recipients do not give in to the unlawful demands, he would deal with them by either laying criminal charges, complaints, and/or exposing the recipients through the media.

212. Whilst it is acceptable that complainants are entitled to assist IPID members in carrying out investigations, however, such should be done within reason and the confines of the Law. The involvement of O'Sullivan in the Phahlane matter was more than merely assisting and/or giving the investigators information and assistance. O'Sullivan and Trent did the actual investigation in the Phahlane case.

213. In the affidavit of Phahlane which is filed with the Commission, a plethora of emails is attached[29] thereto demonstrating the point that is being raised in this

29 Annexure "MMM18", paginated page 051, para 123.

regard. Similarly, both Dr Pretorius and Mashuga were subjected to the same conduct by O'Sullivan, which is evidenced in the attachments[30] to their affidavits.

214. It is the implicated prosecutors' case that IPID was captured by O'Sullivan for nefarious and self-serving reasons.

215. On the 13th of November 2016, O'Sullivan sent an e-mail to Christiaan Hendrik Jooste ("Jooste") with two building plans attached thereto, and requesting that Jooste should retake the photos of the building plan of Phahlane's home and send it to O'Sulivan.[31]

216. On the 23rd of November 2016, O'Sullivan sent a WhatsApp message to Jooste, requesting that Jooste provide O'Sullivan with the number plates and photographs of Phahlane's motor vehicles.[32]

Both Trent and O'Sullivan actively took part in the obtainment of the section 205 subpoenas and statements which were presented as if they were compiled by the IPID members. The unlawful conduct was embraced by both Bonang and Mahlangu.[33]

217. The objective view of the implicated prosecutors is supported by Coetzer who was tasked with the responsibility of making a prosecutorial decision regarding

30 Paginated page 074 – 090, paras 190 to 192
Annexures "MMM30" to "MMM42".
31 Annexure "MMM5", paginated page 168, para 7
32 Annexure "MMM5", paginated page 168, para 9
33 Paragraph 198 paginated pages 091

the charges levelled against Phahlane. In the memorandum dated 2 December 2016, which is annexure "**GB16**" to Baloyi's affidavit, Coetzer is heavily criticised the involvement and conduct of O'Sullivan which led to the issuing of a *nolle prosequi.* In the memorandum dated 2nd of December 2016 relating to the decision whether to prosecute Phahlane, Coetzer states as follows:

> *6. "Taking into account the abovementioned factors, together with the available evidence, the writer therefore comes to the following conclusions:*
>
> *6.1. It appears common cause that Terblanche informed Phahlane pertaining to the meeting that he had with A1 and the other role players. It would be evident that Terblanche would also inform him of the participation of O'Sullivan, private person in the investigation. It is further common cause that at that stage Phahlane would have been aware of the various allegations that had been against him by Phahlane.*
>
> *6.2. It is submitted that Phahlane's subsequent conduct in instructing Jooste not to co-ooperate with IPID, was not unlawful, especially taking into account the fact that IPID allowed a private person access to confidential information relating to the house of Phahlane. Even if it can be argued that his conduct was unlawful in this regard, there is insufficient evidence to warrant the interference that he acted with the necessary dolus in acting in the manner that he did.*
>
> *6.3. Phahlane did not threaten Jooste or instruct him to hide or destroy and evidence. All the information IPID required could easily have been obtained by applying for a search warrant and/or a Section 205 subpoena.*
>
> *6.4. The allegation that the instruction that Phahlane gave to security at the Estate not to allow any access to his house amounts to an offence, can be dismissed out of hand. The residence of a person is sacrosanct, and any intrusion can only be done in terms of legal procedures, which in the writer's opinion was not done in casu. The fact that O'Sullivan previously*

photographed the house of the Commissioner of SAPS and e-mailed it to him was in the writer's opinion further illegal conduct.

E. CONSLUSION

7. The writer is therefore of the opinion that taking into account the factors supra 4 – 6 that there is not a reasonable prospect of a successful prosecution in this matter.

8. Consequently, it is submitted that the docket be closed as "nolle prosequi".

218. It is respectively submitted that the answers that McBride gave during his cross-examination demonstrate that O'Sullivan was not merely a complainant, he actively took part in the Phahlane investigation as referred to below.

"*MR McBRIDE:* *He has been involved in investigations previously and he should testify about his motives and what he did, but indeed and I can even go further and say he assisted IPID with lots of investigations.*

ADV JOUBERT SC: *But in this instance he had a more personal interest, he is the complainant.*

MR McBRIDE: *I think it is his modus operandi when he deals with someone in high office to provoke them to make mistakes and I believe General Pashlane Chair made such a mistake because the provocations and incessant emails should be normal in a constitutional democracy but it does irritate some people and they respond perhaps and there is an element of overreach, but that is his way, he seems to succeed every time.*

ADV JOUBERT SC:*...*

MR McBRIDE: *I don't want to comment on ...[intervenes]*

ADV JOUBERT SC: *That was just a – Mr McBride your agreement must have been that as a result of the wide tyres IPID investigators have, or they should do their investigations and which are very important, primarily against police officers who don't always toe the line, should do that independently, transparently and objectively.*

MR McBRIDE: *Indeed.*

ADV JOUBERT SC: *Ordinarily complainants don't get involved in that investigations, because they should lay their complaint, they should make an affidavit under oath, a docket or an inquiry docket should be opened and from there on it is the duty of your investigators to do their work or their job in accordance with the transparent protocol.*

MR McBRIDE: *Indeed, complainants do assist in investigations sometimes, and perhaps Mr O'Sullivan was more helpful than others.*

ADV JOUBERT SC: *…*

MR McBRIDE: *…*

ADV JOUBERT SC: *…*

MR McBRIDE: *…*

ADV JOUBERT SC: *…*

MR McBRIDE: *…*

CHAIRPERSON: *I think what Mr Joubert maybe doing is to seek your comment on a proposition that says when one looks at the role that they played in this investigation it seems to have been too active – they seem to have been too active or more active than they should have been. They should not have allowed to be. Maybe the investigators should have said, well we know that you – you are available to assist us but we are in control of this process. We will tell you if we need anything if you are going to be with us as we go to that place just listen to us. So – so that you do not appear like you in charge of this process. I think that*

is the proposition in which he would like you to hear what you have to say about that.

MR MCBRIDE: *Well there have been instances where I have had to intervene and it was an uncomfortable situation because they had provided assistance. But in fairness to the investigators and to O'Sullivan and Trent there is an explanation which they give in their affidavits as to how they came to be together in one car at that specific time. So I think once I acknowledge that there was perhaps too much assistance if I can put it that way, they have explained the circumstances in which this – in which this happened. So to – I mean from the outside view there has been and some people have commented the over involvement and too much assistance.*

CHAIRPERSON: *Ja.*

ADV JOUBERT: *Well…*

CHAIRPERSON: *So maybe just to complete that point speaking generally would you accept that their involvement seemed to seemed – seems to have been more than normal but whether in the particular case it was justified is something you leave to the investigators to deal with?*

Would it be fair to say that is how look at it generally and in – and on the particular circumstances?

MR MCBRIDE: *Chair I would agree with you except to add that in this particular case the police themselves the complainants against Mr Phahlane had gone to O'Sullivan first.*

CHAIRPERSON: *Hm.*

MR MCBRIDE: *And had made statements O'Sullivan already have statements from police officers.*

CHAIRPERSON: *Hm.*"

219. It is interesting to note that Coetzer is one of the prosecutors who enjoy selective condemnation despite condemning and declining to prosecute Phahlane.

J. SARS RELATED MATTERS:

(a) The interception of communication at the DSO and the NPA Offices

220. The case involving the interception of communication at the offices of the DSO and the offices of the NPA was widely publicised in the media under the headline "SARS Rogue Unit". In this recordal, the implicated prosecutors refer to the above case as "the Rogue Unit case" as it is referred to in the public domain.

221. In a nutshell, the Rogue Unit matter is about:

221.1. Whether SARS officials installed listening and monitoring devices at the offices of the DSO and the offices of the NPA of the following officials:

221.1.1. The former NDPP, Adv Vusi Pikoli (*"Pikoli"*);

221.1.2. The former DNDPP, Adv Mokotedi Mpshe (*"Mpshe"*);

221.1.3. The former DNDPP, Mr Willie Hofmeyer (*"Hofmeyer"*);

221.1.4. Adv Kiliany Pillay ("Pillay");

221.1.5. Adv Gerrie Nel ("Nel");

221.1.6. Mr Andrew Leask ("Leask");

221.1.7. Ms Thanda Mgwengwe ("Mgwengwe").

221.2. If such devices were installed:

221.2.1. Who authorised such installations;

221.2.2. On what authority did such person rely;

221.2.3. If it was SARS management, whether SARS has the statutory authority not only to authorise, but also to carry out such surveillance.

222. The implicated prosecutors demonstrate that SARS had no, and still has, no authority to authorise and/or conduct such surveillance, save for limited instances where SARS act with other law enforcement agencies, such as the Intelligence Division of the SANDF, the Intelligence Division of SAPS and the State Security Agency.

223. The implicated prosecutors further demonstrate, by reference to legislative prescripts and witness statements, that:

223.1. SARS is not statutorily authorised to act as it did;

223.2. There is undisputed evidence that SARS officials installed such surveillance equipment in the offices of the officials referred to above; and

223.3. SARS, in fact, carried out the unlawful interception of communication.

224. The High-Risk Investigation Unit was a unit within SARS around which the case referred to above revolves. In line with what is said above, this unit is referred to as the Rogue Unit in this recordal.

225. The Rogue Unit owes its origin to the memorandum dated 2 February 2007, written by Pillay in his capacity as the General Manager of the Enforcement and Risk Division of SARS. The memorandum was directed to the Minister of Finance at the time, Mr Trevor Manuel seeking approval for the funding of special capability within the former National Intelligence Agency ("NIA") (currently known as the State Security Agency) to supply SARS and other law enforcement agencies with the necessary information to address illicit economy, from where SARS was losing a lot of revenue.

226. A copy of the memorandum is attached to the Rule 3.4 Statement of Maema filed with the Commission as annexure "GSM21". From the memorandum, the following can be gleaned:

226.1. The purpose of the memorandum was to seek approval to fund a special capability within NIA to supply SARS and other law enforcement agencies with necessary information to address the illicit economy.

226.2. Mr Pravin Gordhan, SARS Commissioner at the time, approved the recommendation on 8 February 2007.

226.3. Mr Jabu Moleketi, the former Deputy Minister of Finance approved the recommendation on 22 February 2007. Mr Moleketi's approval was accompanied by a handwritten comment stating, "*Supported however this is a strange way of executing what I consider to be an economic mandate of NIA… it seems as an add on rather than part of NIA's mandate*".

226.4. Mr Manuel, the former Minister of Finance approved the recommendation on 22 February 2007.

226.5. In paragraph 2 of the memorandum, it is acknowledged that SARS did not (the implicated prosecutors argue that even now, SARS does not) have statutory authority to conduct covert surveillance on anyone. Mr Moleketi confirms this in his handwritten comment when supporting the recommendation.

227. It is worth noting that, from the reading of the memorandum, the initial intention for establishing the unit was good and perfectly in order. Also, the manner in which it was intended to be established and conduct its business was legally permissible.

228. The investigation that followed confirmed that the Rogue Unit did exist. However, the Rogue Unit's establishment was not in accordance with the law. The Rogue

Unit also did not conduct its business in accordance with the law. Consequently, certain SARS officials were criminally charged.

229. The said officials were charged of contravening section 49(1), read with sections 1, 2, and 51(1)(b) of the Regulations of Interception of Communication and Provision of Communication–Related Information Act No. 70 of 2002 ("RICA"), amongst others.

230. The abovementioned charge relates to the unlawful fitment of surveillance equipment in the offices of the former DSO and the NPA (Operation Sunday Evenings). The elements of this offence are as follows:

230.1. Unlawful and intentional;

230.2. Interception of communication; and

230.3. Without authorisation of a designated judge in terms of section 16 of the RICA

231. Helgard Lombard ("Lombard") submitted a statement in terms of section 204 of the Criminal Procedure Act, 1977 ("CPA"),[34] in relation to the above case. A copy of his Statement is attached to Maema's Rule 3.4 Statement and marked "GSM23.2". In the Statement, Lombard confirms the following:

231.1. He was an employee of SARS at the time;

34 Criminal Procedure Act No. 51 of 1977.

231.2. His immediate supervisor was Mr Andries Janse van Rensburg ("Skollie"), who in turn reported to Pillay;

231.3. He, with the assistance of Skollie to some extent, fitted the surveillance equipment in the offices of the DSO and NPA.

231.4. On instruction of Skollie and Pillay, he intercepted communication of the DSO officials using the surveillance equipment that he and Skollie installed.

231.5. The installation of the surveillance equipment and the interception of the communication were conducted without authorisation of a designated Judge in terms of section 16 of the RICA.

231.6. After Skollie had left the employ of SARS, Mr Johann van Loggerenberg ("Loggerenberg") took over Skollie's position, and the unit continued to conduct surveillance, still without the section 16 authorisation.

232. Evidence given by Lombard above is corroborated by Messrs Jappie Tshabalala, Eric Khulekani Khwela, Dillo Nyapudi, Danie le Roux and Francois van Niekerk, as well as Ms Norah Pitsi. Copies of their statements are attached to Maema's Rule 3.4 Statement as annexures "GSM25" to "GSM30". All the above witnesses were SARS employees attached to the Rogue Unit at the times relevant to this case.

233. Johannes Daniel de Waal ("De Waal"), whose statements are A35, A46 and A121 in the docket, also corroborates the evidence given by Lombaard.

234. If regard is had to the content of the memorandum of 2 February 2007 prepared by Pillay, it is clear that Pillay and everyone who supported the contents of the memorandum, knew that SARS did not and still does not have the statutory authority to carry out surveillance.

235. In addition to Lombard's confirmation of installation of the surveillance equipment at the DSO and the NPA offices, and the interception of communication, Col Izak Johannes Fisher confirmed the capability of the surveillance equipment, as indicated by Lombard. A copy of his statement in this regard is attached to Maema's affidavit as annexure "GSM22".

236. In view of the evidence that was before the implicated prosecutors set out above, they were justified in instituting criminal proceedings in this regard.

(b) <u>Early retirement of and pension pay out to Pillay</u>

237. The matter relating to the retirement of Pillay surfaced during the investigation of the Rogue Unit case, when a correspondence relating to it was discovered. The investigation referred to here was guided by the PCLU, as it had been referred to it by the NDPP in terms of the Proclamation.

238. On perusal of the correspondence, it appeared that SARS might have incurred unauthorised, irregular, and fruitless and wasteful expenditure in respect of the early retirement of Pillay. It appeared very improper that SARS could pay a retirement penalty for an employee, particularly when an employee takes an early retirement due to purely personal reasons.

239. Since the PCLU must guide and manage the investigation of matters referred to it and matters incidental thereto, PCLU was obliged to request the investigators to investigate Pillay's pension payout and guide the investigation in that regard.

240. The investigation revealed that the manner in which Pillay was granted early retirement was in contravention of the law relating to pensions. It was meant to assist Pillay to sort out his personal problems relating to the schooling of his children.

241. The approval of Pillay's early retirement by the then Minister of Finance was coupled with the recommendation that, almost immediately after retirement, Pillay would be reappointed by SARS to occupy the same position he occupied before taking retirement, i.e., position of a Deputy Commissioner even though the reappointment was on contract basis.

242. The reappointment of Pillay was done without following the correct and necessary procedure. For instance, the position was not advertised, and no interviews were conducted with potential candidates.

243. Based on the above, Magashula, Pillay, and Gordhan were criminally charged.

244. It is worth noting the following in relation to the criminal proceedings that were instituted against the three above:

244.1. The prosecution team did not have Symington's statement in the docket when the decision to prosecute was made. Symington was at the relevant time employed by SARS at its Legal and Policy Department. He prepared an opinion upon which it was alleged that the decision to approve Pillay's early retirement was based. The prosecution became aware of the existence of Symington's opinion on 14 October 2016 when Magashula and Pillay made section 179(5) representations for the withdrawal of charges against them.

244.2. The prosecutors who were involved in charging the three above were accused of instituting malicious prosecution against them. This allegation is levelled against the said prosecutors coupled with the allegation that they, together with others referred to in Booysen and McBride's affidavits, enabled state capture by "persecuting corruption busters" and refusing to prosecute politically connected individuals.

244.3. It is not the individuals who were charged that accuse the prosecutors of malicious prosecution, but it is Booysen and McBride. Be that as it may, considering the *sui generis* nature of the proceedings of the Commission,

the prosecutors must respond to the unsubstantiated and baseless allegations that Booysen and McBride made against them.

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

245.1. Fraud in that a false pretence was given to SARS and National Treasury to its prejudice that SARS was liable to pay in excess of a million rands to the Government Employees Pension Fund (GEPF) on behalf of Pillay which was a penalty for taking early retirement for personal reasons.

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

245.3. A further fraud in that a false pretence was given out to the Human Resources of SARS to its prejudice to enter into an employment agreement with Pillay for a remuneration package for a period of five (5) years instead of three years which was in the approved memorandum.

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

246. The prosecutors who were involved in the prosecution of this case, being Dr Pretorius and Maema demonstrate in their respective Rule 3.4 Statements filed with the Commission that, based on the objective evidence that was before them, they were justified in recommending to the NDPP that the individuals referred to above must be prosecuted. They demonstrate that there was a reasonable prospect of successful prosecution in the matter.

247. Dr Pretorius sets out the reasons for instituting criminal proceedings against Magashula, Pillay, and Gordhan from paragraph 241.3 to 306 of his supplementary Rule 3.4 Statement. On the other hand, Maema deals with the case pertaining to early retirement and reappointment of Pillay including reasons for instituting criminal proceedings against Magashula, Pillay, and Gordhan from paragraph 378 to 393 of his Rule 3.4 Statement.

248. In the paragraphs that follow, the implicated prosecutors demonstrate that there was a rational basis to bring charges against the three individuals.

249. The following evidence was in the docket when the decision to prosecute was made:

    249.1. On 12 August 2010, the former Commissioner of SARS, Magashula requested the former Minister of Finance, Gordhan to approve the early retirement of Pillay from SARS with full retirement benefits with effect from 1 September 2010 and that SARS must pay the early retirement penalty that is payable to the GEPF as contemplated in Rule 14.3.3(b)

of the GEPF Pension law read with section 19 of SARS Act and section 16(2A) of the Public Service Act, 1994 ("PSA").[35] Approval was also sought for Pillay to be reappointed almost immediately after retirement, in the same position as a Deputy Commissioner on contract for three (3) years. Effectively, Pillay would be enabled to pay for his children's education and continue his employment at SARS for another three (3) years, whilst SARS would suffer financial loss in excess of a million rands.

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

249.3. After Pillay went on early retirement, Magashula entered into an employment agreement with Pillay in the same capacity for a period of five (5) years commencing 1 January 2011 knowing that the approval granted was for a period of three (3) years only.

249.4. Just before Gordhan was appointed as Minister of Cooperative Governance and Traditional Affairs in May 2014, he extended Pillay's contract for another four (4) years when there was no internal

35 Public Service Act No. 103 of 1994.

memorandum authorising same, when Pillay's employment contract was to terminate in 2015. The contract still had a year to run before it expired.

250. Also, at the disposal of the implicated prosecutors, there were two (2) undated memoranda which were written by Pillay. The one was addressed to Magashula, and the other to Gordhan.

251. In the one addressed to Magashula he mentions the reason for his early retirement as "*I was expected to perform at a very high level accompanied by accountabilities that go with the performance of such a high level job. This exacted its toil from me in the sense that my health condition is slowly deteriorating. Added to this, my family responsibilities, for a long time, suffered on account of the dedication required by my job… I have decided to take early retirement*".

252. In the one addressed to Gordhan, he states:

> "*I have reached a stage in my life where it has become a reality that I had to make some very important decisions about the education of my children. The decision I have taken will require a considerable capital investment, money that can be raised by means of a bank loan, but which would be prohibitively expensive in view of the current financial circumstances where very high rates of interests are the order of the day and indications are that this situation will prevail for the foreseeable future. In view of this I have decided to inform you that I intend to retire in 2009 when I reach the age of 56 years. As I have already reached the earliest optional retirement age of 55 years in terms of SARS retirement provisions, the*

retirements benefits will provide me with a lump sum benefit (which will financially support the decision I have made in terms of the education of my children) as well as a monthly pension. Whilst this may not be ideal in terms of maximum benefits when finally retiring, I am of the opinion that this is the best option available to me as far as my children's education is concerned.

This brings me to the second issue at stake, namely how I view my retirement as raised above. Clearly I am doing this on account of a matter that has nothing to do with my work at SARS. I still feel that I am still capable of doing my work, I still have the enthusiasm and will to do it and I am of the opinion that through my work, I can still contribute to the establishment of an even better South Africa for all its citizens."

253. The implicated prosecutors held a view that the separate reasons for early retirement are quite different and contradict each other. Section 16(6)(a) of the PSA requires that the Executive Authority may authorise an employee to take early retirement if there are sufficient reasons to take such early retirement. In their view, the reasons advanced for such early retirement contradict each other, are purely personal, and have nothing to do with his obligations towards SARS. The officials at Human Resources warned Magashula that implementation of the decision would amount to SARS paying for the education of Pillay's children, but they were simply ignored.

254. In addition to the three memoranda referred to above, the implicated prosecutors had the following documents in their possession, which they considered when making the decision to bring the charges in issue:

254.1. Affidavit of Nico Johan Coetzee – At the relevant time, Coetzee was an employee of SARS. In his affidavit, he says:

> "*In 2008, I was instructed to prepare a ministerial memorandum to be signed by Gordhan (who was Commissioner of SARS at the time), to recommend to the then Minister of Finance (Trevor Manuel) that he approve Pillay's early retirement*".
>
> "*I awaited the approval by the Minister of the request by Mr. Pillay. In October 2009 while waiting for the approval of the memorandum, I received a revised memorandum from the office of the Commissioner, Mr Oupa Magashula. The memorandum contained different reasons from my original memorandum as to why the Minister should approve Mr. Ivan Piliay's early retirement. The reasons on the revised memorandum were that Mr. Pillay wished to go on early retirement in order to enable him to provide for his children's education and not as I have previously stated that he wished to pursue other interests. I raised concerns to the Commissioner through the e-mails dated the 8th and the 9th October 2009 respectively, that if the Minister should approve Mr. Piliay's application on the grounds of personal interest may create a precedent in terms of which, other employees might come forward with similar request for early retirement*."

254.2. In the e-mails dated 8 and 9 October 2009 referred to in his affidavit, Coetzee said the following to Magashula:

> "*Hi Oupa*
> *Luckily for me I have dealt with this matter during June this year but i do not know why the matter was not promoted at the time as I have certainly started the process. I have amended the two submissions (attached) to fit in with Mr. Pillay's latest request. It is not unusual that a retirement employee is re-appointed after retirement in a contract capacity. What may raise some eyebrows in this particular case is that the employee is*

appointed in the same position he held before his retirement. Ordinarily such a re-appointment will be a different and a lower-graded position. It will have to be decided if satisfactory reasons can be given for the re-appointment in the same position. We had two similar application for early retirement, both which were not approved by the Minister as the Minister could not find sufficient reason to approve early retirement. In terms of section 16(6) of the Public Service Act, the Minister only has to consider if sufficient reason exist to approve Mr. Pillay's early retirement..."

254.3. In Coetzee's e-mail of 9 October 2009, he said:

"*I am resending this e-mail on account of a slight change I have made to the two attached documents. The changes indicated that the reason why Mr. Pillay is requesting approval for early retirement is to provide for his children's education and not as I have previously stated that he wished to pursue other interests. You will now have to consider to recommend and the Minister consider to approve if this is sufficient reason to recommend/approve Mr. Pillay's application for early retirement. If his application is duly recommended/approved, it could technically be construed that SARS is willing to contribute from its budget an amount of ±R340 000 towards the education of his children. I admit it is a rather cynical viewpoint, but it can be a viewpoint that may be held by other parties as well and that may put yourself and the Minister in a tight spot, especially because Mr. Pillay was re-appointed in his present position. The argument may be that he was able to continue with his present functions, but his early retirement and reappointment was purely to assist him to be able to provide for his children's education with a R340 000 'contribution' from SARS*."

254.4. Chrisna Sussana Visser in her affidavit also confirms that there was no business reason for SARS to pay Pillay's penalty and the contents of her

affidavit are captured at page 287 to 289[36] of Maema's Rule 3.4 Statement.

254.5. Other statements being statements of Susana Venter (A130), Estelle van Niekerk (A100), and others based at the Human Resources and Finance sections of SARS are in the docket. Gerda van den Heveer whose statement is A104 in the docket also took early retirement at an age of 58 (fifty-eight) after serving SARS for 27 years. She was not accorded the same privilege as Pillay. She repaid her penalty to GEPF after SARS had earlier paid it.

255. When the implicated prosecutors decided to bring charges, they also took into account that there was no authorisation in law for SARS to pay the penalty, effectively financing the education of Pillay's children.

256. In addition, the implicated prosecutors took into account that the so-called early retirement was in fact not an early retirement at all. This is so due to the fact that Pillay did not intend to retire and both Gordhan and Magashula were fully aware that Pillay did not truly intend to retire. The fact that Pillay did not truly intend to "retire" is clear in his memorandum dated 27 November 2009.

257. In the aforesaid memorandum, a false impression is created that Pillay was to serve SARS in a "different capacity" where the demands of such a job would "positively support the reasons why I am in the first instance taking early

[36] SEQ 29/2021-287 to 290.

retirement". The reason given for early retirement is that “my health condition is slowly deteriorating" and “my family responsibilities, for a long time, suffered on account of the dedication required by my job". Despite all of this, Pillay was reappointed to the very same position from which he so desperately wanted to “retire".

258. In addition to the above, the fact that Pillay was reappointed at the same time that he went on early retirement clearly meant, as far as the implicated prosecutors were concerned, that the position of Deputy Commissioner of SARS, to which he was reappointed immediately, was not advertised and other interested parties were not given an opportunity to apply. This would have been necessary due to the fact that at the moment that Pillay took early retirement, his position of Deputy Commissioner became vacant, and the position had to be advertised to give all interested parties an equal opportunity to apply. This was not done.

259. The implicated prosecutors’ view is that the provisions of sections 16(6)(a) and (b) of the PSA do not apply in Pillay’s case. Similarly, Rule 14.3.3(b) of Government Employees Pension Law, 1996 (“GEP Law”), read with section 19 of SARS Act and section 16(2A)(a) of the PSA are not applicable in Pillay’s case. The implicated prosecutors set out their reasons for holding a view that the above pieces of legislation do not apply to Pillay’s case on page 296 to 299 of Maema’s Rule 3.4 Statement.

260. Another consideration when the charges in issue were preferred was Pillay's contract of employment after his reappointment.

261. Pursuant to Magashula's recommendation, Gordhan approved Pillay's early retirement and re-appointment. The approved re-appointment was to be for a period of three years. Gordhan also approved that Pillay's penalty to the GEPF be paid by SARS.

262. Despite the fact that the Minister approved Pillay's re-appointment to be for a period of three years, on the 7th of February 2011, Magashula and Pillay concluded a five-year contract. This contract was clearly not approved by Gordhan, and all the payments made in terms thereof were not lawfully authorised. Magashula and Pillay were fully aware of this illegality. They acted in contravention of the empowering approval given by Gordhan which approved conclusion of a three-year contract (even though that approval itself was unlawful).

263. The aforesaid contract was to have come to an end in 2016. However, on the 26th of March 2014, Gordhan concluded a new contract just weeks before his appointment to a different ministry. In terms of that contract, Pillay was appointed with effect from the 1st of April 2014 to the 31st of December 2018. There does not appear to be a lawful reason for concluding another contract before the expiry of the contract concluded in February 2011.

264. If regard is had to the above background and the provisions of the GEPF Law and the GEPF Rules, it cannot be said that there was no rational basis to institute criminal proceedings against Magashula, Pillay, and Gordhan. Equally, the allegations that charging the three individuals was malicious and politically motivated are unfounded and baseless.

(c) <u>Refusal to prosecute Brigadier Xaba and Others for charges of kidnapping and assault: Symington Matter (Brooklyn CAS 790/10/20160</u>

265. The implicated prosecutors in relation to the above matter are Dr Pretorius and Baloyi. This matter relates to the incident that took place at the offices of the South African Revenue Services ("SARS").

266. The summary of the facts is as follows:

266.1. During the investigation of the Rogue Unit case, some documentation relating to Pillay's early retirement was discovered. Perusal of the documentation revealed that contravention of the law relating to pensions might have taken place in relation to the approval of Pillay's early retirement.

266.2. The suspected contravention of the law referred to above was investigated further and flowing from the investigation, Magashula, Pillay and Gordhan were criminally charged.

266.3. Magashula and Pillay later made section 179(5) representations to the NDPP, motivating that the charges against them be withdrawn.

266.4. In their representations, Magashula and Pillay indicated, amongst others, that the decisions taken in relation to Pillay's early retirement were done so relying on the opinion that was prepared by Symington.

266.5. Flowing from the above, it became necessary that a statement from Symington must be obtained.

266.6. Dr Pretorius in his capacity as the Acting Head of the PCLU emailed a memorandum to Brigadier Xaba, a member of the DPCI investigation team in the Rogue Unit case. In the memorandum, Dr Pretorius gave guidance to the investigation team on issues that Symington had to address in his statement.

266.7. Brigadier Xaba forwarded the PCLU memorandum to Mr Maphakela, an attorney who was contracted to SARS, who in turn forwarded the memorandum to the SARS Commissioner, Mr Moyane ("Moyane").

266.8. Moyane gave the memorandum to SARS Chief Legal Officer, Symington's immediate supervisor Mr Kosie Louw ("Louw") to discuss it with Symington.

266.9. On 18 October 2016, the DPCI investigating team went to SARS offices, amongst others, to obtain a statement from Symington.

266.10. When discussing with Symington about the points he needed to cover in his statement, which points were in the memorandum, it became clear that Symington was already aware of the issues raised in the memorandum.

266.11. When the DPCI members enquired from Moyane as to how Symington became aware of the issues, Moyane informed them that he gave the memorandum to Louw to discuss it with Symington.

266.12. The DPCI members indicated to Moyane that they wanted to retrieve the memorandum from Symington as they feared that it might be leaked to the media.

266.13. Moyane requested his bodyguard Mr Titi ("Titi") to accompany the DPCI members to go and retrieve the memorandum from Symington.

266.14. Symington refused to hand over the memorandum to the DPCI members and Moyane requested Louw to intervene.

266.15. Before Louw came to the boardroom where Symington, Titi and the DPCI members were, there had been a stand-off between Symington on the one hand and Titi and the DPCI members on the other. The

stand-off resulted from Symington's refusal to handover the memorandum to the DPCI members.

266.16. Even after Louw and other SARS members of staff had come to the boardroom and tried to persuade Symington, he still refused to give the memorandum back to the DPCI members.

266.17. When Symington was storming out of the boardroom, one of the DPCI members snatched the memorandum out of his hand and the DPCI members thereafter left.

266.18. Seven days later, Symington laid criminal charges against the members of the DPCI and Titi, for kidnapping and assaulting him.

266.19. In this regard he made two statements, one on 25 October 2016 and the other on 26 October 2016.

267. When the matter ultimately came to Baloyi as the then Acting DPP, Baloyi declined to prosecute.

268. The reason for declining to prosecute was that two affidavits deposed to by Symington which were in the docket were contradicting each other and thus impacting negatively on the prospects of a successful prosecution. This is set out in the letter which Baloyi wrote to the IPID attached to his Rule 3.4 statement marked "GB11".

269. Based on the above, McBride accused Baloyi of being a member of the "core group" within the NPA that enabled the capture of the criminal justice cluster.

270. Even if his decision may be wrong, which he denies, Baloyi argues that such a decision cannot justify the allegations made against him by McBride.

271. In support of this contention, Baloyi makes reference to Fabricius J's remarks when dismissing Symington's urgent interdict application against SARS arising from the same facts. A copy of Fabricius J's judgment is attached to Baloyi's rule 3.4 statement as annexure "GB12". The Judge remarked as follows:

> "*In my view those events ought to have been settled with a handshake and discussed over beer. Mr Titi was prepared to accept an apology, whilst Applicant demanded his dismissal. Respondent's comment that Applicant is inclined to melodrama is borne out by his assertion that he was 'subjected to unlawful kidnapping'. The person on that day in the boardroom conducted themselves in a less than dignified manner but that was about it*."

272. According to Baloyi, the Judge's remarks indicate that the Judge was also of the view that there was no threat to Symington.

273. Further, Symington's attorneys applied for a *nolle prosequi* certificate which Baloyi issued to them on 24 October 2017. A copy is attached to Baloyi's rule 3.4 statement as annexure "GB13". To date, no private prosecution has been instituted on behalf of Symington. Baloyi argues that the private prosecution has not been instituted after almost four years now because Symington and his legal

representatives have realised that there are no reasonable prospects of a successful prosecution.

274. In conclusion, based on the above, in comparison with lack of detail in McBride's testimony and generalised hearsay statements, Baloyi respectfully submits that the allegations levelled against him in this regard are unfounded.

K. SUBMISSIONS ON ALLEGATIONS REGARDING THE PROSECUTION OF G BREYTENBACH ("BREYTENBACH")

275. It is important to bring to the attention of the Commission that:

275.1. Mathenjwa did not receive a notice indicating that Breytenbach will implicate him of any wrongdoing or unprofessional conduct;

275.2. To the best of Mathenjwa's knowledge, he is not aware that Breytenbach submitted an affidavit to the Commission in which she allegedly implicates him in any wrongdoing or unprofessional conduct;

275.3. The unfounded and malicious allegations that are levelled against Mathenjwa in this regard are made by:

275.3.1. Booysen;

275.3.2. McBride; and

275.3.3. Sesoko.

275.4. The aforementioned persons do not have intimate knowledge of the facts relevant to this matter. They have not demonstrated to the Commission any factual evidence in support of their allegations. It is not sufficient to merely make malicious and unsubstantiated allegations to tarnish Mathenjwa's personal and professional reputation.

276. In his Rule 3.4 statement, Mathenjwa first set out the detail and evidence regarding the prosecution of Breytenbach. Thereafter, he detailed the unfounded and malicious allegations that Booysen, McBride, and Sesoko made against him.

(a) <u>The Charging of Breytenbach</u>

277. The charging of Breytenbach was premised on the legal prescripts set out below.

(b) <u>AI framework</u>

278. The charges preferred against Breytenbach were based on legislation set out below:

278.1. The relevant portions of section 40A of the NPA Act, on which Mathenjwa relied on are set out below and provide:

*"**40A Unauthorised access to or modification of computer material***

(1) Without derogating from the generality of subsection (2)-

(a) 'access to a computer' includes access by whatever means to any program or data contained in the random access memory of a computer or stored by any computer on any storage medium, whether such storage medium is physically attached to the computer or not, where such storage medium belongs to or is under the control of the prosecuting authority;

(b) …

(c) 'modification' includes both a modification of a temporary or permanent nature; and

(d) 'unauthorised access' includes access by a person who is authorised to use the computer but is not authorised to gain access to a certain program or to certain data held in such computer or is unauthorised, at the time when the access is gained, to gain access to such computer, program or data.

(2) Any person is guilty of an offence if he or she wilfully-

(a) gains, or allows or causes any other person to gain, unauthorised access to any computer which belongs to or is under the control of the prosecuting authority or to any program or data held in such a computer, or in a computer to which only certain or all members of the prosecuting authority have access in their capacity as members; or

(b) …

(c) performs any act which causes an unauthorised modification of the contents of any computer which belongs to or is under the control of the prosecuting authority or to which only certain or all members of the prosecuting authority have access in their capacity as members with the intention to-

(i) impair the operation of any computer or of any program in any computer or of the operating system of any computer or the reliability of data held in such computer; or

(ii) prevent or hinder access to any program or data held in any computer.

Emphasis added.

279. Section 41 of the NPA Act makes provision for offences and penalties. The complete section is set out in Mathenjwa's affidavit. It demonstrates that most of the penalties of imprisonment from 5 years to 25 years. This indicates that the legislature considered the offences to be of a very serious nature. Section 41(4) provides that:

*"**41 Offences and penalties***

(4) Any person who is convicted of an offence referred to in section 40A (2), shall be liable to a fine or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.

280. The NPA Policy on Internet and Email Usage dated 31 May 2006 ***("the policy")***, which provides, amongst others, as follows:

"*NPA reserves the right to examine personal file directories and other information stored on the NPA computer or IT systems at anytime without prior notice or consent by the user when required by and consistent with law, when there is*

substantiated reason to believe that infringement of policy or law has taken place or in exceptional circumstances when required to meet time dependent critical operational needs." A copy of the policy is attached in Mathenjwa's Rule 3.4 Statement and marked as annexure "**KRM7**"**.**

281. The referral was based on Clause (a) of Proclamation Number 46 of 2003 published in the Government Gazette No. 24876 on 23 May 2003 which is attached and marked as annexure "**KRM4**" in Mathenjwa's Rule 3.4 Statement.

282. Mathenjwa, as the lead prosecutor and Van Jaarsveld were allocated this matter for prosecution. To the best of Mathenjwa's knowledge, Van Jaarsveld is not painted with the same brush as he in this matter. This conduct clearly demonstrates *male fides* on the part of those who, without any reason, crucified Mathenjwa.

283. The charges emanated from a complaint lodged by a representative of Imperial Crown Trading (Pty) Ltd ("ICT") that Breytenbach had a close relationship with Kumba Iron Ore (Pty) Ltd's ("Kumba") Counsel. ICT felt that Breytenbach might be controlled by Kumba's Counsel in the decision-making process.

284. Van Rensburg served Breytenbach with a letter of intention to suspend, with an instruction that Breytenbach should hand over her work laptop. Breytenbach refused to hand over the laptop on the basis that handing over the laptop which has her personal information would violate her constitutional right to privacy.

285. Breytenbach's Attorney wrote a letter to the NPA informing the organization that the laptop would be surrendered once all contents of the laptop are cleared.

Breytenbach's Attorney was advised that it is a criminal offence to gain unauthorized access to and modify the NPA's material without approval. On the 28th of February 2012, Van Rensburg submitted a recommendation to Jiba to have Breytenbach suspended.

286. On the 30th of April 2012, Breytenbach was served with a notice of precautionary suspension. Paragraph 7 of the notice categorically stated that all laptops and other equipment must be left at the workplace. The NPA's officials who served Breytenbach with the notice of precautionary suspension requested the laptop from her. Her Attorney and herself refused to hand over the laptop. A copy of the statement of Xaba is attached to Mathenjwa's Rule 3.4 Statement and marked as "**KRM13.1**". A copy of a supplementary affidavit of Xaba dated 7 March 2016 is also attached to the Rule 3.4 Statement and marked as "**KRM13.2**".

287. On 2 May 2012, Breytenbach and her Attorney hired a private forensic expert, Phillip Otto ("Otto") to shred computer contents. The computer contents which were shredded are folders as set out in the table below:

Table 4

FOLDERS_DELETED	FOLDER CREATION DATE	SUB FOLDERS_DELETED	FOLDER CREATION DATE
APBEZUIDENHOUT	13 JULY 2011 @ 13:53	YENGENI	13 JULY 2011 @ 13:53
BERTUS JOUBERT	04 NOVEMBER 2011 @10:19:59	EMAILING ALFRED E.NEUMAN FOR PRESIDENT_FILES	20 SEPTEMBER 2011 @ 10:44
EMAILS	13 JULY 2011 @ 14:00		
EXECUHITCH	13 JULY 2011 @ 13:56	NEW EXECUHITCH	01 SEPTEMBER 2011 @ 13:06
		PROGRESS REPORT EXECUHITCH	01 SEPTEMBER 2011 @ 16:12
JANDRE BEZUIDENHOUT	12 OCTOBER 2011 @14:42		
KUMBA ICT	06 SEPTEMBER 2011 @ 09:14		
LEAF GROUP	05 SEPTEMBER 2011 @ 12:37		
MILLVALE	06 MARCH 2012 @ 11:40		
MY PICTURES	13 JULY 2011 @ 13:57		

288. The information that was shredded is to be found from paragraph 210 to 222 of Mathenjwa's Rule 3.4 Statement. During the trial, it was alleged that the prosecution of Breytenbach was motivated by malice in that she insisted that Richard Mdluli ("Mdluli") be prosecuted. In order to dispel or contradict such allegations, Mathenjwa wrote a memorandum to the Acting Special Director of the PCLU, Dr Pretorius requesting a memorandum dated 03 February 2017 which requested authorisation in terms of section 41(6) of the NPA Act to call Jiba and Mrwebi as witnesses to deal with the aforesaid allegations. Mathenjwa attaches a copy of the memorandum to his Rule 3.4 Statement which is marked as annexure "**KRM27**". The memorandum was forwarded to Abrahams. Subsequently, Dr Pretorius sent Mathenjwa an internal memo dated 24 February 2017 which reads as follows:

> "*After consulting and considering all the options, my directive in this instance is to close the case and argue the matter on the existing evidence and decided cases*."

289. Mathenjwa attaches a copy of the memo marked as annexure "**KRM28**" to his Rule 3.4 Statement.

290. The non-granting of the authorisation discouraged Mathenjwa from appealing the acquittal.

291. Breytenbach's section 174 application was dismissed, and she testified in her defence. The Presiding officer ruled at the end of the defence case that the State had proved all the other elements except for intention, and at the end, thanked the defence and the prosecution for the manner in which the trial was conducted, stating that the parties were exemplary to the country.

292. The objective facts of this matter clearly demonstrate that the prosecution of Breytenbach was factually and legally justified. All those that make noise alleging that the prosecution of Breytenbach was motivated by malice are individuals who when charged, based on objective evidence, took all technicalities on earth to avoid appearing before trial courts[37] and be cleared on merits of charges levelled against them.

L. ABRAHAM'S RESPONSE TO IPID'S COMPLAINTS

293. As indicated above, on 19 December 2017, Abrahams responded to the complaints from the IPID, as set out in annexure **"GB2"** of Baloyi's Rule 3.4 Statement. He addressed each complaint individually, as follows:

293.1. Defeating the ends of justice investigation against Phahlane

[37] National Director of Public Prosecutions v King (86/09) [2010] ZASCA 8; 2010 (2) SACR 146 (SCA) ; 2010 (7) BCLR 656 (SCA) ; [2010] 3 All SA 304 (SCA) (8 March 2010)

Abrahams indicated that, after perusal of the available information, he confirmed Baloyi's decision not to prosecute the matter. A decision in this matter was taken by Coetzer and van Rensburg from his office.

293.2. Investigation against former Acting Executive Director General Kgamanyane

Abrahams indicated that the decision not to prosecute was indeed correct. This decision was taken by a Deputy Director of Public Prosecutions ("DDPP") who is a senior counsel, Leonard. Leonard was not referred to as part of the prosecutors who are captured for either political or corrupt reasons.

293.3. Torture Investigation against the Mabula Team

Abrahams indicated that the matter will be prosecuted by a State Advocate stationed at the DPP: NG office and no further review of these matters are required.

293.4. Investigation against the Mabula Team on charges of kidnapping, defeating the ends of justice and contempt of court

Abrahams indicated that after consideration of the representations in the above matters and consultation with Baloyi, he agreed with Baloyi's decision to decline to prosecute the above matters.

293.5. Investigation of kidnapping and assault against Brigadier Xaba and others: Symington matter

Abrahams indicated that he supported Baloyi's decision not to prosecute members of the Hawks and Titi and that their actions should rather be dealt with internally by SAPS and SARS, respectively.

293.6. Perceived double standards in dealing with IPID cases:

293.6.1. Decision to prosecute IPID investigators and issuing of J175

Abrahams indicated that he was satisfied, following consultation with Baloyi, that the swiftness in handling of the said matter is to be expected, as it was handled by the Organised Crime Component with dedicated resources, and nothing sinister could be found in this regard.

293.6.2. Failure by the Asset Forfeiture Unit ("AFU") to launch a preservation order

Abrahams indicated that the AFU preservation order application in respect of Phahlane showed evidential gaps and that further investigations were necessary. This was conveyed to the IPID and at the date of the response by Abrahams, feedback from IPID was still awaited.

293.6.3. Refusal by NPA prosecutors to assist IPID in applying for Section 205 subpoena

Abrahams indicated that following a perusal of the explanations supplied by the relevant prosecutors, he was satisfied that no sinister or inconsistent conduct can be attributed to them.

M. RESPONSE FROM IPID TO ABRAHAM'S LETTER

294. In response to annexure **"GB2"** referred to above, McBride addressed a letter to Abrahams dated 23 of February 2018. A copy of this letter is attached to Baloyi's Rule 3.4 Statement, marked as annexure **"GB15"**.

295. In this letter, McBride individually responds to each of Abrahams' responses, as follows:

295.1. Defeating the ends of justice against General Phahlane (Kameeldrift, CAS123/11/2016)

McBride indicated that IPID does not agree with Abrahams' decision and that it questions the rationality thereof. IPID requested that the NDPP issue a *nolle prosequi* certificate. The decision in this matter was taken

by the two Advocates as shown in the attached memorandum of Baloyi's Rule 3.4 Statement and marked as Annexure **"GB16"**.

295.2. Investigation against former Acting Executive Director, General Kgamanyane (Pretoria Central CAS 868/11/2016)

McBride indicated that IPID does not agree with Abrahams' decision and that it questions the rationality thereof. IPID requested that the NDPP issue a *nolle prosequi* certificate.

295.3. Torture investigation against the Mabula Team

McBride indicated that the IPID does not understand why the other accused members were not charged, given the evidence, including the additional statements obtained as per Adv van der Westhuizen's instructions. McBride further indicated that Abrahams' decision was irrational and the IPID requested that the NDPP issue a *nolle prosequi* certificate.

295.4. Investigation against the Mabula Team on charges of kidnapping, defeating the ends of justice and contempt of court (Lyttleton CAS309/02/2017 and Sandton CAS 688/02/2017)

McBride indicated that the IPID disagrees with Abrahams' decision and that the complainant in the matter indicated that they intend pursuing private prosecution.

295.5. Investigation of kidnapping and assault against Brigadier Xaba and others: Symington matter (Brooklyn CAS 790/10/2016)

McBride indicated that the IPID disagrees with Abrahams' decision and that the complainant in the matter indicated that they intend pursuing a private prosecution.

DOUBLE STANDARDS

295.6. Decision to prosecute IPID Investigators and issuing J175 (Kameeldrift CAS 12/01/2017)

McBride indicated that IPID still holds the view that the investigation against IPID is for an ulterior motive, which is to interfere with the IPID's investigations, and that continuing with such prosecution is irrational. McBride requested, as there is litigation pending in the North Gauteng High Court, that before any decision is taken on this matter, the IPID should be informed to enable them to make representations.

295.7. Failure by AFU to launch preservation order

McBride indicated that they have moved forward, in consultation with the SCCU prosecutors and that there is an agreement on how to move forward.

295.8. Refusal by NPA prosecutors to assist IPID in applying for Section 205 subpoenas (Kameeldrift CAS 123/11/2016)

McBride indicated that IPID is not able to engage further on this issue, as IPID is not privy to the explanation given to Abrahams. See paragraph 8 of Annexure **"GB2"** in Baloyi's Rule 3.4 Statement referred to above.

N. MISUNDERSTANDING OF THE PCLU MANDATE

296. In this section of the recordal, it is demonstrated that Adv P J Pretorius SC ("the evidence leader") does not fully understand the mandate of the PCLU, as demonstrated from what is set out below.

296.1. The evidence leader, in his opening address, correctly quoted the mandate of the PCLU.[38] However, the evidence leader is incorrect in his submission that:

"So clearly Chair this unit was set up to deal with specific category of crime."[39]

38 Transcribed record: Day 81, 11 April 2019, page 23, line 21 to page 24, line 8
39 Transcribed record: Day 81, 11 April 2019, page 24, line 9

"ADV PAUL JOSEPH PRETORIUS SC: As described in the proclamation of an international flavour informed by international statute. However we know and you will hear evidence in this regard that the Priority Crimes Litigation Unit was peopled under the authority of the National Director of Public Prosecutions at the time with a number of prosecutors ***and investigators*** *and it was this unit that investigated and sought to prosecute the Minister of Finance at the time, Mr Pravin Gordhan.* (PCLU does not have investigators)

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: For the payment – the pension pay out payment.

CHAIRPERSON: Huh-uh.

ADV PAUL JOSEPH PRETORIUS SC: The previous Deputy Commissioner, Mr Ivan Pillay. Mr van Loggerenberg, all of SARS, Mr Robert McBride whom you will hear about of IPID in, Innocent Khuba of IPID, Matthews Sesoko of IPID, a previous state prosecutor Glynnis Breytenbach, Paul O'Sullivan and the secretary of Paul O'Sullivan.

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: They were all prosecuted or sought to be prosecuted.

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: ***Or investigated under the rubric of the International Security Crimes described in the proclamation****. We will investigate whether this was a deliberate manipulation and distortion of the mandate of the PCLU and a misuse of that body.* (our emphasis)

CHAIRPERSON: Hm.

ADV PAUL JOSEPH PRETORIUS SC: To conduct investigations for which it was not intended and we will ask questions around that and seek to address the issues arising out of that."[40]

296.2. Dr Pretorius, in his Rule 3.4 statement draws the attention of the Commission to the fact that it is a misnomer to refer to the prosecutions under the mandate of the PCLU as being "*under the rubric of the International Security Crimes*". This is so because there is no crime defined as international security crime.

296.3. Instead, there are "international crimes", such as genocide, war crimes and crimes against humanity. Then there are crimes that touch the security of the State and international terrorism.

40 Transcribed record: Day 81, 11 April 2019, page 24, line 11 to page 25, line 12

296.4. Regarding "such other priority crimes" referred to in the 2003 proclamation, the discretion granted to the National Director is intended to be used for purposes of referrals regarding matters that require specialised skills or where the implicated persons are very high ranking officials or the matters are very sensitive, such that they may touch on the security of the state or the independence or integrity of state institutions. Such referrals are or were made in terms of the Omnibus Clause.

297. Booysen is disingenuous in alleging that the PCLU was involved in matters which it was not supposed to have dealt with, as such matters were properly, lawfully and legitimately referred for investigation and prosecution to it. He sets out the Presidential Proclamation and states:

> "*The point I want to make here is that I find it very strange that some of the prosecutors from this - from the PCLU would involve themselves with investigations against the likes of McBride, Dramat, Shadrack Sibiya for cases I will not say that are not serious but they are relatively much less serious than the things that they should be dealing with. Such* …"[41] (except that he is wrong about Dramat and Shadrack Sibiya, as the matter was not dealt with by the PCLU).

297.1. Booysen continues:

> "***For instance they would prosecute certain people that I have now mentioned for fraud. That does not fall into the remit of what they should be doing in the first place***."[42]

41 Transcribed record: Day 87, page 205/258 line 1 – 6.
42 Transcribed record: Day 87, page 205/258 line 8 – 11.

297.2. After interaction with the Chair he finally responded:

> "*I will not call the menial investigations but much less serious investigations*."

297.3. However, later on Booysen describes the very same prosecutions as *"catastrophic effects on the economy of the country"*.[43]

297.4. Booysen continues:

> "*And in this statement of mine I mention that those prosecutors should be dealing with cases and that is before I heard the evidence of Mr Agrizzi. I did not even know who Mr Agrizzi was* [the same with me and the prosecutors of PCLU] *and here in my statement I said that they should be – should have been dealing with matters such as Bosasa, state captures. All those cases which seriously affected the economy of the country*."[44]
> *"I previously alluded to the fact that the PLCU of which he is a member these investigations do not fall into the remit of the PCLU"* (this is the prosecution of Mr Pravin Gordhan)[45]

297.5. It is not for Booysen to make a judgment call as to which type of matters should be referred to the PCLU. In any event, Booysen should make a choice as to whether the pension pay out matter is serious or not. He cannot have it both ways.

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43 Transcribed record: Day 87, page 241 line 13.
44 Transcribed record: Day 87, page 206 line 23 to page 207 line 9
45 Transcribed record: Day 87, page 241/258 lines 13 – 15

297.6. Equally so, it is important to mention that the pension pay out that was made to Pillay, affects the economy of the country and the taxpayers.

297.7. It must be explained how SARS investigation was allocated to the PCLU. The initial complaint laid referred to “Spying at the NPA” itself. Spying, intelligence and protection of information fall within the remit of the PCLU. The very independence of the NPA is at stake and such an investigation touches the security of the institution. Once a team and prosecutor start with an investigation, they must handle all matters related to the investigation. During the investigation, the golden handshakes’ of the members of the investigation unit like Andries Janse van Rensburg (“Skollie”) came to the fore midstream. Thus, any unlawful activities in the payment of pension came to the fore and resorted with the PCLU and did not fall outside the remit of the PCLU. It was a very sensitive matter. During that time, it was also made very clear during the press statement that the investigation into the planting of 12 listening devices and transcribing of audio recordings of the DSO meetings where the criminal charges levelled against the then National Commissioner of SAPS, J Selebi (“Selebi”) was continuing. That is how the fraud charges in relation to SARS resorted with the PCLU.

297.8. It is clear that Booysen understands the Omnibus Clause, which was used to refer matters to the PCLU, although Booysen criticises the PCLU for carrying out its mandate.

297.9. McBride is not candid with the Commission and is bent on misleading the Commission for his personal gain with regard to the mandate of the NPA and the PCLU.

297.9.1. On his own version, he stated:

"Ja. There is a direct link between CATS and PCLU both have to deal with priority issues, and yet – cases are passed on to PCLU and my understanding is that there has to be a particular process of involving the NDPP in PCLU matters I am not sure the relevant legislation or regulations but I am not sure whether they comply with this provision or not but they work hand-in-glove."[46] (my emphasis)

297.9.2. McBride should have verified the correct facts prior to making the reckless allegations which, on his own evidence, proved that he is not sure about the veracity and correctness of his allegations.

297.9.3. It is reckless and misleading for McBride to criticise the PCLU when, on his own version:

297.9.3.1. he does not know whether or not the proper process was followed prior to the PCLU investigating these matters. The matters complained of were properly, legitimately and

46 Transcribed record: Day 84, 16 April 2019 page 114/136, line 23 to page 115 of 136, line 3

lawfully referred for guiding the investigation and prosecution;

297.9.3.2. he is well aware that it is the function of the PCLU, *inter alia*, to guide investigations of priority issues.

297.9.3.3. McBride, in his evidence in chief, also canvassed the view that the PCLU should not have been involved in his criminal case. The relevant portion of his evidence reads as follows:

"MR ROBERT McBRIDE: The charges were withdrawn because according to the Prosecutor there isn't evidence to sustain the prosecution which obviously left us dumbfounded because we couldn't explain why we were arrested, and prosecuted if no evidence existed why it was the priority crimes litigation unit that was involve in the prosecution of the matter whereas the charges by every stretch of the imagination would amount to fraud …"[47]

297.9.4. To demonstrate that the evidence leader misconstrued the mandate of the PCLU, and that the allegations made by both McBride and Booysen are reckless and aimed at misleading the Commission, as they do not take into account the Omnibus Clause as set out below, namely:

47 Transcribed record, Day 81, 11 April 2019, page 68, lines 15 to 20

"… or <u>such other priority crimes</u> to be determined by the National Director;" (my emphasis")

297.9.5. It is clear that McBride and Booysen have a clear understanding of an Omnibus Clause as, when it suits them, they rely on such clause, in particular, in relation to the Panday matter, which Booysen referred to as "also that nice little rider (sic) at the bottom that says any case that he head of IPID decide to allocate to IPID."

297.9.6. In fact, McBride is the one that abused the authority of his office for ulterior purposes, under the guise of Section 28 of the IPID Act, systemic corruption, as fully referred to in Dr Pretorius' affidavit pertaining to the cross-examination of both McBride and Booysen.

298. Dr Pretorius is of the view that no evidence was put before the Commission to substantiate the averments persistently made against him that he is captured for corrupt and political purposes. Dr Pretorius' views are premised on the fact that only general statements are made regarding acts and decisions taken within the NPA to prefer charges against McBride, Booysen, Khuba and Sesoko, without identifying the particular persons, politicians and others who are alleged to be his handlers. Dr Pretorius points out that he was not involved in the investigation of Booysen, save for giving a legal opinion as described in the relevant portion of this affidavit.

299. In a further memorandum dated 12 April 2016, the NDPP referred to the PCLU all matters relating to O'Sullivan. In terms of the memorandum, Dr Pretorius, as the Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit, was enjoined to manage and direct all investigations and prosecutions in relation to O'Sullivan. A copy of the memorandum is attached to Dr Pretorius' affidavit, marked as annexure **"JPP49"**. The referral was based on paragraph (a) of Proclamation No. 46 of 2003 published in Government Gazette No.24876 on 23 May 2003. Thus, PCLU was properly mandated to deal with the matters relating to O'Sullivan.

O. MANDATE OF THE PCLU

300. The PCLU was established in terms of Proclamation No 46, 2003 published in the Government Gazette No 24876, of 23 May 2003, attached to Dr Pretorius' supplementary Rule 3.4 statement, marked as annexure **"JPP6"** which sets out the duties and functions of the PCLU.

301. The mandate reads, *inter alia*, as follows:

> *"To exercise the powers, carry out the duties and perform the functions necessary, within the Office of the National Director of Public Prosecutions as directed by the national Director and* **–**
>
> > *"(a) in particular to head the Priority Crimes Litigation Unit and to manage and direct the investigation and prosecution of crimes contemplated in the implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002), and serious national and International crimes, which include acts of terrorism and sabotage*

committed under the Internal Security Act, 1982 (Act No. 74 of 1982), high treason, sedition, foreign military crimes committed by mercenaries, or such other priority crimes to be determined by the National Director;" (my emphasis)

(b) generally giving such advice or rendering such assistance to the National Director as may be required to exercise the powers, carry out the duties and perform the functions which are conferred or imposed on or assigned to him by the Constitution or any other law."

302. The underlined portion in the quotation above is referred to as an Omnibus clause.

P. RENDITION (CAS25/07/12) AND DEFEATING/ OBSTRUCTING THE ENDS OF JUSTICE AS WELL AS FRAUD (CAS2454/05/2015)

(a) Opening remarks

303. In *Aktiebolaget Hassle and Another v Triomed (Pty) Ltd* ("*Triomed*"), [48] Nugent JA, referred to the remarks of Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly*[49]*, that '[I]n law context is everything',* Nugent JA took this expression further and remarked that *"[A]nd so it is when it comes to construing the language used in documents, whether the document be a statute, or a contract…*"

48 (63/2002) [2002] ZASCA 103, para [1].
49 [2001] 3 All ER 433 (HL) at 447a.

304. In the same manner, context is everything when it comes to construing the documents and statements contained in the rendition docket and those in the docket pertaining to the charges preferred against McBride, Khuba and Sesoko for defeating/obstructing the course of justice and fraud.

305. The documents in the rendition docket provide the context of the charges of defeating the ends of justice because it is the IPID's high ranking officials; its Executive Director, McBride; the Acting National Head of Investigations, Sesoko; and the Head of Investigations: Limpopo who was also the lead investigator in the rendition matter, Khuba, who by changing the contents of the report dated 18 March 2014 and leaving out the portions that implicated Dramat and Sibiya, which portions were contained in the report dated 22 January 2014, attempted to stifle and cover up the involvement of very high ranking police officers' involvement in the rendition.

(b) <u>The role players, implicated prosecutors, and the interconnectedness of the rendition and defeating/ obstructing the course of justice as well as fraud</u>

306. This portion of the recordal, thematically deals with the following:

306.1. General overview of the rendition matter.

306.2. The role of Mosing:

306.2.1. Appointment of Mosing to guide the investigation.

306.2.2. Investigations by Khuba and preparation of the IPID's interim reports (22 April 2013, 2 July 2013, 4 September 2013 and 22 October 2013).

306.2.3. The IPID report dated 22 April 2013.

306.2.4. The IPID report dated 2 July 2013 and the NPA memorandum dated 7 July 2013.

306.2.5. The IPID report dated 4 September 2013.

306.2.6. The IPID report dated 22 October 2013.

306.2.7. The IPID report dated 22 January 2014.

306.2.8. The NPA memorandum dated 14 February 2014 and referral of the docket to DPP: South Gauteng.

306.3. The appointment of McBride as the Executive Director of the IPD:

306.3.1. Retrieval of docket from DPP:SG and preparation of the report dated 18 March 2014; and

306.3.2. Review of the evidence and updating of the IPID report, 18 March 2014.

306.4. Submission of the docket and report dated 18 March 2014 to Nxasana and his indecisiveness.

306.5. Investigation by Werksmans.

306.6. Werksmans interviews and transcripts.

306.7. The role of Dr Pretorius and Maema:

306.7.1. Memorandum of 22 February 2016 – the recommendation and decision to prosecute; and

306.7.2. Memorandum of 31 October 2016 – the withdrawal of the charges.

306.8. The role of Baloyi:

306.8.1. Statutory prescripts relevant to extradition;

306.8.2. Summary of the evidence in general.

306.8.3. The evidence against Maluleke.

306.8.4. The evidence against Sibiya.

306.8.5. The evidence against Dramat.

306.8.6. Representations of Dramat, Sibiya and Maluleke.

306.9. Closing remarks.

(c) Crux of McBride's evidence and general overview of the rendition matter

307. On 11 April 2019, McBride testified in this commission that there was no evidence that linked Dramat to the "*reports of fiction about what "rendition" entails".* As far as he was aware*, "General Dramat's association with the series of events was that he was informed by a Crime Intelligence Officer who was at the border… That Zimbabwe officials want to come and see him. They are looking for suspects…The next link of General Dramat to the series of stuff is that he allegedly congratulated officers for the arrest of the Zimbabweans…he was also amongst those who received automated SMS' indicating successes…so if I remember correctly…That is the sum total…Of General Dramat's…Involvement in this whole saga"*[50]

308. McBride then described "*rendition*" as a loaded term, used in the United States, whose meaning is detaining a person without following procedure and not taking the person to trial and have the person taken back to their country's authorities to have them killed.[51]

309. After a series of questions from the evidence leader and McBride's response, the chairperson asked McBride, "*what it is that they were alleged to have actually*

50 Transcribed record, 11 April 2019, page 87 line 20 to 25 and to 88 lines 1 to 25.
51 Transcribed record, 11 April 2019, page 73 lines 7 to 14.

done that was referred to being "rendition" what was it? …Just the actual acts as you understood them that was referred to as "rendition" what was it?[52]

310. McBride, failed to answer this question.

311. According to the affidavit of Mosing the "*actual acts"* that were referred to as rendition are the following:

312. After a meeting that Generals Dramat and Sibiya had with their Zimbabwean counterparts sometime in August 2010, where they amongst others agreed to assist each other with cross border crimes and extradition, Zimbabwean police arrived at the Beit Bridge border post and requested entry into South Africa as they were due to have a meeting with Dramat.

313. A police officer, Madilonga, whom McBride incorrectly refers to as a Crime Intelligence Officer, telephoned two of his superiors, informing them about the presence of the Zimbabwean police officers. Madilonga's superiors instructed him to directly telephone Dramat and to seek his response. Madilonga directly telephoned Dramat on the cell phone number provided to him by the Zimbabwean police officers. Dramat then instructed Madilonga to permit the Zimbabwean police officers entry into the Republic of South Africa.

314. The Zimbabwean police officers arrived at the DPCI office in Silverton and were introduced by Col Maluleke ("Maluleke") to his supervisor, Lt Col Verster.

52 Transcribed record, 11 April 2019, page 87 lines 1-8.

314.1. The Zimbabwean police officers then had a meeting with Dramat the next day.

314.2. An operation for the tracing and arrest of Zimbabwean nationals commenced on the evening that the meeting was held.

314.3. Numerous witnesses deposed to affidavits confirming the presence of Zimbabwean police officers during various operations. The operations were conducted by Maluleke, an accused in the rendition matter, and members of Tactical Operation Management Section ("TOMS") which operations were aimed at arresting the Zimbabwean nationals. The mandate of TOMS is set out in B22 of the docket.

314.4. After each operation and the arrest of the Zimbabwean nationals, Maluleke and other police officers would personally drive the arrested nationals to the Beit Bridge border post and hand the arrested nationals to the Zimbabwean police on the Zimbabwean side of the border.

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

314.6. Some of the Zimbabwean nationals handed over are alleged to have been tortured in police custody whilst others were killed.

314.7. One of the victims, Maqhawe Sibanda ("Sibanda") deposed to an affidavit and stated that when Maluleke paid him a visit after the arrest, he informed Maluleke that Witness Ndeye was killed by the Zimbabwean police whilst in custody, which is what had happened after they were handed over to Zimbabwean police. Maluleke allegedly told Sibanda that he knew they would get killed in Zimbabwe because that is what happens when one kills a police officer in Zimbabwe.

314.8. The persons so handed to the Zimbabwean police were wanted in Zimbabwe for the murder of a Zimbabwean police officer Superintendent Chatikobo.

314.9. In summary, four operations were conducted as follows:

314.9.1. On 5 November 2010, the first operation commenced. Four Zimbabwean nationals were arrested and detained at the Orlando Police Station. A few days later, two of the Zimbabwean nationals were illegally taken over the border and handed to the Zimbabwean police, whilst the other two Zimbabwean nationals were dropped off on the N14 freeway, next to Diepsloot. The DPCI, at the time, alleged that all four Zimbabwean nationals were deported on the basis of deportation documents allegedly issued by the Department of Home Affairs, which documents subsequently proved to be

false documents in that such documents were not issued by the Department of Home Affairs.

314.9.2. On 23 November 2010, the second operation was conducted by the DCPI. Pritchard Tsuma was arrested and detained at the Alexandra Police Station under a Zimbabwean Police Case reference number. He was taken to the Beitbridge border control by Warrant Officer Selepe of TOMS, accompanied by Maluleke, where he was unlawfully handed over to the Zimbabwean Police.

314.9.3. On 11 January 2011, the third operation was conducted by the DCPI, with the assistance of the Crime Intelligence Gathering ("CIG") Pretoria Central at the specific request of Maluleke to trace a Zimbabwean national, Gordon Dube, who was eventually arrested in Diepsloot. The Tactical Response Team ("*TRT"*), Johannesburg provided support during the arrest of Dube. Dube was a wanted suspect on several Wierdabrug dockets, and he was wounded by the police during the arrest. He was arrested with two other suspects on the Wierdabrug dockets. A firearm was seized from him which was allegedly the firearm that was taken from Supt Chatikobo at the time that he was murdered. Maluleke requested a police officer from Wierdabrug to hand the seized firearm over to him, which, in turn, he unlawfully handed over

to the Zimbabwean Police. After receiving medical treatment, Dube was detained at Pretoria Correctional Centre.

314.9.4. On 26 January 2011, the fourth operation commenced, and a Zimbabwean National, Johnson Nyoni, was arrested by the DCPI, with the assistance of the CIG Pretoria Central, again at the specific request of Maluleke, and supported by the TRT, Johannesburg. Nyoni was taken directly to the DCPI office in Silverton, accompanied by the TRT and CGI members and Maluleke. It was at this stage that Dramat allegedly congratulated the members involved in the operation, whilst Nyoni was detained in a police vehicle. He was subsequently taken to the Moot Police Station where he was detained, allegedly for fraud. On 28 January 2011, Nyoni, together with Dube, were transported by Maluleke to the Beitbridge border control where they were illegally handed over to the Zimbabwean Police. Maluleke instructed the investigation officer of the Wierdabrug dockets, Leon Meyer, to hand over Dube to him for purposes of handing him over to the Zimbabwean Police at the Beitbridge border control instead of taking him to the Atteridgeville Magistrate's Court, where he was due to appear on that same day. Subsequently, Maluleke deposed to an affidavit which he gave to Meyer, wherein he stated that Dube was convicted and sentenced to life imprisonment in Zimbabwe, and he will never be back in

South Africa to stand trial. The case against Dube and the other two suspects were eventually withdrawn.

315. According to the implicated prosecutors, the above synopsis are the facts that were ultimately termed "rendition". This "*rendition"* is corroborated by documentary evidence, witness statements and pictures, contained in the docket.

(d) <u>The report of the Police Civilian Secretariat</u>

316. Sometime in November 2011, newspaper articles reported that Zimbabwean nationals were arrested by the South African Police Service ("SAPS") and handed over at the Beitbridge border post to members of the Zimbabwean Police and the said Zimbabwean nationals were either killed or tortured. This handing over of the Zimbabwean nationals was conducted in contravention of South Africa's international obligations and national statutory prescripts.

317. The newspaper articles referred to this illegal extradition of Zimbabwean nationals as "the rendition".

318. The Police Civilian Secretariat ("the Secretariat") reported the newspaper articles to the Minister of Police who requested the DPCI to respond to the allegations. The DPCI furnished the Minister of Police with two information notes[53] to respond

53 Information notes dated 22 November 2011 and 13 December 2011.

to the questions posed by members of COPE in the National Assembly and the National Council of Provinces.

319. The Secretariat conducted an assessment of the investigation conducted by the DPCI, the documents that the DPCI furnished to the Minister of Police in order for the Minister of Police to answer questions posed by members of COPE in the National Assembly and the National Council of Provinces, and the Department of Home Affairs documents utilised to facilitate the illegal extradition of the Zimbabwean nationals. The Secretariat found that there were inconsistent versions which required further investigation and recommended the appointment of a retired judge or the IPID to investigate the matter further.[54]

(e) <u>The role of Mosing</u>

i. Appointment of Mosing to Guide investigation

320. On 10 July 2012 Mosing was appointed by Jiba to guide the investigation of the rendition matter at the request of Moukangwe, a detective from Detective Services in Mpumalanga, and Mahlangu who was attached to the Stock Theft Unit in Middleburg. At this first consultation, Moukangwe enquired whether warrants of arrest could be issued and Mosing informed him that there was insufficient evidence to issue the warrants of arrest at that stage.

54 Report of the Police Civilian Secretariat dated 25 June 2012.

321. At this stage, the docket only had seven statements and three other documents in it.

322. Four statements were from members of Crime Intelligence, who were seconded to TOMS which was led by Sibiya who, at the time, was the Provincial Commander of the DCPI in Gauteng. These members of Crime Intelligence were involved in the operations where the Zimbabwean nationals were arrested.[55]

323. The other three statements were those of the victims who were arrested during the operations. Only one of these victims was unlawfully extradited to Zimbabwe. After he was tortured by the Zimbabwean Police, he returned to South Africa. This person gave information about three other individuals who were also unlawfully extradited to Zimbabwe. One of the individuals were killed and the other two individuals were tortured. The two individuals who was tortured, disappeared without a trace.

324. The other three documents in the docket were the SAPS12, Orlando Police Station Occurrence and the Orlando Police Station Detention Register.[56]

325. After considering the abovementioned documents, Mosing informed Moukangwe that many questions arise from the statements in the docket and require further investigation.[57]

55 Mosing affidavit, para 442, A4, A5, A6 and A7, page 214.
56 Mosing affidavit, para 442, A8, A9, A10, page 214 to 125.
57 Mosing affidavit, para 431.1 to 431.11, page 206 to 211.

326. During this first consultation, Mosing asked why members of Crime Intelligence were involved in the operations and he was informed that, at the time, they had been seconded to TOMS to assist with the tracing of suspects.[58]

327. During such further investigation, Mosing enquired from Moukangwe as to why IPID is not investigating the matter as there were members of SAPS involved in the matter.[59] On 10 September 2012, Moukangwe addressed a letter to IPID and requested them to investigate the matter and indicated that he and Mahlangu are available to assist in such investigation.[60]

ii. Investigations by Khuba and Preparation of IPID's interim reports (22 April 2013, 2 July 2013, 4 September 2013, and 22 October 2013)

328. In October 2012 Kokie Mbeki ("*Mbeki*"), the then acting Executive Director of IPID appointed Khuba to lead Moukangwe and Mahlangu in the investigation of the rendition matter.[61] According to Mosing, after the appointment of Khuba, most of the queries raised by Mosing from the contents of the docket, were addressed and documents and statements were obtained by Khuba.

329. Khuba obtained the statement of the station Commander of Orlando Police station and the police officers who were on duty on the day the Zimbabwean nationals were detained at Orlando Police Station and when they were booked out. The relevance of the statements showed that Zimbabwean nationals were

58 Mosing affidavit, para 422, page SEQ 47/2020-207
59 Mosing affidavit, para 453
60 Mosing affidavit, para 425, Annexure "AMR18", page SEQ 47/2020- 207 to 208.
61 Mosing affidavit, para 404.1 and 404.2, page SEQ 47/2020- 195 to 196.

arrested and detained for being illegal immigrants and instead of being taken to Lindela repatriation centre they were booked out to be driven to Musina, Beitbridge. [62]

330. Between 10 February 2013 and 21 February 2013, Khuba obtained documentary evidence and statements which included, amongst others, Home Affairs related evidence relating to the circumstance under which Zimbabwean nationals were deported. For example, the statements of:[63]

330.1. Ndwadwe, a Home Affairs official at Soweto Regional Office, who confirmed that the deportation of Zimbabwean nationals took place during the Dispensation for Zimbabwean Programme ("*DZP*") period which prohibited the deportation of illegal Zimbabwean immigrants.

330.2. Skosana, an immigration officer since 2007 who confirmed that the detention warrant shown to her ceased being in use in 2008.

330.3. Jackson, an employee of Home Affairs since 1988 who explained the deportation procedure of illegal immigrants and confirmed that such procedure was not followed by Maluleke when "*deporting*" the Zimbabwean nationals.

62 Mosing affidavit, paras 460 to 463.
63 Mosing Affidavit, paras 465.1 to 466.3.

330.4. Eiberg, a Control Immigration Officer at Beit Bridge who also confirmed that forms shown to him were not in use in the deportation process at ports of entry and thus the forms were incorrectly endorsed.

330.5. Mahlahlo whose stamp was used on the forms, and she confirmed that at the time she was on leave as confirmed in the duty roaster.

331. Khuba then obtained the documents that DPCI had utilised in preparing the information notes that DPCI furnished to the Minister of Police when he requested the report on the matter and which he used as the basis of his response to parliament. The documents included the statements of Maluleke, Makoe, Ntlhamu, Selotole and Radebe who all confirmed Maluleke's version that they were investigating robberies which led them to the arrested Zimbabwean nationals and when they could not link them to the crimes, they decided to deport them and take them to Beitbridge and handed over to Zimbabwean immigration officials. Sibiya's statement that he was not involved in the operations. The uncommissioned statement of Madilonga that confirms Maluleke's statement and says that when Maluleke brought the Zimbabwean nationals to Beitbridge he consulted the immigration office which stamped the documents, and he took the persons over to the Zimbabwean side.[64]

332. The un-commissioned statement of Madilonga led Khuba to Beitbridge where he interviewed Madilonga.

64 Mosing affidavit, paras 472.1 to 472.7.

333. On 8 April 2013, Khuba obtained a statement of Madilonga which linked Dramat to the rendition matter. In this statement, Madilonga stated that, on 4 November 2010, Zimbabwean Police requested to enter South Africa as they had a meeting with Dramat. Madilonga phoned his immediate Commander, Brigadier Makashu, to enquire whether he can let them enter the country. Makashu informed Madilonga to enquire from their Commander, Colonel Radzilani, who told Madilonga to phone Dramat and find out from him. Madilonga was informed by Dramat that he had a meeting with the members of the Zimbabwean Police and that Madilonga allow them to enter the country.[65]

334. The statement of Madilonga was emailed by Mulaudzi, an IPID official to Khuba and Sesoko and on 08 April 2013. Khuba emailed it to Mosing on 15 April 2013.

335. After obtaining the statement of Madilonga, Khuba started preparing reports to Mbeki.

iii. IPID report dated 22 April 2013

336. Khuba also obtained statements from other members who were involved in the TOMS operations, Occurrence Books of Alexandra[66] and Silverton[67] Police Stations, showing the detention of Chuma. The Cell Register of Moot Police

65 Mosing affidavit, paras 473 to 475, Annexure "AMR23" (A51) – Statement of Madilonga; Annexure "AMR24" (A53) – Statement of Makashu; Annexure "AMR25"(A54) – Statement of Radzilani.
66 Mosing affidavit, para 480.3 and Occurrence Book of Alexandra Police Station A57 in the docket.
67 Mosing affidavit, para 480.4 and Occurrence Book of Silverton Police Station A58 in the docket

Station, Occurrence Book of Wierdabrug Police Station, and the statement of the former spokesperson of the DPCI, McIntosh Polela.[68]

337. Of importance amongst the statements Khuba obtained, was the statement of Neethling who is stationed at DPCI Provincial Office Gauteng and is the Section Commander of Organized Crime Tactical Section (OCTS). Neethling confirmed that Maluleke requested his unit's assistance in the operations. Neethling believes that Maluleke reported these arrests to Sibiya. Neethling also confirms that the suspects who were arrested were taken to Musina and handed over to Zimbabwean authorities. Of importance is that Neethling is not attached to Crime Intelligence and cannot be said to have had a motive to implicate Sibiya and or Dramat.[69]

338. Another important statement is that of Selepe who is stationed at DPCI under the command of Neethling. The latter instructed Selepe to give Maluleke escort when Maluleke was driving Chuma to Musina. Selepe confirmed the arrest, detention and subsequent surrendering of Chuma during the second operation. Again, Selepe is a TOMS member who is not attached to Crime Intelligence.[70]

339. In the April report, the outstanding investigations were: Section 205 statements/records in respect of SMS's exchanged between Dramat, Sibiya and Maluleke. Warning Statements of Maluleke, Dramat and Sibiya. Section 205 cell phone records of Madilonga, AVL of all vehicles attached to TOMS.

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68 Mosing affidavit, para 479.
69 Mosing affidavit, para 480.1, Statement of Neethling, A55 in the docket.
70 Mosing affidavit, para 480.2

340. After this report, Khuba carried on with the investigations and complied a report dated 2 July 2013 and Mosing compiled a memorandum dated 7 July 2013.

iv. IPID report of 2 July 2013 and NPA Memorandum of 7 July 2013

341. Both documents summarised the evidence obtained up until that stage and listed outstanding investigations as: SMS exchanges, emails exchanged between Dramat, Sibiya, Maluleke and their Zimbabwean counterparts; application for seizure of Maluleke's laptop, AVL of all vehicles, Silverton Police Station OB, registers and statements of members on duty on 23 and 24 November 2010 when Pritchard Chuma was booked in and out by Maluleke.[71]

342. Khuba concluded the report with possible charges of kidnapping, contravention of Immigration Act, forgery and assault.

343. Mosing's memorandum also analysed the evidence and outlined outstanding investigations.[72]

344. Khuba continued with the investigations and obtained statements and documentary evidence which included: the statements of Moatshi; Takalani a member of TRT stationed at Johannesburg Central Police Station; Seletela and Phaswana also a member of TRT who explained the details of the operation

71 Mosing affidavit, paras 481 t0 482 page SEQ 47/2020-233 .
72 Mosing affidavit, paras 483 to 484, page SEQ 47/2020-234.

conducted in January 2011 at Diepsloot and led to the arrest of Zimbabwean nationals who were taken to Pretoria Moot Police Station for detention. These members also confirm the presence of members of the Zimbabwean Police and that the operation was conducted with the assistance of members of Crime Intelligence who were in the company of Maluleke.

345. The members of Crime Intelligence responsible for information gathering who assisted in the operation that led to the arrest of Gordon Dube were Rikhotso,[73] Mkabise[74] and Mokgobu[75]. Rikhotso mentioned the presence of Zimbabwean Police at offices of the DPCI at Silverton and that they took photos with them and he also mentioned that Dramat walked from house number 1 accompanied by DPCI spokesperson and Dramat addressed them and thanked them for their assistance and warned them not to tell anyone about the operation.[76]

346. During the arrest of Dube, he was injured in the shoot out with police. The investigating officer of the docket that involved his shooting also gave Khuba a statement that Maluleke instructed him to bring him the docket as he will take over the investigation. Khuba also obtained a statement of Ramabuda who stated that Maluleke instructed him to retrieve the firearm taken from Dube from ballastics and after he took the firearm he gave it to Maluleke who said he had to deliver it to Zimbabwe.[77]

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73 A67
74 A68
75 A69
76 Mosing affidavit, para 490.1 to 490.2 page SEQ 47/2020 240 and 241
77 Mosing affidavit, paras 491 and 493, page SEQ 47/2020 242 and 243

347. Khuba obtained the statement of Leon Meyer who confirmed that Maluleke informed him that Dube was a suspect in Zimbabwe for the murder of a Zimbabwean police under Bulawayo CR 438/10/2010. Maluleke informed Meyer that Dube will be handed to Zimbabwean Government through immigration. The statement of McIntosh Polela confirmed that he saw Zimbabwean police officers who were having a meeting with Dramat.[78]

v. IPID report dated 4 September 2013

348. The report of 4 September 2014 was more detailed. It included witness statements of police members who took part in the operations; the Occurrence Books and the cell registers of various Police Stations where the Zimbabwean nationals were detained; the statements of Home Affairs officials and documentary evidence of Home Affairs; statements of members of Limpopo SAPS, members of TOMS, members of TRT and members of Crime Intelligence Gathering who traced and arrested Gordon Dube and Johnson Nyoni; evidence obtained from Maluleke's seized laptop which had been decommissioned and formatted to remove the evidence; evidence in terms of section 205 of the CPA. The report concluded with the recommendation that Generals Dramat and Sibiya together with Maluleke and other members of DPI be charged.[79]

349. This report did not mention any outstanding investigation.

78 Mosing affidavit, paras 494 to 496, page SEQ 47/2020 2443 to 244

79 Mosing affidavit, paras 498.1 to 498.18

350. Khuba also obtained the report of Precision Forensics, dated 2 September 2013.[80] Khuba continued with the investigations and obtained evidence entered into the diary as A80 to A88 and B12 to B23. This included: handwriting experts report showing that the signatures on the Home Affairs documents were forged; success reports regarding the arrest of Zimbabwean nationals; statement of Maluleke[81] filed in the Atteridgeville Magistrates' Court stating that he was investigating the Bulawayo matter and based on the seriousness of the matter Dube was handed over to Zimbabwean Government through immigration related matters on 2011/01/26; list of motor vehicles assigned to DPCI members and their contact details; Letter to Jaco Venter requesting him to interpret cell phone data[82] and overtime claims of Maluleke for the period 2010-11-05 to 2010-11-29 as well as 2011-01-21 to 2011-01-31.[83]

vi. IPID report dated 22 October 2013

351. Khuba then prepared the report dated 22 October 2013 which is identical to the comprehensive report prepared in September 2013.

352. In that report, Mosing made manuscript inscription requesting Khuba to number the summary of the witness and documents in accordance with their entry in the docket. The importance of such labelling is to ensure that if a document is removed from the docket this can be discovered by reference to the report. It

80 Mosing affidavit, para 501.9
81 Mosing affidavit, para 501.6.2
82 Mosing affidavit, para 501.13, B16/1 dated 15 August 2013, page SEQ47/2020-250
83 Mosing affidavit, para 501.15 to 501.16, B17/1, page SEQ47/2020-250 to 251

thus assists with the prevention of destruction of evidence and also to ensure that all the evidence in the docket is dealt with in the report.[84]

353. The outstanding investigations were warning statements of General Dramat and Sibiya, warrant officer Makoe and constable Leburu and cell phone interpretation report and mapping.[85]

354. Mosing prepared two memoranda to Nxasana and Jiba, dated 9[86] and 12[87] November 2013.

355. The memorandum of 9 November 2013 summarised the evidence at that point and detailed the unsworn statement of Dramat where he made allegations of "witch-hunting" and requested that the NDPP be the one to make a decision pertaining to the decision to charge him or senior advocate who has not been involved in matters which his unit has or is dealing with.[88] The unsworn statement also set out Dramat's elaborate history and involvement in the liberation struggle.

356. Dramat also requested that the IPID send him a list of questions they wanted him to answer. Khuba wrote Sesoko two emails requesting his assistance in compiling the questions for Dramat.[89] Sesoko assisted Khuba with the questions

84 Mosing affidavit, para 502.2, page SEQ47/2020-251 to 251.
85 Mosing affidavit, paras 502.6.1 and 502.6.2, page SEQ47/2020-251 to 252.
86 Moring affidavit, para 503, Annexure "AM30", page SEQ47/2020-253.
87 Mosing affidavit, para 513, Annexure "AM35", page SEQ47/2020-255.
88 Mosing affidavit, para 506.5, page SEQ47/2020-254
89 Mosing affidavit, para 508 and 509, "AMR32" and ""AMR33" page SEQ47/2020-255.

and same was emailed to Dramat and he was requested to respond by 11 November 2013.[90] He failed to meet the deadline.

357. Mosing identified the outstanding investigations as reports of cell phone records, report on analysis of vehicle tracking, warning statement of Maluleke was still outstanding and Dramat requested to furnish a sworn statement and he was furnished with questions with a deadline of 11 November 2013.[91]

358. The memorandum of 12 November 2013 is similar to the one of 9 November as it also gave a detailed report of the state of the investigation, the evidence obtained and that which was still outstanding.

359. On 27 November 2013, Khuba wrote an email to Mosing asking to meet him the next day so that they can "***finalise***".

360. On 28 November 2013, Khuba entered further evidence in the investigation diary which, amongst others, included:

360.1. Forensic investigation extraction of information from Maluleke's laptop;[92]

360.2. Additional statement of Maqhawe Sibanda[93] (Zimbawean national who was arrested) and he identified Maluleke on Khuba's computer and told Khuba he had asked Maluleke whether he knew that Witness had

90 Mosing affidavit, para 511, page SEQ47/2020-255.
91 Mosing affidavit, para 505.1 to 505.4, page SEQ47/2020-253
92 Mosing affidavit, A89, para 516.1, page SEQ47/2020-257.
93 Mosing affidavit, A92, para 516.3, page SEQ47/2020-257.

passed away and Maluleke told him that he was aware and knew that when Witness got to Zimbabwe they would kill him;

360.3. Additional statement of Shepard Tshuma[94](Zimbabwean national who was arrested) stated that Khuba showed him pictures of police officers in uniform and private clothes, and he identified Maluleke and told Khuba that after his return from Zimbabwe Maluleke came to see him at Diepsloot and asked him how the free transport to Zimbabwe was. He too told Maluleke that Witness had passed away and Maluleke told him he already knew that once handed to Zimbabwean police he would not survive.[95]

360.4. Interpretation of AVL;[96]

360.5. Cell phone records;[97]

360.6. Statements of General Lebeya[98] and Bongani Moyo.[99] The latter was handed over to South African Police by the Zimbabwean Police.

360.7. Various documentary evidence.[100]

94 Mosing affidavit, A93, para 516.4, page SEQ47/2020-257.
95 Mosing affidavit, paras 516.4.1 to 516.3, page SEQ47/2020-257 to 258.
96 Mosing affidavit, A95, para 516.6, page SEQ47/2020-258.
97 Mosing affidavit, A96, para 516.7, page SEQ47/2020-258.
98 Mosing affidavit, A97, para 516.8, page SEQ47/2020-258.
99 Mosing affidavit, A98, para 516.8, page SEQ47/2020-258.
100 Mosing affidavit, B24 to 37, paras 51610 to 516.23, page SEQ47/2020-259 to 260.

vii. IPID report dated 22 January 2014

361. The report dated 22 January is similar to the report of 22 October 2013.

362. Although some witness statements were numbered as Mosing had earlier requested not all of them were given their corresponding exhibit numbers as appears in the docket.

363. Khuba gave the report to Mosing, upon realising that not all witness statements were numbered as requested Mosing requested Khuba to attend to same and prepare his affidavit as the investigating officer.

364. Mosing states that after Khuba had attended to the issues he had raised, Khuba signed the report and gave him a copy and the report was still dated 22 January 2014. Mosing states that when Khuba submitted the report with the same date a couple of days later he did not ask him to change the date. He cannot remember when Khuba gave him the corrected report, but it is likely that Khuba gave him on 5 February or few days thereafter. This assumption is based on the entry made, in the investigation diary, on 5 February 2014 when Khuba entered his affidavit as the investigating officer, which he marked A100.

viii. NPA memorandum of 14 February 2014 and referral of docket to DPP: South Gauteng

365. Mosing then prepared two memoranda dated 14 February 2014. The first one was addressed to Chauke (DPP: South Gauteng) to accompany the 6 lever arch files that comprised. The second one was addressed to Jiba and Chauke, it summarised the facts and evidence in the docket and requested the office of DPP: South Gauteng to make a decision regarding the prosecution.[101]

366. In the second memorandum, Mosing stated that the challenges experienced with the investigation were that most of the documentation was in the possession of police who are being investigated and thus they were not cooperating. Mosing also noted that '*although it was unlikely that the operations were carried out without Sibiya's knowledge, the cell phone evidence does not corroborate his presence at the operations*.' The issue could be closely looked at after an expert witness had been procured to analyse the cell phone data.[102]

367. In his affidavit, Mosing mentions that the cell phone data expert, Jaco Venter, was appointed in September 2013 but only submitted his report in 2016, more than two years after appointment.

368. The cell phone evidence pertaining to Sibiya, Maluleke, Neethling and Madilonga was available in September 2013 and is referred to in the September and October 2013 reports. All that was outstanding had always been the analysis thereof.

101 Mosing affidavit, para 524, page SEQ47/2020-262.
102 Mosing affidavit, paras 524.5.1 and 524.5.2, page SEQ47/2020-262 to 263.

369. Between 17 and 18 February 2014; Mosing, Jiba and Chauke exchanged emails pertaining to the section 22(3) certificate, i.e., centralisation. Although Diepsloot at the time fell within the jurisdiction of DPP: North Gauteng the rationalisation process would move it to DPP: South Gauteng with effect from 1 December 2014.[103]

370. Mosing prepared another memorandum dated 18 February 2014 attaching a draft section 22(3) directive for Nxasana to sign.

(f) The appointment of McBride as Executive Director of IPID

i. Retrieval of docket from DPP: South Gauteng

371. McBride was appointed as the Executive Director of the IPID, and he assumed office on Monday 3 March 2014.[104]

372. Dr Pretorius refers to Khuba's testimony that Sesoko phoned and informed him that McBride requires Khuba to come to the national office of IPID in order to brief McBride on the rendition matter. Khuba also testified that he emailed Sesoko the report to furnish same to McBride for McBride to be aware of the facts when Khuba briefs McBride.[105]

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103 Mosing affidavit, paras 529 and 530, page SEQ 47/2020-264.
104 Pretorius affidavit, para 107, page SEQ 29/2020-074.
105 Pretorius affidavit, para 108, page SEQ 29/2020-074 read with Annexure HIK/W2 (Werksmans transcript of the interview with Khuba on 27 March 2015, page 34, lines 23 to 25; page 44 lines 1-2; and page 46, lines 1-5) to Khuba's supplementary affidavit date 6 December 2019.

373. Sesoko confirms that Khuba emailed him the report to give it to McBride but does not recall whether he gave McBride a copy or he emailed it to McBride.[106]

374. Khuba and Sesoko's evidence casts doubt on McBride evidence that he never saw the report of January 2014.

375. On 5 March 2014, Khuba briefed McBride on the rendition matter. During the interview with Werksmans, Khuba stated that when briefing McBride he got the impression that McBride had knowledge of the report.[107]

376. Khuba told McBride that the then Acting Executive Director (AED) of the IPID Ms Mbeki instructed him not to work with Sesoko. Instead, he should work with Moukangwe, who Khuba says is from Crime Intelligence.

377. Mosing had already demonstrated by reference to the statements that Moukangwe commissioned in the rendition docket that he was a detective attached to Detective Services in Mpumalanga.

378. Simply saying they, Khuba and Sesoko, knew Moukangwe as a member of Crime Intelligence, that is not sufficient they must adduce evidence to prove their statements.[108]

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106 Pretorius affidavit, para 109, page SEQ 29/2020-074 read with Annexure SM1 to Sesoko's affidavit dated 16 July 2019, page MS-029 line 16-25 and pageMS-030 line6.

107 Pretorius affidavit, para 111, page SEQ 29/2020-075, read with Annexure HIK/W2 (Werksmans transcript of the interview with Khuba on 23 April 2015, page 4, line 25 to page 5 line 1 and page 6 lines 17-21)

108 Sesoko's affidavit, deposed to on 31 May 2021, para 16.1, page 6.

379. Mosing also demonstrated by reference to statements commissioned by Moukangwe and Mahlangu that the two were not members of Crime Intelligence.[109]

380. On the same day that Khuba briefed McBride, i.e., 5 March 2014, McBride phoned Angus and requested him to come to the national office of the IPID on 6 March 2014. Angus went to the IPID's offices as McBride requested and he stated that McBride told him he wanted Angus to review the investigation conducted by Khuba. McBride also told Angus to interview Khuba and Sesoko to establish whether the investigation was thorough and procedural.[110] Angus stated that McBride mentioned that he saw a progress report or something of that nature.[111]

381. In the affidavit filed in the docket of defeating the ends of justice, Angus stated that he felt uncomfortable with the request. In fact, there are 6 instances where Angus mentions that he felt uncomfortable. In the same affidavit, Angus also stated that Khuba and Sesoko also seemed uncomfortable.

382. After McBride informed Angus that he wants the latter to review the investigation, McBride called Khuba and Sesoko to his office and told them that he asked Angus to review the investigation. McBride then instructed Khuba to retrieve the docket from the DPP: South Gauteng.[112]

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109 See A1 to A7 in the docket.
110 Pretorius affidavit, para 112, page SEQ 29/2020-075 read with A4, statement of Angus, in the docket of defeating the ends of justice (CAS2454).
111 Para 8 of A4, Angus statement in the docket Cas 2454.
112 Pretorius affidavit, para 112, page SEQ 29/2020-075.

383. At this stage, Khuba knew that the docket was in South Gauteng because he had written Mosing an email on 28 February 2014 attaching the statement of Sibiya that he wanted to file in the docket. Khuba obtained the statements of the Secretariat and that of Sibiya in February 2014. Mosing had told Khuba to file the evidence with the DPP South Gauteng and any further evidence he may obtain in future.

384. From all the above, McBride's version before the Commission that he did not see the January 2014 report is improbable.

385. According to the supplementary affidavit, that McBride filed with the Commission,[113] McBride and Nxasana had a meeting on 6 March 2014 where Nxasana and McBride discussed the concerns over the leaking of the January 2014 report, and they agreed that McBride would send the final report directly to Nxasana to avoid leaks. It appears that it is at this meeting, that McBride and Nxasana had a lengthy discussion about the renditions matter and "*agreed that there was insufficient evidence against Generals Dramat and Sibiya".* It is astonishing how McBride and Nxasana can have a lengthy discussion when McBride had neither seen the January 2014 report nor the docket as Khuba had not yet uplifted it from the office of DPP South Gauteng.

113 Deposed to on 8 March 2020, at para 47, page Y7-RM-SUP-027 and Pretorius affidavit, para 146, page SEQ 29/2020-090 and para 168.4 page 102.

386. On 7 March 2014, Khuba and Angus went to DPP: South Gauteng and uplifted the docket from Advocate Zaius Van Zyl SC ("Van Zyl") who made them sign for it and they undertook to return the docket on 13 March 2014. They never did.

ii. Review of the evidence and updating of report- 18 March 2014

387. According to Khuba the new evidence included in the docket was; the affidavit of the Secretariat, dated 17 February 2014; the sworn statement of Sibiya; as well as the cell phone expert mapping of cell phone records of Sibiya. According to Dr Pretorius and Mosing, this "*new evidence*" could not be the basis for changing the recommendation to charge Dramat because it had nothing to do with Dramat.[114] However, in the investigation diary there is no entry of the statement of Sibiya and the expert cell phone mapping.

388. Pretorius, Mosing and Maema[115] stated that Khuba also added what he referred to as the statement analysis of Madilonga by an "expert". Madilonga's statement was analysed by a certain Ann-Mari Van Staden (Van Staden) of Precision Forensics, the company appointed to retrieve the formatted data from Maluleke's decommissioned laptop.

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114 Pretorius affidavit, para 118 to 120, page SEQ 29/2020-078 and Mosing affidavit, para 544.3 page SEQ 47/2020-278.

115 Maema's affidavit refers to the paragraphs in Mosing and Pretorius affidavits and he aligns himself whith what is stated therein. Due to time constrains specific reference is not made to the relevant paragraphs in Maema's affidavit. Maema relies on the affidavits of Pretorius and or Mosing at para 289, pages SEQ 29/2021- 204 to 208; para 290 at pages SEQ 29/2021- 208 to 212; para 291.3 at pages SEQ 29/2021- 2013217 and para 292 at pages SEQ 29/2021- 217 to 218.

389. Pretorius, Mosing and Maema are of the view that the alleged statement analysis is not a proper expert report for the following reasons:[116]

389.1. Khuba alleges Van Staden analysed Madilongoa's statement in October 2013 and emailed it to him on 4 October 2013.

389.2. Yet, Khuba never discussed the alleged analysis with Mosing whilst Mosing was guiding the investigation.

389.3. Khuba failed to include the statement analysis in his report date 22 October 2013 and the report date 22 January 2014. The investigation diary shows that the "statement analysis" was entered into the diary on 18 March 2014, the day he and Sesoko signed the "reviewed report".

389.4. The statement analysis failed to take into account other relevant independent material in the docket such as the statements of Makhushu and Radzilani and the cell phone date of Madilonga that he made a call to Dramat on 4 November 2010 as such the analysis is not objective, independent and rational.

389.5. The analysis also failed to take into account the fact that Madilonga's mother tongue is not English and that he may not be proficient in English, by basing its criticisms on his use of the English language. For example,

116 Pretorius affidavit, paras 121 to 128, pages SEQ 29/2020-078 to 79 and Mosing affidavit, paras 544.5 to 544.8, page SEQ 47/2020-279 to 280.

Madilonga is criticised for using 5 pronouns in 1 sentence and same is said to be indicative of dishonesty and or unreliability. Surely much more is needed to criticise his statement.

389.6. The report does not qualify as an expert report in that the "expert's" qualifications and experience are not set out therein. Neither has the "expert" filed an affidavit in support of the report or to demonstrate his field of expertise.

390. Khuba's statement that the rendition investigation was "*essentially a CIG and NPA driven investigation and that Moukangwe, Mosing and Moeletsi met on several occasions, given Khuba inputs on the analysis of the evidence contained in the docket and were adamant on what recommendation should be in the report"* is not borne by objective evidence,[117] for the following reasons:

390.1. Mosing demonstrated that Moukangwe and Mahlangu were not attached to Crime Intelligence;

390.2. Members of Crime Intelligence Gathering, were involved in the operations of DPCI at the request of Maluleke to assist in tracing suspects and their arrest;

117 Pretorius affidavit, para 130, page SEQ29/2020-081 and Mosing affidavit, para 404.4 page SEQ 47/2020-196.

390.3. Bonus Eusa Khoza (Khoza), a Lieutenant Colonel at Counter-Intelligence Investigations: Crime Intelligence, is the only person who commissioned statements during the rendition investigation and appears to be from a unit linked to Crime Intelligence. Mosing stated that as far as he is aware, the Counter-Intelligence Investigations: Crime Intelligence, is a unit within Crime Intelligence which deals with allegations of police corruption and safeguarding of police investigation. Khoza commissioned A11, 12, 16, 17,18,19, 20, 21, 22, 24 and 25.

390.4. Mosing noted that statements that Khoza commissioned are those of witnesses who were in the Witness Protection Program, for instance Maqhawe Sibanda.[118] Mosing was also informed that the members of Crime Intelligence who were involved in the operation, namely Campbell,[119] Jawuke, Ndobe and Yende were also in the Witness Protection Unit. The other statements commissioned by Khoza were those of Andrew Mark Sampson,[120] Nelson Ndlovu,[121] Reason Sibanda,[122] Rachel Ncube,[123] Brightness Ncube,[124] Madala Nyoni[125] and Sibonile Mpofu.[126]

390.5. To the extent that Counter-Intelligence's mandate is to safeguard police investigation and investigate police corruption it does not seem that his

118 A11 in the docket.
119 A11 and A19, additional statements of Campbell, in the docket.
120 A12, in the docket.
121 A18, in the docket.
122 A20, in the docket.
123 A21, in the docket.
124 A22, in the docket.
125 A23, in the docket.
126 A24, in the docket.

involvement was sinister. In any event, objective evidence of the unlawful extradition of Zimbabwean nationals existed and required investigation and prosecution irrespective of who investigates same.

390.6. It is clear from the above that Crime Intelligence played a supportive role and not led the investigation.

391. As stated above, McBride had also testified that Dramat was implicated by a Crime Intelligence officer at the border, that statement is far from the truth. Madilonga was not a member of Crime Intelligence, he was a Commander of Crime Prevention stationed at Thohoyandou, before that he was stationed at Beitbridge police station, and his duties entailed patrolling and commanding the crime prevention duties as well as liaising with immigration officials and police from other stations and units.[127]

392. Despite what Khuba stated that the new evidence included the statement of Sibiya and cell phone mapping, as evident from the entries made on page C17 of the investigation diary only two entries were made on 18 March 2014,i.e., the statement of the Secretary of Police filed as A100 (Khuba's statement of investigating officer crossed out as A100 and replaced with A102), and Analysis of statement by Precision Forensics filed as A101.

393. The next entries were made by Angus when he collected the docket from Adv Roberts SC and are not relevant to the issue at hand.

127 A51, rendition docket, statement of Madilonga, dated 8 April 2013, para 3.

394. Around the time the entries were made in the investigation diary, McBride, Khuba and Sesoko removed evidence that implicated Dramat from the report and changed the recommendations that were set out in the report dated 22 January 2014 and stated that there was no evidence implicating Generals Dramat and Sibiya.

(g) <u>Submission of the docket and the report dated 18 March 2014 to Nxasana and his indecisiveness</u>

395. On 13 April 2014, the IPID report dated 18 March 2014 and the docket were submitted to Nxasana.[128]

396. Since Khuba and Angus had failed to return the docket to Van Zyl, the latter phoned Khuba on 30 May 2014 and left a message. On 18 June 2014, Van Zyl got hold of Khuba who informed him that the docket was given to Nxasana as there had been a meeting that the docket would be given to him. Van Zyl phoned Khuba again on 23 June 2014 and asked him why had had lied when he uplifted the docket and told him he never intended to return the docket. On 27 June Van Zyl phoned Mosing to find out if he had the docket and Mosing said the docket was not returned to him. Van Zyl was worried about the whereabouts of the docket as it had been uplifted under seemingly false pretences[129]

128 McBride supplementary affidavit, 8 March 2020, para 47, page Y7-RM-SUP-027.
129 Pretorius affidavit, para 135 and 136, page SEQ 29/2020-082 to 084 read with A5, in CAS2454, Van Zyl's affidavit

397. On 27 June 2014, Van Zyl wrote to Chauke and requested him to enquire from Nxasana whether he had the docket. On 3 July 2014, Chauke wrote to Nxasana asking if he had the docket, if so, whether Nxasana would deal with it so that he can close his file.[130]

398. On 20 August 2014, Nxasana wrote to Chauke and confirmed that he had the docket and was considering it and informed Chauke to close his file.[131]

399. According to Chauke, in December 2014, when Dramat was suspended, Nxasana phoned him to ask about the rendition docket and Chauke informed him that the docket is with him.[132]

(h) <u>Investigation of Werksmans</u>

400. According to the Werksmans report,[133] Nxasana phoned Mzinyathi in January 2015 and sent the docket to his office, DPP: North Gauteng on 13 January 2015 for Mzinyathi to make recommendation. Mzinyathi allocated the docket to Baloyi to study it and make recommendations. Baloyi studied the docket and consulted with Khuba and Maoka on 3 March 2015.

401. Mzinyathi and Baloyi issued their recommendation on 13 March 2015.[134] They could not make a decision because they did not have jurisdiction since the

130 Pretorius affidavit, para 137 and 138, page SEQ 29/2020-085 and annexure "JPP43"
131 Pretorius affidavit, para 139, page SEQ 29/2020-085 and annexure "JPP44"
132 Pretorius affidavit, para 139, page SEQ 29/2020-086.
133 Werksmans report, para 3.2.2.4, page 32.
134 Pretorius affidavit, para 141, page SEQ 29/2020-086.

rationalisation came into effect on 1 December 2014 and Diepsloot fell under the jurisdiction of DPP: South Gauteng, i.e., Chauke.

402. Slight digression, Khuba also complained about the conduct of Baloyi at the meeting of 3 March 2015. Khuba alleges that initially Baloyi agreed with Maoka and him that there was no evidence against Generals Dramat and Sibiya but after he spoke to his superior, Mzinyathi, he told them that he has to "*bite the bullet"* and prosecute the generals. Khuba and Maoka complained to Nxasana about the manner in which Baloyi conducted the consultation. Baloyi responded to their complaint and stated that they had little or no idea on how to conduct a consultation and consider all scenarios, i.e., "play devil's advocate". Mzinyathi considered the complaint and was of the view that it had no merit and wrote a memorandum to Nxasana advising him accordingly.[135]

403. Back to the investigation, on 1 April 2015, Chauke received the rendition docket from Nxasana with a letter setting out Mzinyathi's recommendations and Nxasana requested Chauke to make a decision on the matter.[136]

404. Nxasana's conduct raises concern when regard is had to the following facts:[137]

    404.1. Nxasana had been kept abreast of the investigation of the rendition matter;

135 Baloyi affidavit, para 80.6 to 80.11, and annexures "GB17" and "GB19", pages SEQ 33/2020-085 to 087.
136 Werksmans report, para 3.2.2.8, page 33.
137 Pretorius affidavit, paras 143 to 146, page SEQ 29/2020-087 to 090

404.2. Mosing addressed the memorandums dated 9 and 12 November 2013, making him aware of Dramat's request that the NDPP make a decision pertaining to his prosecution;

404.3. the 18 February 2014 memorandum informing Nxasana that the docket is taken to DPP: South Gauteng for decision;

404.4. the request by Mosing made on 18 February 2014 for Nxasana to sign the section 22(3) directive;

404.5. The alleged meeting with McBride on 6 March 2014;

404.6. Nxasana's receipt of the docket on 13 April 2014;

404.7. Chauke's inquiries, in July 2014, whether he had the docket and will be dealing with it;

404.8. Nxasana's response, in August 2014, that he is considering it and Chauke can close his file;

404.9. Only for Nxasana to sit on it until Dramat is suspended and then phone Chauke to ask where the docket was;

404.10. Then take it to the office of DPP: North Gauteng, Mzinyathi, which no longer had jurisdiction to make decision but could only make recommendations; and

404.11. Then take it back to Chauke (DPP: South Gauteng) for decision.

405. Pretorius, Mosing and Maema are of the view that from the above, it appears, the rendition docket was a “hot potato” that Nxasana did not want to deal with and hence he left the docket on a merry go round for approximately 8 months and thus obstructed the administration of justice whilst McBride on several media platforms and court affidavits repeatedly stated that the IPID report exonerated Dramat and Sibiya and that the NPA has the docket and yet Nxasana kept quiet.

406. Before this Commission, and in addition to what is stated above, the conduct of Nxasana must also be considered against the lengthy meeting that McBride said he had with Nxasana in early 2014 (on 6 March 2014), where he undertook to give him the docket on 13 April 2014, and they agreed that there was no case against General Dramat and Sibiya. At that stage, McBride did not see the docket which was only retrieved on 7 March 2014 and on his own version, had not seen the report dated 22 January 2014. Where they also discussed the leaking of the January 2014 report and yet before this Commission, on his own version, McBride stated that he did not know about the existence of the January 2014 report and Khuba only told him and Sesoko about it in January 2015.

407. A further cause for concern, is that McBride does not consider his lengthy discussion with Nxasana and their agreement that there was no case against Dramat and Sibiya, as influencing the independence of the NPA.[138] Whilst Nxasana's conduct had the potential to deprive him of the review powers as set out in section 179(5)(d) of the Constitution.

(i) <u>Werksmans Interviews and transcripts</u>

408. Pretorius, Mosing and Maema are of the view that Khuba's contradictory versions during the interviews with Werksmans leave much to be desired.

409. In the interview conducted on 27 March 2015, Khuba was adamant that McBride did not know of the January 2014 report. There was new evidence and he needed to update the docket. The changes in the March 2014 report were made by him in consultation with Sesoko. McBride only made corrections to grammatical errors and spelling. He was concerned how the evidence was taken out because the report only went through three hands, Sesoko, McBride and his. Angus was only involved during discussions. The analysis looks rewritten as it does not conform to the old analysis.[139]

410. On 23 April 2015 when Khuba was informed that his version is different from that of McBride, he changed tune and stated, amongst other, as follows:

138 Pretorius affidavit, para 154, page SEQ 29/2020-092.
139 Pretorius affidavit, para 155.1 to 155.6, page SEQ 29/2020-093 to 094 and HIK2, 93 line 4; page 94 line 24; page 96 lines 1-7. Mosing affidavit, paras 536.1 to 536.6, page SEQ 47/2020-268 to 269. Mosing affidavit, para 537.1 and 537.2, page SE 47/2020-269.

410.1. That Angus version that he accompanied Khuba to the office of DPP: South Gauteng on 7 March 2014 to check on prosecutors dealing with the Cato Manor matter was untrue, that "*there was no CATO MANOR in the picture."* Angus was bragging about the new boss (McBride) talking to him for 45 minutes;[140]

410.2. Khuba felt that Angus "*was placed there to be able..."* possibly check on him. This may explain what Angus meant about being uncomfortable and Khuba also being uncomfortable;[141]

410.3. The existence of new evidence is open to interpretation, he could not talk to McBride and asked Sesoko why he can't just attach the things and send back the docket;[142]

410.4. McBride wanted copies of everything including the docket;[143]

410.5. They did the updates in Sesoko's office and "*most of the meetings, in terms of the report, were <u>not done when I was there.</u>"*[144]

140 Pretorius affidavit, para 156.2. page SEQ 29/2020-095 and Werksmans transcript of 23 April 2015, page 9 lines 15-25 and page 10 lines 1-5.
141 Pretorius affidavit, para 156.3. page SEQ 29/2020-095 and Werksmans transcript of 23 April 2015, page 10 lines 17-19. Mosing affidavit, para 537.3, page SE 47/2020-270.
142 Pretorius affidavit, para 156.4. page SEQ 29/2020-095 and Werksmans transcript of 23 April 2015, page 12 lines 17-25 and page 13 lines 1-3. Mosing affidavit, para 537.4, page SE 47/2020-270.
143 Pretorius affidavit, para 156.5. page SEQ 29/2020-095 and Werksmans transcript of 23 April 2015, page 13 lines 5-15. Mosing affidavit, para 537.5, page SE 47/2020-270.
144 Pretorius affidavit, para 156.7. page SEQ 29/2020-096 and Werksmans transcript of 23 April 2015, page 14 lines 8-25. Mosing affidavit, para 537.7, page SE 47/2020-271.

410.6. If he had been alone, he would not have changed the report.[145]

410.7. Whether they discussed the fact that they are discussing a report submitted to NPA as the final report, Khuba stated that due to his rank he could not have the confidence to question a political appointee and told him he is sticking to his report, it would have been impossible. He signed because he had to sign.[146]

410.8. Khuba was told the boss is happy with the final product and he must come sign and he went to sign. He did not check the report because he was told the boss is happy with it and thus there was nothing to check if the boss is happy.[147]

411. Pretorius, Mosing and Maema are of the view that it is clear from the interview of 23 April 2015, that the report was finalised in Khuba's absence. Khuba was emailed the final product told that McBride is happy with it he must come sign and he did as he was told. The answers that Khuba gave at the interview required further probing and they were also not probed before this Commission.[148]

145 Pretorius affidavit, para 156.8. page SEQ 29/2020-096 and Werksmans transcript of 23 April 2015, page 15 lines 22-25 and page 16 lines 1-5. Mosing affidavit, para 537.8, page SE 47/2020-271.

146 Pretorius affidavit, para 156.9. page SEQ 29/2020-097 and Werksmans transcript of 23 April 2015, page 17 lines 5-22. Mosing affidavit, para 537.9, page SE 47/2020-271.

147 Pretorius affidavit, para 156.11. page SEQ 29/2020-098 to 099 and Werksmans transcript of 23 April 2015, page 18 lines 1-8 and page 20 lines 14-22. Mosing affidavit, para 537.11, page SE 47/2020-273.

148 Mosing affidavit, paras 538 and 539, page SE 47/2020-274. Pretorius affidavit, paras 157 and 158, page SEQ 29/2020-099.

(j) The role of Dr Pretorius and Maema

412. Pretorius and Maema are of the view that the consideration of their decision to charge McBride, Khuba and Sesoko with defeating/obstructing the course of justice and fraud has to be viewed within the above context. Because in law context is everything.

413. They are also of the view that the Chairperson must have appreciated the necessity of context and hence, during the evidence of Sesoko, the Chairperson remarked as follows:

> "*CHAIRPERSON: Well I have instructed the legal team and the investigation team to secure the relevant files and dockets relating to the criminal proceedings relating to you and Mr McBride and Mr Khuba was also charged…I have said that I want to see exactly what documents the person who made the decision that you be charged had before him or her. I will want that person to come and give evidence. Maybe they will be able to show that there were proper grounds for the decision to charge and if that is so it is important that their side of the story be heard…"*[149]

414. Maema perused the docket for defeating the ends of justice, taking into account, the context of the rendition docket, from where the charges of defeating/obstructing the ends of justice emanate.

149 Transcribed record, 25 September 2019, Day 170, page 62 lines 17-25.

i. Memorandum of 22 February 2016- the recommendation and decision to prosecute

415. It is for that reason that in his memorandum dated 22 February 2016, presented to Dr Pretorius on 26 February 2016, Maema mentions the role played by Nxasana in facilitating the defeating the ends of justice by keeping the docket in the office of the NDPP without having it allocated or dispatched to a DPP to make a decision on it for a period in excess of 6 months, during which period McBride made utterances about the role of Dramat and Sibiya in the rendition. However, Maema decided not to include Nxasana to avoid dragging unnecessary side issue into the matter.[150]

(aa) <u>Defeating the ends of justice</u>

416. Maema sets out the elements of the offence and deals with the evidence that he considered to prove each element.

417. Unlawful conduct was the removal of the information that appeared at pages 9, 16, 20, 21, 26 and 30 of the report of 22 January 2014 in the report of 18 March 2014. That being the nature of the deletions. It being evidence that linked Dramat to the Commission of the crime. The deletions and additions were made with the <u>intention of exonerating Dramat and Sibiya</u>, whilst there was no new evidence that justified the removal and additions. The investigation diary shows that the

150 Pretorius affidavit, paras 161 and 162, and annexure "JPP46" (memorandum of 22 February 2016), page SEQ 29/2020-100. Maema affidavit, para 290, making reference and endorsing the affidavit of Pretorius, page SEQ 29/2021-208.

only entry made since Khuba's statement as investigating officer, initially entered as A100 but subsequently changed to A102, whilst the statement of Secretariat was entered as A100 and the report of Precision Forensics was entered as A101 to give the impression that the new evidence justified the change of the recommendations in the report.[151]

418. Defeating or obstructing, Maema state that he relied on removal of the docket from Van Zyl under the false pretext that they would return it knowing well that they will not return it and failing to gainsay Van Zyl statement when he told Khuba that Khuba lied to him. Inserting the report of Van Staden and pretending that it casts doubt on the evidence of Madilonga when the Van Staden's analysis could not be considered an expert's analysis or report, based on Mosing's views.[152]

419. Administration of justice. The removal of the docket under the false pretext that further investigations had been conduct when no such further investigations were filed save for the statement of the Secretariat which mirrors her report of June 2012 and the analysis of Van Staden which casts doubt on Madilonga's reliability simply because he used 5 pronouns in a sentence.[153]

420. The element of intention is evidenced by the failure to return the docket despite numerous attempts by Van Zyl enquiring about the docket.[154]

151 Maema affidavit, paras 286.1 to 289, pages SEQ 29/2021-202 to 204.
152 Maema affidavit, paras 291.1 to 291.3, pages SEQ 29/2021-212 to 217.
153 Maema affidavit, paras 296, pages SEQ 29/2021-219.
154 Maema affidavit, paras 297 to 299, pages SEQ 29/2021-219 to 220..

(bb) Fraud

421. With regard to fraud, in addition to the above facts, McBride, Khuba and Sesoko removed information linking Dramat and Sesoko and misrepresented in various court proceedings and in public that there was no evidence implicating Dramat and Sibiya and that they were exonerated. This conduct prejudiced and or had the potential to prejudice the administration of justice.[155]

ii. Memorandum of 31 October 2016 - Withdrawal of the charges

422. In preparation for the trial Maema had to consult with witnesses. Maema experienced difficulties as some of the witnesses were reluctant to testify.

423. For example, Mr Sandile July who conducted the Werksmans investigation refused to testify and threatened to institute urgent interdict proceedings. Maema was of the view that it is not desirable to have a state witness not willing to voluntarily testify.

424. Similarly, Angus of the IPID was reluctant to testify because McBride had returned to his position as the Executive Director of the IPID.

425. Maema and Pretorius take note of the affidavit of Angus attached to Khuba's affidavit deposed to on 31 May 2021 where Angus denies that he informed Maema that he was reluctant to testify. Maema persist with his version and contends that the affidavit that Angus filed in the docket is evident that Angus

155 Maema affidavit, paras 300 to 304, pages SEQ 29/2021-220 to 222.

was very uncomfortable with McBride's instructions. Angus mentioned that he was uncomfortable with the whole situation over 6 times in that affidavit and also mentioned that Khuba and Sesoko also seemed uncomfortable. Angus discomfort when viewed in context, particularly transcript of Khuba's interview with Werksmans in April 2014 that Angus was happy that McBride seemed to prefer and or trust him such that he was tasked to review Khuba's investigation and how he bragged that McBride spoke to him for forty minutes indicates that Angus was most likely uncomfortable to testify against McBride.

(k) <u>The role of Baloyi</u>

i. Statutory prescripts relevant for Extradition

426. Baloyi stated that in making a decision to prosecute the rendition matter he considered the statutory prescripts relating to extradition; namely, the Extradition Act,[156] and the SADC Protocol on Extradition.[157] He found that there are four scenarios on which a person may be extradited; namely:[158]

426.1. The Extradition Act;

426.2. Bilateral or Multi-lateral International Treaty;

426.3. The SADC Protocol; and

156 Act 67 of 1962, Baloyi affidavit, para 89 to 89.1.2, page SQ 33/2020-092 to 094.
157 Baloyi affidavit, para 89.2.1 to 89.2.5, page SQ 33/2020-094 to 095 to 109.
158 Baloyi affidavit, para 91.1 to 91.4, page SQ 33/2020-092 to 093

426.4. Comity between Requesting State and Host State.

427. In none of the four instances would officials of the requesting state arrive without the necessary official documentation stating the purpose of their visit and confirmation of the arrangements for their arrival. The statements and representations of Maluleke, Dramat and Sibiya do not mention any of the four scenarios. Because the Zimbabwean police did not have the necessary arrangements and documentation for their entry was allowed by Dramat after Madilonga called Dramat and Dramat told him to let them come into the country.[159]

428. The Zimbabwean nationals were not sought through the INTERPOL procedure which requires the involvement of the Department of Justice through the Department of International Relations ("DIRCO"). The warrant of arrest is issued whereafter, section 11 of the Extradition Act is followed.[160]

ii. Summary of the evidence in general

429. Dramat, Sibiya and Brigadier Basi ("Basi") visited Zimbabwe on 5 August 2010 where they held meetings with the Head of Regional Bureau in Harare. At the time, Sibiya was Brigadier and he was the sectional head of TOMS. The meetings discussed policing issues including drug trafficking, extradition process

159 Baloyi affidavit, para 92 to 94, page SQ 33/2020-092 to 110.
160 Baloyi affidavit, para 95 to 97, page SQ 33/2020-092 to 110 to 111.

and the handing of fugitives. A fugitives Committee was established and Sibiya was made head of the committee.

430. On 18 September Chatikobo was killed in Bulawayo. The victims of the kidnapping charges were suspects in Chatikobo's murder and robbery of his service pistol.[161]

431. On the evening of 4 November 2010, a delegation of 8 Zimbabwean Police entered South Africa after Madilonga had phoned Dramat as discussed above. The Zimbabwean Police met Maluleke at Promat Building on the night of 4 November 2010 and Colonel Leonie Verster saw them with Maluleke when she returned from an operation and Maluleke introduced her to the head of the delegation. Maluleke informed Verster that the members of the Zimbabwean Police were in South Africa in connection with an investigation regarding murder.[162]

432. Dramat's personal Assistant, Pumla Mphothulo received the Zimbabwean Police on 5 November 2010 and took them to Dramat's office who directed them to the boardroom where they had a meeting. Neethling of DPCI told Verster that they helped Maluleke to arrest Zimbabwean suspects at the request of Sibiya.[163]

433. Baloyi then describes the four operations described by Mosing, which took place on:

161 Baloyi affidavit, para 101, page SQ 33/2020-112.
162 Baloyi affidavit, para 102 to 104, page SQ 33/2020-092 to 113.
163 Baloyi affidavit, para 105 to 106, page SQ 33/2020-113 to 114.

433.1. 5 November 2010 involving the arrest of Messrs Shepard Tshuma, Witness Ndeya,/Nkosi, Nelson Ndlovu and Maqhawe Sibanda;[164]

433.2. 22 November 2010 involving the arrest of Pritchard Tshuma;[165]

433.3. 12 January 2011 involving the arrest of Gordon Gordi Dube;[166] and

433.4. 26 January 2011 involving the arrest of Johnson Nyoni.[167]

434. The Zimbabwean nationals were removed from South Africa under the guise that they were being deported for being illegal foreigners, despite the existence of the DZP from 20 September 2010 to 31 December 2010 and the period extended to 2011. Documentary evidence from Home Affairs and statements of Home Affairs officials showed that the department was not involved in the "deportation" and thus it was not one but an extradition.[168]

435. The extradition of persons without following procedures set out in various instruments is a serious constitutional breach which renders not only the persons involved but also the State guilty of unconstitutional conduct.[169]

164 Baloyi affidavit, para 108 to 120, page SQ 33/2020-114 to 118.
165 Baloyi affidavit, para 121 to 135, page SQ 33/2020-118 to 120.
166 Baloyi affidavit, para 126 to 130, page SQ 33/2020-120 to 121
167 Baloyi affidavit, para 131 to 135, page SQ 33/2020-121 to 122.
168 Baloyi affidavit, para 136 to 137.4, page SQ 33/2020-122 to 123.
169 Baloyi affidavit, para 140, page SQ 33/2020-124.

436. Mosing in his affidavit,[170] refers to the judgments of the Constitutional Court of **Mohamed and Another v President of the RSA and Others[171] (Mohamed)** and **Minister of Home Affairs and Others v Tsebe and Others[172] (Tsebe)**.

437. The handing over of legal or illegal foreigners to their country of origin where they are sought for crimes they committed without the "*requisite assurance*" that they will be treated humanely and that they will not be subjected to the death penalty was held to be unconstitutional in the judgement of **Mohamed and Another v President of the RSA and Others (Mohamed)** and the principles laid down in Mohamed were followed in another judgment of the Constitutional Court, **Minister of Home Affairs and Others v Tsebe and Others (Tsebe)**. This judgment is also attached in the docket as "**B38**".

438. The Constitutional Court made it clear in **Tsebe** that:

> *"[65] The human rights provided for in ss 10, 11 and 12 of our Constitution are not reserved for only the citizens of South Africa. Every foreigner who enters our country — whether legally or illegally — enjoys these rights and the state's obligations contained in s 7(2) are not qualified in any way. Therefore, it cannot be said that they do not extend to a person who enters our country illegally. In the light of this the question then would be: how does the Government discharge its s 7(2) obligations in respect of such a person if it extradites, deports or surrenders him to a state where, to its knowledge, he runs the real risk of the imposition and execution of the death penalty if he is convicted of the crime for which he is wanted?*
>
> *[74] Accordingly, in terms of s 7(2) of the Constitution the Gorvenment is under an obligation not to deport or extradite Mr Phale or in any way to transfer him from*

170 Mosing affidavit, para 368 and 369, page SQ 47/2020-173 and 174.
171 2001 (3) SA 893 (CC)
172 2012 (5) SA 467 (CC)

South Africa to Botswana to stand trial for the alleged murder in the absence of the requisite assurance. Should the Gorvenment deport or extradite Mr Phale without the requisite assurance, it would be acting in breach of its obligations in terms of s 7(2), the values of the Constitution and Mr Phale's right to life, right to human dignity and right not to be subjected to treatment or punishment that is cruel, inhuman or degrading. In my view no grounds exist upon which the judgment of the high court can be faulted."

iii. Evidence against Maluleke

439. The evidence against Maluleke is summarised at paragraphs 143 to 157 of Baloyi's affidavit. The trial against Maluleke is pending before the Gauteng Division, Pretoria and is not discussed further.

iv. Evidence against Sibiya

440. The evidence that implicates Sibiya is set out at paragraphs 158 to 160.[173]

441. The statements of 9 witnesses implicate Sibiya. These include the statements of three of the victims, six members of TOMS which was a unit headed by Sibiya. Some of these witnesses had been seconded from Crime Intelligence to assist TOMS in the tracing and arrest of suspects whilst others were not from any other units.

v. Evidence against Dramat

173 Baloyi affidavit, para 158 to 160, page SQ 33/2020-130 to 135.

442. The evidence that implicates Dramat is set out at paragraphs 161 to 184.[174]

443. The evidence pertaining to the visit to Zimbabwe. Beitbridge Occurrence Book and three witness statements, Madilonga,[175] Makhusu and Radzilani. The information note found on Maluleke's decommissioned and formatted laptop. Evidence of Dramat's meeting with Maluleke and Zimbabwean Police on 5 November 2020, consolidated success report. Verster statement, information notes and success reports drafted by Maluleke and signed by Verster and Selundu. Ms Pumla Mphothulo, Dramat's personal assistant, made a statement that she brought these success reports to the attention of Dramat. The statements of two witnesses who saw him when they had a braai at Promat. Dramat's briefing on extradition with Mendez of Interpol. Dramat's meeting with Mkhwanazi.

vi. Representations of Dramat, Sibiya and Maluleke

444. Dramat submitted his representations on 24 April 2018 and Sibiya submitted his on 1 October 2018. After Baloyi considered their representations he wrote to the NDPP recommending the provisional withdrawal of the charges against them.

445. Maluleke submitted his representation on 1 December 2019 and same was turned down and his criminal case is pending before the Gauteng Division, Pretoria.

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174 Baloyi affidavit, para 161 to 184, page SQ 33/2020-135 to 141.
175 To be accepted as an exception to the hearsay rule since Madilonga has since passed away.

(I) Closing remarks

446. It is clear from the exposition of the facts and evidence set out above that the decision to investigate the rendition was not some “fiction” as McBride testified. Although there is no crime labelled rendition, the facts of the matter show that there was one (“rendition”), all be it, in South African law the suspects were charged with kidnapping and defeating the ends of justice.

447. It has been demonstrated that the persons who implicated the relevant implicated prosecutors were not candid with the Commission and did not place all the true facts before the Commission. In misleading the Commission, whose proceedings are publicly aired, an impression was created that the relevant implicated prosecutors did not uphold their Oath of Office and the values and principles enunciated in the Constitution.

448. A further impression was created that the relevant implicated prosecutors were prepared to persecute individuals in the pursuance of what is termed the state of capture and the crippling of the criminal justice system, for political or corrupt reasons. If this impression is not corrected in a public forum, the perception created will remain ingrained in the public mind and will cause the public to lose trust in the NPA and thus affecting its integrity.

449. In the judgment of **Magidiwana and others v President of the Republic of South Africa and others**[176] the Constitutional Court recognised the role of a Commission of Inquiry to be primarily truth telling, that is exactly what the implicated prosecutors in the rendition matter have done. They have told the truth.

Q. AMIGOS/ SAVOI CASE

(a) Preface

450. Starting from around March 2005, R44 million from the poverty alleviation budget in was utilised to purchase Oxygen Self Generating Plants, Dialysis machines as well as Water Purification Plants for hospitals and rural communities in drought stricken areas of KwaZulu-Natal ("KZN"). It wasn't too long that reports started surfacing of fraud, corruption and non-compliance with tender -related prescripts.

451. Investigations into the reports resulted in criminal charges being identified and preferred against individuals fingered in the fraud and corruption. At the centre of the reports is one Dr Gaston Savoi, a businessman of Uruguayan origin, whose "Amigos" greeting in emails became a colloquial title of the cases uncovered in the investigation.

176 2013 ZACC 27 at [15]

452. Advocate Anton Steinberg, at the time a Deputy Director of Public Prosecutions: Organised Crime, Durban considered the charges that can be preferred from the content of the docket in June 2010, and he appeared at the hearing of the first appearance of the first six accused to be charged. He then left the NPA to join the International Criminal Court.

453. Advocate Cyril Simphiwe Mlotshwa ("Mlotshwa"), who was the Acting Director of Public Prosecutions ("DPP") in KZN assembled a prosecution team led by Advocate Ncedile Dunywa ("Dunywa"), and consisting of Advocates Nomfundo Sipunzi ("Sipunzi"), Vincent Ntanjana ("Ntanjana") and Makhosini Mthembu ("Mthembu"). Sipunzi and Ntanjana later left the NPA to join the magistracy and were replaced on the team by Advocate Bulelwa Vimbani ("Vimbani").

454. The Special Projects Division was a unit located within the office of the NDPP, and its purpose was to evaluate and interrogate possible racketeering charges before they were placed before the NDPP for authorisation as required by section 2 (4) of the Prevention of Organised Crime Act, No 121 of 1998. Advocate Johan Kruger ("Kruger") was the head of the SPD at that time.

455. Kruger considered draft charges and, consulting his colleagues with expertise in charges of fraud, raised issues with what he perceived and was also advised were deficiencies in the formulation of the charges.

456. Mlotshwa signed the indictment in respect of the predicate charges on 31 July 2010, in spite of the various concerns raised by Kruger about the formulation of the charges in the indictment. On the same date, Advocate Menzi Simelane ("Simelane") issued an authorisation certificate in respect of racketeering charges.

457. Adv Nomgcobo Jiba succeeded Simelane and became the Acting NDPP and in that period, Mosing was seconded to become the head of the SPD, after Kruger. While in that position, he was mandated at a meeting of the Top Management, together Advocate Lawrence Mrwebi ("Mrwebi") to assist the KZN prosecution team in amending the indictment as Kruger's queries relating to the charges therein had still not been attended to.

458. Mlotshwa was still the DPP at the time, and Mosing testifies of the distance that Mlotshwa kept away from the processes and the evasive manner in which Mlotshwa avoided disclosing his non-attendance of meetings meant to assist and guide the prosecution team through amending the charges. Mlotshwa was to be later replaced by Advocate Moipone Noko ("Noko") first as acting DPP and ultimately appointed DPP for KZN.

459. Noko attended to the amendment of the indictment and, upon the finalisation of amending the indictment, a decision was taken by Noko to withdraw charges against some of the accused where it was found that the evidence available does not support the charges laid against them.

460. It is in the midst of what has been sketched above that Mosing finds himself being singled out as having facilitated the withdrawal of charges against Nkonyeni and Mabuyakhulu.

461. Even though there are criminal processes regarding the Amigos cases in both KZN and the Northern Cape, Mosing is implicated only in respect of the KZN leg of the proceedings and are confined only to the withdrawal of the charges against Nkonyeni and Mabuyakhulu. The focus of this recordal will therefore be on processes that have thus far taken place in KZN.

(b) <u>Amigos/Savoi matters: charges against accused persons indicted in the Durban High Court</u>

462. Mosing has been issued with a Rule 3.3 Notice that he is an implicated person in terms of the Commission's Rules, having been implicated by du Plooy, White and Booysen.

463. Du Plooy and White's allegations relate mainly to the working session of 23 March 2012 that the two of them attended together with the KZN prosecution team in Durban.

464. A perception was also raised that it appeared like Mosing and Mrwebi went to the working session with a foregone conclusion that charges will be dropped

against Peggy Nkonyeni ("Nkonyeni") and Michael Mabuyakhulu ("Mabuyakhulu").

465. Mosing has dealt at length with the working session complained about as well as the 2 day working session that preceded the one of 23 March 2012, including that the work sessions emanated from the Top Management meeting of 8 March 2012, wherein Mosing and Mrwebi were tasked to attend to the problems identified with the indictment signed by Mlotshwa. Also, that the working session of 23 March 2012 that included White and Du Plooy was preceded by the one with the prosecution team, where the charges were interrogated against available evidence.

466. Booysen alleges that Mosing and Mrwebi attempted to put pressure on Mlotshwa to withdraw charges against Mabuyakhulu and Nkonyeni.

467. Mosing has dealt with all the allegations made by Booysen against him in his Rule 3.4 Statement[177]. Booysen was not at the working session complained of. He bases his allegations on what he alleges he was told or he heard from White and Du Plooy. Apart from the fact that what Booysen alleges Mosing did wrong is hearsay, it is not even corroborated by White and Du Plooy, who both testified at the Commission and also submitted their witness statements.

[177] SEQ 47/2020-133-148

468. Booysen even conceded, albeit indirectly on being challenged by Mosing to prove that he had "inherited" the Amigos matter, that he does not have the knowledge he claims to have about the Amigos case.[178]

469. Mosing has also dealt with Mlotshwa's evidence at the Commission and the Mokgoro Enquiry, even though it does not directly implicate Mosing.[179] Mosing deals also with what Mlotshwa did not give evidence on regarding the role of the SPD in the process of considering the racketeering applications.

(c) <u>Bakground: So many role players and yet so few called to account</u>

470. From March 2004 when senior officials in the Provincial Government of KwaZulu-Natal ("KZN") were taken on a trip to São Paulo, Brazil up to March 2012 when Adv Anthony Mosing was assigned to what has become known as the Amigos case, lists of accused persons have changed numerous times and so has the Advocates of the National Prosecuting Authority who have been assigned to the Amigos matter, albeit at different times and in different capacities.

471. At the first hearing of the matter at the Commercial Crime Court, Bellville on 25 August 2010, there were six accused persons on the charge sheet, with accused number six being a corporate entity, Intaka Holdings (Pty) Ltd,

[178] Booysen Answer to Mosing's Rule 3.4 Statement at paragraph 7
[179] SEQ 47/2020-148 to 158

represented in the proceedings by accused number one Dr Gaston Savoi. The other accused in the matter on the day were Fernando Praderi ("Praderi"), Annsano Romani ("Romani"), Donald Keith Miller ("Miller") and Ronald James Geddes ("Geddes").

472. Advocate Anton L. Steynberg ("Steynberg"), who was the Deputy Director of Public Prosecutions: Organised Crime Division, Durban, appeared for the state at the Commercial Crime Court in Bellville, Cape Town on 25 August 2010.

473. Miller and Romani entered into a plea agreement with the state after their first appearance and were therefore removed from the list of accused persons.

474. At the end of the hearing in Bellville, the matter was transferred to Pietermaritzburg Regional Court.

475. The second appearance for some of the original accused persons together with new accused persons was on 20 October 2010 at the Pietermaritzburg Regional Court.. At that hearing, which was a bail hearing, there were 10 accused persons with only Savoi and Intaka being the only remaining accused persons from the Bellville Commercial Crime Court appearance.

476. The other accused persons, who were new on the charge sheet, were Sipho Shabalala ("Shabalala"), Busisiwe Muriel Nyembezi ("Nyembezi"), Beatrice

Shabalala (“Beatrice”), Sandile Kuboni (“Kuboni”), Lindelihle Mkhwanazi (“Mkhwanazi”), Yoliswa Lulama Mbele (“Mbele”), Blue Serenity Investments (Pty) Ltd (“Blue Serenity”) and Rowmoore Investment (Pty) Ltd (“Rowmoore”).

477. The state was represented by Advocate Menzi Simelane on that day.

478. Another appearance in the matter was on 2 December 2010 at the Pietermaritzburg Regional Court where 19 persons appeared on the charge sheet as accused. There were however 6 “unnamed” accused persons on the charge sheet, with the result that there were only 13 accused persons in appearance. Kuboni Shezi Attorneys (“the Attorneys”), Victor Ntshangase (“Ntshangase”) as well as Alson Sipho Saribiyane Buthelezi (“Buthelezi”) were additional accused persons on the charge sheet.

479. The next appearance of the accused was on 16 February 2011 at the Pietermaritzburg Regional Court, and the same accused persons as with the 2 December 2010 appearance were on the charge sheet.

480. Advocate Ncedile Dunywa (“Dunywa”) appeared for the state at the Pietermaritzburg Magistrates Court on 16 February 2011.

481. Adv Cyril Simphiwe Mlotshwa ("Mlotshwa") became the Acting DPP of KZN on 17 May 2010. He was therefore already the acting DPP KZN when the accused first appeared at the Commercial Crime Court in Bellville, Cape Town.[180]

482. Mlotshwa also put together a prosecution team that would replace Steynberg when Steynberg left the country to take a position in the International Criminal Court. [181]

483. The Prosecution Team assembled by Mlotshwa was led by Dunywa and comprised of Adv Nomfundo Sipunzi ("Sipunzi"), Mr Vincent Ntanjana ("Ntanjana") and Adv Makhosini Mthembu ("Mthembu").

484. Sipunzi and Ntanjana later went on to take up positions of Regional Court Magistrate at Empangeni, and Magistrate at Pietermaritzburg respectively. Advocate Bulelwa Vimbani ("Vimbani") was then added to the team to work with Dunywa and Mthembu.

485. It is this team that worked on the indictment as well as the application for certification of racketeering charges in respect of the Amigos matter when Advocate Johan Kruger ("Kruger") was the head of the Special Projects Division ("SPD"). Kruger's responsibility, as will be elaborated upon in due course, was to process the racketeering charges before they got authorised by the NDPP in

180 transcribed record of 27 February 2020 (Day 220) at page 8 line 4.
181 transcribed record of 27 February 2020 (Day 220) at page 46 lines 24 to 25.

terms of section 2(4) of POCA, and at that particular time he worked with Adv Elijah Mamabolo (“Mamabolo”).182

486. This is the team also that, according to Kruger, went straight to the NDPP to obtain the section 2 (4) of POCA authorisation in respect of racketeering charges that were considered against the accused in the Amigos matter.[183]

487. It is against the above background that the allegations made against Mosing and his role in the Amigos matter should be viewed and understood.

488. This part of the recordal focuses not only on the implicating facts arising in relation to the Amigos case. It seeks to give an account of the processes that unfolded in respect of the Amigos matter (“the Durban leg”) and the role players in those processes in a manner that allows those who listen with open minds to get a grasp of the real hard facts.

489. This recordal does not seek to give a narration from the point of view of the implicating witnesses, lest Mosing come across as defensive. This recordal is intended to reveal to the Chairperson and the public at large not only the facts that have thus far not been laid bare to the public, but also to expose the half-truths, inaccuracies and outright lies that have been planted in the minds of those who cared to listen and/or watch the proceedings of the Commission.

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182 Abridged Summary of the Enquiry in terms of section 12 (6) of the National Prosecuting Act, Act Number 32 of 1998 ("the Mokgoro abr report") JMC-105

183 see Kruger's email of February 29, 2012 at SEQ 47/2020-882.

490. From the serious allegations of fraud, corruption and racketeering which have been said to be uncovered by the investigations in the Amigos matter, the allegations made against Mosing have reduced this serious matter into an issue about a captured prosecutor who threw the spanner in the works of the prosecution of two politicians because he is captured for undisclosed political reasons, and a missing R1m whose origin or source remains undisclosed.

491. Mosing's Rule 3.4 Statement maps out the role played by numerous players from the investigation of the charges right up to the processes that are in the various courts currently.

492. Those who search for the truth should take the time to go through Mosing's rule 3.4 statement supported by annexures to his affidavit, and get a perspective of the Amigos matter which has not told publicly thus far..

(d) <u>Investigation</u> of charges

493. A summary of evidence which forms part of the indictment in respect of which the accused in this matter were charged in the KwaZulu-Natal High Court, Pietermaritzburg reveals that the complainant in the matter (A1 witness) is Dr S Zulu, the Head of the Department of Health in KZN at the relevant time.[184]

[184] SEQ 47/2020 -1038

494. Colonel Petrus Johannes du Plooy ("Du Plooy") of the DSO at the time but subsequently the Directorate for Priority Crime Investigation ("the DPCI") was appointed as the investigating officer in the matter.

495. He investigated the following dockets:

495.1. Durban Central CAS 1538/01/2009 relating to Department of Local Government and Traditional Affairs, in re: Water Purification Plants;

495.2. Pietermaritzburg CAS 626/01/2010: KZN DoH: Water Purification Plants; and

495.3. Pietermaritzburg CAS 151/08/2010.[185] KZN DoH: Oxyntaka Self Generating Plants.

496. The focus of the investigation was contracts the Department of Health KZN awarded to Intaka (Pty) Ltd, owned by Dr Gaston Savoi. The Head of Department for the KZN DoH at the time was Dr Yoliswa Mbele she commissioned a forensic investigation to be conducted by PricewaterhouseCoopers ("PwC") on 20 May 2009.[186]

497. The commissioned forensic investigation was extended on 9 February 2010 by Mr N. Biyela, then Chief Financial Officer of the KZN DoH.[187]

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[185] RR5-PJDP-002 paragraph 7 to 10.
[186] RR4-TSW-0042 at paragraph 53; transcribed record of 21 January 2020 (Day 202) page 85

[187] RR4-TSW-0042 at paragraph 54; transcribed record of 21 January 2020 (Day 202) at page 85

498. Records seized from Intaka in the course of investigations revealed that the company had similar contracts with the KZN Department of Local Government And Traditional Affairs ("LGTA") as well as the Northern Cape Department of Health ("NC: DoH"). These contracts involved the procurement by the respective departments of Oxygen Self Generating Plants ("Oxyntaka"), Water Purification Plants ("Wataka") as well as Dialysis machines.

499. It is at the stage that the National Treasury was approached with a request that the investigation extend beyond KZN DoH and into the Northern Cape. A national investigation on Intaka-related contracts was prompted, which the National Treasury subsequently commissioned.

500. The forensic investigation was led by PwC's Forensic Auditor, Trevor White ("White"). In the course of the investigation White produced the following reports and an affidavit:

500.1. S v G Savoi and Others - KZN Dept of Health - Awarding of a contract for Oxyntaka Self- Generating Oxygen Plants to Intaka - CAS 151/08/2010 - dated 24 May 2010 (Annexure TSW 7)[188].

[188] annexure TSW 8 to RR4 dated 24 May 2010

500.2. S v G Savai (sic) and Others - KZN Dept of Health - Purchase of Water Purification Plants from Intaka - dated 24 May 2010 (Annexure TSW 8).[189]

500.3. S v G Savoi and Others - Northern Cape Dept of Health - Procurement of x10 Water Purification Plants-dated 12 October2010 (Annexure TSW 9).[190]

500.4. S v G Savoi and Others - Northern Cape Dept of Health - Procurement of 30 Oxyntaka Self-Generating Oxygen Plants - dated 19 November 2010 (Annexure TSW 10)[191]

500.5. S v G Savoi and Others - Northern Cape Dept of Healtb - Procurement of x16 Dialysis Machines - dated 4 April 2011 (Annexure TSW 11)[192]

500.6. S v G Savoi and Others - Northern Cape Local Government - Procurement of one Water Purification Plant - dated 8 July 2011 (Annexure TSW 12).[193]

500.7. S v G Savoi and Others - KZN Dept of Local Government and Traditional Affairs - Procurement of x20 Water Purification Plants - dated 29 July 2011 (Annexure TSW 13).[194]

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189 annexure TSW 8 to RR4 dated 24 May 2010
190 annexure TSW 9 to RR4 dated 12 October 2010
191 annexure TS W 10 to RR 4 dated 19 November 2010
192 annexure TSW 11 to RR 4 dated 4 April 2011
193 annexure TSW 12 to RR 4 dated 8 July 2011
194 annexure TS W 13 to RR 4 dated 29 July 2011

500.8. S v G Savoi and Others {Peggy Nkonyeni) - KZN Dept of Health - Supplementary Report- Procurement of Water Purification Plants and awarding of contract for Oxyntaka Self- Generating Plants - dated 28 October 2011 (Annexure TSW 14).[195]

500.9. S v G Savoi and Others - KZN Dept of Health - Supplementary Report - Awarding of a contract for Oxyntaka Self- Generating Oxygen Plant at Murchison Hospital to Intaka - dated 28 October 2011 (Annexure TSW 15).[196].

500.10. Affidavit dealing with MEC Mike Mabuyakhulu - dated 27 May 2011 (Annexure TSW 16).[197]

(e) Initial arrests and Charges

501. On 17 June 2010, Steynberg wrote to Du Plooy informing him that he is satisfied that a prima facie case of fraud, alternatively conspiracy to commit fraud, has been made out from the docket in Steynberg's possession.[198] Possible persons identified for the charge of fraud, alternatively conspiracy to commit fraud were:

501.1. Gaston Savoi ("Savoi")

501.2. Fernando Praderi ("Praderi")

501.3. Ansano Romani ("Romani")

195 annexure TS W to RR 4 dated 28 October 2011
196 annexure TS W 15 to RR 4 dated 28 October 2011
197 annexure TS W 16 to RR 4 dated 27 May 2011
198 RR5-PJDP-003 paragraph 11; RR5-PJDP-012

501.4. Donald Keith Miller (“Miller”)

501.5. Ronald James Geddes (“Geddes”)

501.6. Intaka Holdings (Pty) Ltd (“Intaka”)

502. Steynberg held the view that there is no evidence in the docket that implicates Yoliswa Lulama Yende, and no evidence under oath on which a warrant for arrest can be applied for.[199]

503. Savoi, Praderi, Romani, Geddes and Miller were then arrested 25 August 2010. They appeared in the Commercial Crime Court in Bellville, Cape Town on the same day charged with fraud, together with Intaka.

504. The matter was transferred to court A of the Pietermaritzburg Regional Court for 2 December 2010 and accused numbers 1-5 were granted bail with bail conditions set. Accused number 6 being a corporate entity, is represented in the proceedings by accused number 1.

(f) <u>Predicate charges by Mlotshwa</u>

(i) Initial charges against Nkonyeni and Mabuyakhulu

[199] RR5-PJDP-012

505. Nkonyeni and Mabuyakhulu were not part of the first accused to be charged in the matter. They were added after the following court appearances of the accused in the KZN leg of the Amigos case:

505.1. Bellville Magistrates Court on 25 August 2010;

505.2. Pietermaritzburg Magistrates Court on 20 October 2010;

505.3. Pietermaritzburg on 2 December 2010;

505.4. Pietermaritzburg on 16 February 2011

506. Du Plooy indicates that on or around 4 July 2011 he received the draft charges from Dunywa which were to be used to charge Nkonyeni and Mabuyakhulu.[200] Du Plooy has not provided the Commission with a copy of the said draft charges.

507. According to the draft the charge sheet that du Plooy attached to his rule 3.3 statement to the commission, draft charges against Nkonyeni and Mabuyakhulu were as follows:

(ii) <u>Mabuyakhulu</u>

1.1 Fraud (1 Count). This charge relates to the utilisation of R44 Million Rand initially allocated for Poverty Alleviation Fund, used to purchase 22 Watakas.

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200 RR5-PJDP-003 at paragraph 18

1.2 Money Laundering (1 Count). This charge is in respect of the amount of R1 Million Rand he allegedly received as a donation on behalf of the ANC.

(iii) Nkonyeni

1.3 Fraud (1 Count). This count is in respect of three quotations, two of which were fictitious, obtained in respect of the acquisition of Watakas for the Department of Health, KZN.

1.4 Corruption (1 Count). This count is said to be in respect of the gratification amounting to R1 Million which was deposited into the account of her friend, Lindelihle Mkhwanazi ("Mkhwanazi").

508. On 31 July 2011, An indictment was signed for the first time,[201] and a racketeering certificate was issued in respect of all the accused, including Mabuyakhulu and Nkonyeni[202].

509. The following charges were preferred against Mabuyakhulu and Nkonyeni in terms of the indictment and the racketeering certificate of 31 July 2011:

(iv) Factual basis for and charges ultimately brought against Nkonyeni and Mabuyakhulu

[201] SEQ 47/2020-793 to 870
[202] SEQ 47/2020-877 to878

510. According to White's evidence to the Commission, the charges against Mabuyakhulu are based on an affidavit deposed to by White dated 27 May 2011. With regard to Nkonyeni, the basis for the charges emanates from the supplementary report dated 28 October 2011.[203]

511. According to information gleaned from the indictment issued by Mlotshwa [204] the factual basis for charges against Nkonyeni and Mabuyakhulu are as set out below.

(v) Nkonyeni

512. Nkonyeni was the MEC for Health for KwaZulu-Natal between 2004 and 2009, and according to her affidavit in response to Constitutional Warning questions sent to her by Du Plooy, she assumed office as the Provincial Treasurer for the African National Congress ("ANC") in 2007.[205]

513. Charges against her are linked to contracts that were concluded between the Department of Health: KZN and Intaka when she was the MEC for Health.

514. Her culpability is said to arise from that she was the Minister (sic) of Health in the KwaZulu-Natal Provincial Government and was also a manager of the Enterprise together with accused numbers 1, 2 and 3. She participated during the commission of count number 46, 6, 7, 27 and 28[206]

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[203]
[204] SEQ 47/2020-793 to 870
[205] SEQ 47/2020-987-991
[206] SEQ 47/2020-839

515. The factual evidence on which charges against her are based are that:

515.1. She attended meetings with Nyembezi and Savoi and at times she was accompanied by her personal friend, Mkhwanazi, who is said to have received two payments from Intaka, of R500 000.00 each;

515.2. She was present at the venue where and when the contract in question was signed; and

515.3. She sent an SMS to Savoi a day after the contract in question was signed, informing him that the contract was signed the day before and that.

516. Based on the above Nkonyeni was charged with the following:

516.1. 1 Count racketeering (managing the enterprise)

516.2. 1 count of racketeering (participating in an enterprise).

516.3. 3 counts of fraud.

516.4. 2 counts of corruption.

516.5. 2 counts of money laundering .[207]

[207] SEQ 47/2020 – 112 at paragraph 240

(vi) Mabuyakhulu

517. Mabuyakhulu was the MEC for Local Government and Traditional Affairs from 2004 to 2009, and served as the treasurer for the ANC during the period 1998 until approximately 21 June 2008.

518. Criminal charges preferred against Mabuyakhulu relate to the period in which he served both as the MEC for LGTA and the Treasurer for the KZN provincial ANC.

519. His culpability is said to arise from that he was the MEC of local government, traditional Affairs and housing in the KwaZulu-Natal provincial government. He participated in the conduct of the enterprise and was either directly or indirectly involved here in. He participated during the commission of offences referred to in count number 8, 18, 22 and 24.

520. The charges against Mabuyakhulu were based on the affidavit of White[208] being, as filed with the Commission.

521. Mabuyakhulu was charged with:

521.1. 1 count of racketeering (conducting participating in the Enterprise's affairs);

521.2. 2 counts of fraud;

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[208] pages 61 to 87 of annexure TSW16

521.3. 2 counts of corruption; and

521.4. one count of money laundering

522. With regard to the 2 counts of corruption, the one count related to the R1 053 000.00 that was paid by Intaka into the account of Kuboni Shezi, and ultimately disbursed for the benefit of the Shabalalas.

523. The allegation in this respect is that:

> "*during the period March 2004 and December 2007 he accepted from accused number 1 (Savoi) an amount of R1,053 000 for the benefit of himself or the benefit of any other person unknown to the state in order to act personally or by influencing other persons to award a tender for the supply of water purification plants to accused number 19 (Inthaka), an act that was illegal dishonest or biased in carrying out or performance of his powers duties and functions arising out of his constitutional, statutory, contractual obligations, which act as amounted to the abuse of a position of authority, violation of his legal duty or set of rules which was designed to achieve an unjustified result, thereby committing the offence of corruption*"[209]

524. The other corruption count related to R1 000 000.00 that he received as a donation to the ANC from Sipho Shabalala.[210] the allegation made is that he "intentionally accepted or agreed to accept gratification of R1 million from Sipho Shabalala (who is accused number 2) for the benefit of both Mabuyakhulu and Shabalala in order for them to act in a manner that amounted to illegal dishonest

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209 SEQ 47/2020-124 to 125 and paragraph 252
210 SEQ 47/2020-127 at paragraph 257

and unauthorised carrying out of their powers duties and functions and/or amounted to the abuse of a position of authority or the violation of a legal duty on a set of rules, which was designed to achieve an unjustified result, thereby committing an offence of corruption."[211]

525. The above charges were preferred again Nkonyeni and Mabuyakhulu in spite of the following:

525.1. The Prosecutor's Memorandum that was submitted to and considered by Simelane for purposes of authorising racketeering charges does not make any reference to Nkonyeni and Mabuyakhulu. .[212]

525.2. According to Mlotshwa, the so- called electronic dairy of Savoi that was used by White in the supplementary report (of 28 October 2011, which implicated Nkonyeni) was obtained from documents emanating from the departments of Health and of Local Government and Traditional Affairs, not from Intaka. Added to that, it is also not clear why Du Plooy is said to not have been able to access documents including the electronic diary, whereas it appears that this diary was the basis of alleging that Nkonyeni, Nyembezi and or Mkhwanazi had been meeting with Savoi.[213]

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211 SEQ 47/2020-125 at paragraph 253
212 SEQ47/2020-119 at paragraph 243.3
213 SEQ 47/2020- 1010 at paragraph 3

525.3. According to White's supplementary report, the aforesaid SMS evidence on which reliance was sought to be placed, turned out to be a file note which appears In the documents that were seized from Intaka[214]

525.4. It is clear from Mosing's evidence that issues that ultimately led to the withdrawal of charges against Nkonyeni and Mabuyakhulu, had been raised before he became involved in the processes by Kruger, who was Mosing's predecessor in the SPD.215

525.5. Emails that Kruger exchanged with Jiba, Ramaite and his colleagues reflect on the defects that have been identified in the indictment. for example, in the email 29 February 2012, Kruger raised the following:

525.6. Mlotshwa sent Kruger the Savoi indictment without the prosecution memorandum, and despite requests for an electrotonic version of the prosecution memorandum, Mlotshwa had not provided same.[216]

525.7. Kruger had a difficulty in setting up the meeting with the KZN prosecution team.[217]

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214 SEQ 47/2020-118-119 at paragraph 243.1
215 SEQ 47/2020 – 091 at paragraph 200
216 SEQ47/2020-092 at paragraph 201.4.1
217 SEQ47/2020-093 at paragraph 201.4.2.

525.8. Kruger had consulted other experienced prosecutors in the field of racketeering, fraud, and corruption for their views and having himself studied all the available indictments and forensic report, the indictment still did not make sense.[218]

525.9. Changes recommended regarding the indictment in 2011 prior to the racketeering authorization by Simelane had also not been attended to.

526. It is also indicated by Kruger that the racketeering authorization issued by Simelane should be reviewed urgently by Jiba, having noted, it was one of the cases "that went straight to the NDPP".[219]

527. Later on, it will be shown that Mlotshwa was not cooperative with the SPD processes led by Mosing either. This should be seen in the light of what Kruger says in the email trail of 29 February to 1 March 2012 that, "…*the provinces see our recommendations as criticism, be that as it may we continue on the mandate you gave us*".

528. This is quite telling, given the narrative created by Booysen and his clan that Mlotshwa was being sidelined in some processes.

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218 SEQ47/2020-093 at paragraph 201.4.3
219 SEQ47/2020-094 at paragraph 201.5.

530. Advocate Silas Ramaite SC ("Ramaite") also appears to have shared the same concerns as Kruger because he responded to one of the emails sent by Kruger stating that:

"*These are precisely some of the difficulties that I have raised previously. I trust the meeting will come out with a more clearly comprehensible draft indictment. I have repeatedly said that in any prosecution based on racketeering or against a group of related individuals, the Court should not have difficulty to pinpoint the specific role and/or function of the participants*. *Once the role of anyone or other of the individuals is not clear, it raises doubt in the Court's mind about the complicity of that individual. I hope that you will be able to get the finilisation of the indictment as soon as possible*".

531. Notwithstanding Ramaite and Kruger's aforesaid concerns, Mlotshwa still proceeded to sign the indictment on 31 July 2011, and Simelane authorised the Racketeering charges .

(g) <u>Authorisation of Racketeering by Simelane</u>

532. Section 2 (4) of the Prevention of Organised Act, 1998 ("POCA") 220 provides that racketeering charges must be authorised by the NDPP. The Special Projects Division ("SPD") was a unit within the office of the NDPP which guided prosecutors and advised the NDPP regarding racketeering charges. The

220 Prevention of Organised Act No. 121 of 1998.

formulation of racketeering charges was guided by the SPD, and ultimately would be submitted to the NDPP for authorisation.

533. Prior to the incumbency of Simelane as the NDPP, Prosecutors who were of the view that racketeering charges should be preferred in a matter they are dealing with would engage with advocates in the SPD, who in turn would rigorously interrogate both the predicate charges as well as the racketeering charges. This process preceded the authorisation by the NDPP. [221]

534. However, during the incumbency of Simelane, it appears that the NDPP was content in authorising the racketeering charges inspired of the concerns raised within the SPD. This is borne out of the evidence of Mlotshwa at the Commission where he never made reference to engaging with the SPD prior to obtaining authorisation for the racketeering charges that the preferred against the accused in this matter. Also, Kruger's reference in the email of 29 February 2012 that the application for racketeering certificate in the matter "is one of those that went strait (sic) to the NDPP".222 This assertion stands in stark contrast to the evidence by Booysen that the prosecutors in this matter had to go a number of times to the national office to have their racketeering charges authorised.

[221] JMC – 103 at paragraph 306
[222] SEQ 47/2020-094 at paragraph 201.5

535. With this approach to processing application for racketeering authorisation, the process lost the benefit of the experience and expertise of prosecutors in the SPD.

536. Just by way of example, problems experienced with the formulation of charges against Nkonyeni and Mabuyakhulu, which led to the withdrawal of charges against them would have been identified and dealt with. The whole debacle about the withdrawal of charges against Nkonyeni and Mabuyakhulu would have most probably been averted. The weaknesses in the charges against Nkonyeni and Mabuyakhulu are dealt with elsewhere in this recordal.

537. Simelane issued a racketeering certificate based on the charges in the indictment signed by Mlotshwa on the same date that Mlotshwa signed the indictment. This in spite of the following:

537.1. Three days after signing the racketeering certificate, on 3 August 2011, Simelane complained to the Accountant General, Mr Freeman Nomvalo ("Nomvalo"), among others, about evidence that implicated Nkonyeni and which has been held from the prosecutors by White and du Plooy, and that up until June 2011 the prosecutors were told (by White and du Plooy) that there is no evidence against Nkonyeni.[223] There is no indication of any evidence uncovered subsequent to June 2011 but before the racketeering certificate could be issued. As

[223] SEQ47/2020-896 to 898

indicated before, the Prosecutor's Memorandum did not make specific reference to offences committed by Nkonyeni.

537.2. Simelane informed Minister of Justice and Correctional Services ("the Minister") in a report dated 14 September 2011, that there is evidence that implicates among others Nkonyeni and Mabuyakhulu, and that investigations are still ongoing.[224] the report to the Minister was submitted a month and ½ after the racketeering authorisation but still the prosecutor's memorandum does not make any reference to Nkonyeni and Mabuyakhulu.

537.3. Criticism for example of the formulation of the fraud charges by Advocate Bruwer, who Kruger approached to provide an opinion on the fraud charges in the indictment.

538. It should be borne in mind that the racketeering certificate was issued without attending to the number of queries that have been raised by Kruger and Mamabolo.

(h) <u>Role of SPD: Kruger and Mosing</u>

(aa) <u>Kruger's role</u>

[224] SEQ47/2020-901 at paragraph 6

539. The role that Kruger played in the processing of racketeering applications has already been set out. The issues that Kruger had regarding both the indictment and the racketeering certificate have also been highlighted, and reference has also been made to the emails that Kruger shared with some of his colleagues in seeking their views on the content of the indictment and the racketeering charges.

540. I dealt with the extent of the challenges that Kruger experienced in trying to have the indictment and racketeering charges of the KZN league of the Amigos matter refined so that the matter can get ready for trial.

541. Subsequent to the departure of Simelane from the office of the NDPP,Jiba, in an email dated 15 February 2012 addressed to Mlotshwa and Advocate Ivy Thenga ("Thenga "), Jiba informed them that she had mandated Kruger to visit both teams i.e. the Northern Cape and KZN Amigos teams "to ensure that all outstanding issues are finalised".[225]

542. It is clear from an update email that Kruger sent to Jiba on 29 February 2012 that Kruger was not getting any assistance of cooperation from the KZN prosecution team. [226]

543. It is also on record that at that particular time the errors that had been pointed out regarding the content of the indictment and the racketeering charges had not been corrected.[227]

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[225] SEQ47/2020-092 at paragraph 201.1

[226] SEQ47/2020—092-093

[227] SEQ47/2020-092 to 094 subparagraphs 201.4.1 to 201.4.6 under the heading "Email of the 9 February 2012"

544. So serious were Kruger's concerns that he even recommended strongly that the acting NDPP call Mlotshwa in and withdraw the racketeering authorisation.

(bb) <u>Mosing's role</u>

545. As already indicated Mosing was seconded to head the SPD in March 2012. He was invited to a meeting of top management on 8 March 2012. Mlotshwa and his prosecution team were to attend that meeting and make a presentation to top management.[228]

546. prior to attending that top management meeting Mosing met with Khuba and mum of all who briefed him about the developments in the KZN Amigos matter. He was also given some there are files as part of his briefing. It is in those funds that he came across the Kruger emails already referred to

547. next he attended the top management meeting and he reports that Mlotshwa was present in that meeting together with his prosecution team led by Dunywa and accompanied by Vimbani, Mthembu and advocate Mthokozisi Mcanyana.

548. Mosing reports that at the heart of the meeting were the concerns that top management had about the (Amigos) indictment.

549. Mosing list among the concerns that top management had about particularly the KZN Amigos indictment when the following:

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[228] SEQ47/2020-087 as paragraph 194

549.1. The definition of the enterprise with regard to the racketeering charges.

549.2. The number of accused (it seemed that everyone concerned with the procurement chain were accused).

549.3. Charges against attorneys in the firm of Kuboni Shezi Attorneys.

549.4. If the MECs' Nkonyeni and Mabuyakhulu, are charged, then why was the then MEC for Finance and Economic Development also not charged. The MEC for Finance and Economic Development at the time was Dr Zwelini Mkhize ("Mkhize"). The concerns regarding Mkhize related to a report that Simelane had submitted to the Minister of Justice and Constitutional Development, in terms of Section 33(2) of the NPA Act dated 14 September 2011. In terms of that report, Simelane was of the view that there is a *prima facie* case that Mkhize had to answer to in a Court of law. I shall give a full exposition of this role when dealing with the charges preferred against Nkonyeni and Mabuyakhulu.

550. The concerns of top management were raised and discussed, but it became clear that it was not possible to thoroughly thrash out all the issues concerning the contents of the indictment in a meeting.

551. It was then decided that a special working session is required to evaluate the evidence available against the charges in the indictment, with a view to then refining the indictment and ensuring that only charges that can be sustained on the available evidence would remain in the indictment.

552. Mosing and Mrwebi were then tasked to assist the KZN prosecuting team in that regard.

553. Carrying out the tasks assigned by top management led to Mosing and Mrwebi attending a working session on 15 and 16 March 2012.

554. The meeting of 23 March 2012 which forms the basis of the complaints against Mosing by White and Du Plooy was a sequel to the working session of 15 and 16 March 2012.

(cc) *The working session of 15 to 16 March 2012*

555. This working session was meant to achieve what was not achievable at the meeting of top management on 8 March 2012. Over two days Mosing and Mrwebi worked with the prosecution team on the indictment. Mosing's evidence is that they went through every charge in the indictment linking it to evidence available and agreeing on charges that are not sustainable on the evidence that was available.

556. Contrary to insinuations made, no decision was taken by Mosing about the withdrawal of charges. But having gone through the indictment and identifying the witnesses in the charges contained in the indictment, it would have been inevitable that some of the charges identified as not being supported by evidence, would fall away.

557. It became clear to Mosing at the concerns that the top management had were not raised with the prosecution team for the first time. Kruger had been engaged

in a process of assisting the Prosecution team with refining the indictment to ensure successful prosecutions. Furthermore, this process also included the Northern Cape Savoi cases.

558. Mosing's record of what transpired at the working sessions of 15 and 16 March 2012 reveals that the following occurred:

558.1. the approach approach adopted was to evaluate the charges against all the accused as against the available evidence and to that and they agreed on the following methodology:

558.1.1. to consider predicate offences or events individually and establish what evidence existed to sustain such;

558.1.2. who are the accused that should be charged for each predicate of friends; and

558.1.3. eliminate such charges and/or accused that could not be sustained by the evidence.[229]

559. There did not seem to be any difficulties with the process agreed on and the exercise was carried out to finish. It was then agreed that another session will be held with the investigating team in order to bring them on board with the developments regarding the considerations that they had about the charges. The working session with the investigating officers was held on 23 March 2012.

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229 SEQ47/2020-096 at paragraph 204 (including subparagraphs 204.1 o 201.3)

560. Mosing's account of the session of 23 March 2012 is as set out below

(cc) Working session of 23 March 2012

561. Two members from the SAPS, Du Plooy and Jones, together with White and the KZN prosecution team were in attendance.

562. White was a forensic investigator employed by Price Waterhouse Coopers ("PwC") which had been mandated to conduct the forensic investigations that preceded the charges in this matter.

563. Du Plooy and Jones had concerns that amendments were being made to a charge sheet that they believed was final and that they have had to deal with many role players in the NPA and this for them was frustrating.

564. That the environment in the meeting was quite tense.

565. This was because Mrwebi and I had not been part of the prosecution, and it was clear that they had a misapprehension about the process and the direction the process was taking, due to the misinformation they were given about the working sessions Mrwebi and I had with the prosecution team the week before, as well as the purpose of the meeting of 23 March 2012.

566. They went through the charges and available evidence during the working sessions and in the process, a number of deficiencies were identified and discussed.

567. Mosing compiled a report of the proceedings at the session, and that report is part of his Rule 3.4 Statement.[230]

568. it is clear from Mosing's notes that the investigators were not comfortable with the presence of Mosing and Mrwebi and were therefore sceptical. However, from the account that Mosing gave it has always been clear that neither Mosing nor Mrwebi had the power to withdraw charges against any of the accused persons.

569. In any event, even if Mosing wanted to withdraw charges against Nkonyeni and Mabuyakhulu as it is alleged, he would be constrained by the provisions of section 20 of the NPA act, considering that KZN was at the time not his area of jurisdiction.

570. It suffices to indicate at this stage that I was not empowered to withdraw any charges as I could only make recommendations, as is evident from the joint memorandum referred to above.

571. I will deal fully with questions that have been raised regarding the withdrawing of the charges when I respond to the allegations raised by the various witnesses relevant to my involvement in the process set out above under "ad seriatim".

572. In March 2012, Jiba seconded Mosing to head the SPD. The involvement of Mosing in the evaluation of the indictment and racketeering certificate was therefore, not an anomaly as alleged by Booysen and suggested by Du Plooy and White.

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[230] SEQ 47/2020 -893-895

573. The role of the SPD was dealt with at the Mokgoro Enquiry,[231] and it is clear from what is set out above that the role that Mosing played regarding the processing of racketeering authorisations was neither foreign nor anomalous to the functioning of the SPD. The role played by Mosing is discussed in the parts of this recordal dealing with

574. Further, in his evidence, Mosing indicates that his involvement in the evaluation of the charges in the Amigos matter emanated from the meeting of the NPA's top management of 8 March 2012. The meeting authorised him and Mrwebi to assist the KZN prosecution team in correcting the defects in the indictment that Mlotshwa signed.[232] That meeting was attended by Mlotshwa and the prosecution team led by Dunywa.[233]

575. It is pursuant to the decision taken in that top management meeting that Mosing and Mrwebi had working sessions with the prosecution team on 15 and 16 March 2012 as well as the much talked about working session that included White and Du Plooy on 23 March 2012.

576. Contrary to what has been touted, Mosing and Mrwebi acted with the authority NPA's top management and their interrogation of the charges and evidence supporting same was part of what the SPD regularly does. Reference will later

231 Exhibit Z(g) to Booysen's Affidavit at JMC-105 paragraphs 313 to 318
232 SEQ47/2020-091 at paragraph 199.
233 SEQ47/2020-087 to 088 at paragraph 195.

on made to disprove allegations that Mosing facilitated the withdrawal of the charges against Mabuyakhulu and Nkonyeni.

577. During that process, it emerged that:

577.1. The charges against Mabuyakhulu are based on an affidavit deposed to by White dated 27 May 2011; and

577.2. The basis for Nkonyeni's charges emanates from the supplementary report of White dated 28 October 2011.

578. Curiously, the Simelane issued a racketeering certificate in which Nkonyeni is listed as an accused and as a manager of the enterprise on 31 July 2011. This was barely a matter of a month or so after the prosecutors discovered the evidence that allegedly implicated Nkonyeni.

579. Furthermore, White's supplementary report, on which the charges against Nkonyeni were based, was only finalised on 28 October 2011, almost three months after the issuing of the racketeering certificate. Mosing has placed evidence before the Commission alluding to the fact that the racketeering certificate was issued without attending to a number of queries that have been raised by Kruger and Mamabolo.

580. Of the glaring defects regarding the charges to Mabuyakhulu is the fact that the fraud charges he faces relate to an amount of R1million donated to the African National Congress ("ANC") in June 2008, which amount Mabuyakhulu testified to receiving and disbursing to defray expenses related to the ANC's provincial conference of June 2008.

581. This is glaring because:

581.1. Despite persisting that the R1million donated to the ANC, White is unable to prove the source of that amount as being Savoi. In TSW19, White reflects payment of R1,053,000.00 (one million and fifty-three thousand Rands) as payment made by Intaka Holdings (Pty) Ltd ("Intaka") to Kuboni Shezi Attorneys ("Kuboni Shezi") on 12 March 2007 and continues to reflect payments that were made by Kuboni Shezi to defray numerous expenses linked to Sipho Shabalala ("Shabalala").

581.2. The total amount allegedly paid to the benefit of Shabalala is reflected as R1,056,204.88 (one million and fifty-six thousand two hundred and four Rands and eighty-eight cents). This amount exceeds the amount allegedly paid to Kuboni Shezi by R3,204.88 (three thousand two hundred and four Rands and eighty-eight cents).

581.3. White then proceeds to reflect a payment of R1million to Mabuyakhulu on behalf of the ANC. The supposition made by White is that the R1miillion Rands paid to Mabuyakhulu in cash emanates from the R1,053 000.00 paid by Intaka to Kuboni Shezi. This supposition is incorrect and is not supported by the figures in TSW19, as the expenses paid on behalf of Shabalala exceed the payment received from Intaka, as already stated.

581.4. Under cross examination by Advocate Dickson SC on 23 June 2021 regarding where the R1million paid to Mabuyakhulu by Shabalala would have come from, White said that the payment to Mabuyakhulu would have come from payment reflected in TSW19 as made to Blue Serenity (Pty) Ltd ("Blue Serenity"). This cannot be correct because the payment TSW19 reflects as made to Blue Serenity amounts to R300 000.00[234].

582. Further, Simelane indicated in his section 33(2)(a) report to the Minister, that "there is no proof of alleged further Savoi donations being paid into any account of the ANC despite allegations of these donations being made"235

583. These fraud charges based on White's report can, therefore, not be sustained against Mabuyakhulu.

[234] RR4-TSW- 1958
[235] SEQ 47/2020-906 at paragraph 22

(i) Withdrawal of charges against some of the accused

584. The KZN Prosecution Team was the one involved in the amendment of the indictment, obtaining Mosing's guidance when same was needed.236

585. Mosing sets out the processes that preceded the actual withdrawal of charges against some of the accused and attached relevant documentation. It is clear from Mosing's account that the prosecution team played a vital role in the process leading to the withdrawal of the charges,237 and that the decision was taken by Noko to withdraw charges against 10 (ten) accused persons that were originally charged.

586. The charges were withdrawn against:

586.1. Peggy Yoliswa Nkonyeni ("Nkonyeni");

586.2. Yolisa Lulama Mbhele ("Mbhele");

586.3. Michael Mabuyakhulu ("Mabuyakhulu");

586.4. Lindelihle Mkhwanazi ("Mkhwanazi");

586.5. Nozibele Priscilla Phindela ("Phindela");

586.6. Jabulani Langelihle Thusi ("Thusi");

586.7. Ian Buhlebakhe Blose ("Blose");

586.8. Rowmoor Investments 738 (Pty) Ltd ("Rowmoor");

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236 SEQ 47/2020-128 at paragraphs 262 to 263
237 SEQ 47/2020 – 1120 to 1122

586.9. Skyros Medical Suppliers (Pty) Ltd ("Skyros"); and

586.10. Blue Serenity Investments (Pty) Ltd (Blue Serenity).

587. After withdrawing the charges, Noko wrote letters to Ramaite and Jiba setting out her reasons for doing so.[238]

588. It should be noted that apart from the interactions that Mosing had with the prosecution team when the latter sought his guidance, Mosing was not involved in the process of having the charges withdrawn. In giving an account of some of the processes that led to the withdrawal of some of the charges, Mosing relies on documents that became available to him while coordinating the NPA's response to the DA's review application as well as the Stay of Proceedings Application ("SPA"), as indicated previously.

(j) <u>New Indictment</u>

589. Pursuant to the withdrawal of charges against the 10 accused referred to above, a new indictment was issued by Noko, the DPP of KwaZulu Natal at the time.

590. The acting stint of Mlotshwa came to an end on 9 July 2012, which resulted in the appointment of Noko as Acting DPP: KZN.

591. During August 2012, Noko received the representations made by Ngubane & Partners on behalf of Nkonyeni. The representations are filed with the Commission.

[238] SEQ 47/2020 – 1123 to 1133; SEQ 47/2020-1134 to 1144

592. The KZN prosecution team on the one hand proceeded with preparing a new Indictment that would address the deficiencies that were identified during the working sessions.

593. Mosing's evidence is that he was from time to time approached by the prosecution team for guidance in drafting a new indictment, which guidance he continued to provide, on the appreciation that the prosecution team was really struggling with formulating the charges.

594. As Kruger had earlier observed, racketeering was a relatively new process for them and they should have found it tricky to contend with. Mosing also alludes that he never received communication from Mlotshwa throughout his interactions with the prosecution team.

595. As a further confirmation that Mosing was not involved in the withdrawal of the charges against any of the accused, Mosing included in his affidavit a letter from Noko addressed to Ramaite, then acting NDPP dated 2 April 2013. I have already referred to that letter but for the sake of completeness I referred to a portion of that letter which states:

> "*due to the concerns raised with regard to the large number of accused and a need to review the evidence preferred against all these accused, I, Adv. Moipone Noko, the acting director of public prosecutions (ADPP) in KwaZulu-*

Natal, reviewed the evidence in consultation with the prosecution team assigned to the case. It needs mentioning that prosecutors from head office have from time to time been assigned to assist the prosecuting team when requested to. I had conducted a review of the evidence of the case against all accused and have decided to withdraw against nine (9) of the accused on the original indictment."[239]

596. The above is evidence of the process followed in reviewing the indictment in line with the outcome of the working sessions. It also evidences that the decision to withdraw the charges against 9 accused including Nkonyeni and Mabuyakhulu was taken independently by the DPP: KZN, Noko on the recommendations of the prosecution team.

597. In addition to the two memoranda there is also Noko's notes/minutes from meetings with the prosecution team, that included Dunywa. Those notes detail discussions and considerations in meetings held on:

597.1. 20 July 2012;

597.2. 08 August 2012;

597.3. 13 August 2012 and

597.4. 28 August 2012.

[239] SEQ 47/2020-1123

598. These minutes reveal that there was a process followed by the prosecution team subsequent to the work sessions held with Mosing and Mrwebi, prior to the withdrawal of the charges against 9 accused persons.

599. It appears that a new draft indictment was prepared, presumably by the prosecution team, where the number of accused is 11. The draft seems to have been prepared for Mlotshwa's approval and signature, but Mosing's evidence is that the copy in his possession is unsigned. It is common cause that Mlotshwa did not sign any new indictment post the March 2012 working sessions.

600. I also need to point out that, to the extent that it is generally suggested that the evaluation and review of charges in the original indictment was meant to benefit Mabuyakhulu and Nkonyeni, and also was pursued while Jiba was the Acting NDPP, same should be dispelled. The considerations of the prosecution team show that there was focus on analysing the indictment against available evidence, and then eliminating charges and accused against whom charges cannot be sustained. The focus was not on individual accused in their personal capacity, but on their culpability in respect of the identified offences.

601. Pursuant to the process outline above, wherein the indictment was evaluated and charges that could not be sustained were identified, the decision to withdraw charges was then taken by the DPP: KZN, Noko on 23 July 2012.240.

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[240] SEQ 47/2020-1134

602. The indictment was also amended to reflect charges against the remaining accused. Charges were further withdrawn against accused number 12, Dr Yolisa Lulama Mbele as well as Green-Thompson. The latter's charges were apparently withdrawn on the basis of several representations made to the various incumbents of the office of the NDPP. There has been no uproar on those withdrawals.

603. The indictment was finalised and issued when Noko assumed the position of the new Acting DPP: KZN.241

(k) <u>Interlocutory Applications</u>

604. One of the complaints raised by White against Mosing is that the criminal case has not been re-enrolled since the withdrawal of the charges against Nkonyeni, Mabuyakhulu and the other accused. And this, White attributes partly to the fact that the" new" prosecutorial team have not read the docket and his reports.

605. It is incorrect for White to say that nothing has happened to this case since the withdrawal of charges alluded to before.to the contrary, a lot has transpired and Mosing has given an account of some of the developments right up to shortly before finalising his rule 3.4 statement.

[241] SEQ 47/2020-128 to 129

606. Mosing has listed the following as part of the cause for delay in the matter:

606.1. a process for refining the indictment was followed within the office of the DPP: KZN. This process started during the tenure of Mlotshwa, but was finalised after Noko assumed office.

606.2. In August 2012, Noko took a decision to withdraw charges against 9 accused persons. This withdrawal was formalised when the accused appeared in court on 1 October 2012, being a date on which the matter was enrolled for trial.

606.3. The Democratic Alliance brought an application to review the withdrawal of charges against Mabuyakhulu and Nkonyeni. Mosing was responsible for co-ordinating the NPA's response to the application. This application was unsuccessful.

606.4. Accused numbers 1, 2 and 3 brought a constitutional challenge, for the definitions of "pattern of racketeering activity" and "enterprise" to be declared unconstitutional and invalid. This application went right up to the Constitutional Court where it was unsuccessful.

606.5. Another application was brought for and *in camera* application to deal with documents that were seized during a search and seizure operation, which the applicant's alleged are privileged. The applicants are applying for leave to appeal the decision of a full bench.

606.6. A Permanent Stay Application ("the PSA") was brought by some of the accused in the matter, and that impacted on the allocation of trial date while the matter is noted concluded.

606.7. The Shabalalas brought an application for a separation of their trial from the rest of the accused, and they succeeded. The State has applied for leave to appeal to the Constitutional Court.

(I) <u>On allegations made against Mosing by Du Plooy, White and Booysen</u>

607. Issues recorded herein have dealt extensively with allegations that implicated Mosing in state capture, even giving facts that go beyond the allegations made to give a holistic view of the issues raised.

608. Just to sum up. White's version is that the volumes of evidence that the forensic experts have worked on has not been used is disproved. Firstly, the basis on which charges were brought against those whose against whom they have been withdrawn, have proved unsustainable. By way of example, White is still to provide proof of his assumption that the R1 millon rands Shabalala gave to Mabuyakhulu as a donation to the ANC, is from Intaka. Further, his theory that the donation to the ANC is part of the R1 053 000.00 paid by Intaka to Kuboni and Shezi Attorneys cannot hold, given the excess in expenses his theory claims to have been paid from that Intaka payment. An account has been given of those reasons that Mosing is aware have contributed to the delay in the commencement of the trial.

609. Mosing's Rule 3.4 statement has exposed Booysen's untruths. Booysen's response to Mosing's firm assertion that Booysen was can never claim to have "inherited" the Amigos case has been met with a coy but clear retraction in reply. Booysen's response that "The reason I mentioned the 'Amigo' and 'Rendition' cases is to demonstrate that it noticeably is the same prosecutors who have invariably been linked to controversial prosecutions on the one hand and controversial non-prosecutions on the other hand." Is a clear admission that he had no reason to make allegations about the Amigo and Rendition cases.

610. It is now on record that Mlotshwa has proceeded to sign an indictment in spite of concerns raised about the charges therein. It is also on record that, contrary to allegations made by Booysens and others that he has been sidelined are not true, in as far as Amigos matter is concerned.

611. It is notable that Mlotshwa, in his evidence before the Commission on 27 February 2020, makes no reference whatsoever of the involvement of Kruger and Mamabolo in the process of obtaining the racketeering certificate from the NDPP. As Mosing has shown, Kruger and Mamabolo were placed in the same SPD that Mosing was seconded to in March 2012. They played a role in guiding prosecution teams and assisting the teams in getting racketeering submissions to the NDPP for his authorisation.

612. Mlotshwa's silence on this issue flies in the face of allegations that he worked with Kruger and Mamabolo in the application for a racketeering certificate in the Amigos matter, and the process took long, unlike the "speed" with which Mosing is said to have processed the Cato Manor application.

R. CONCLUSION

613. Mlotshwa was at pains but ultimately conceded when questioned by Chairperson regarding the fact that it is legally permissible for prosecutors from one division to conduct a prosecution in another division. The wrong impression that Booysen sought to give on this aspect demonstrate disingenuousness on his part.

614. From the objective facts, it is clear that the persons that made allegations against the implicated NPA officials, did not produce an iota of evidence before the Commission in substantiation of their allegations. The allegations are merely based on conjecture, speculation and conspiracy theories which are sufficient to sustain their unfounded allegations. The failure to adduce the necessary evidence occurred despite the accusers having testified before the Commission, and some of them having submitted more than one affidavit.

615. It should also be borne in mind that most of the accusers were themselves subjects of criminal investigations which, in some instances, culminated in their prosecution, even if, at a later stage, such charges were withdrawn.

616. It has been established that some of those who call themselves “corruption busters” are themselves criminals who sought to protect certain individuals.

617. It could not have been expected of the chairperson to make adverse findings against the implicated officials based on the flimsy unsubstantiated and malicious allegations levelled against the implicated NPA officials.

618. It has not been established that the investigations and the prosecutions complained off, were premised on monies.

619. It has further been established that the implicated NPA officials were the victims of a selective campaign as some of the NPA officials who took prosecutorial decisions complained of or were involved in the investigations are labelled as part of the core group at the NPA that was captured for political and corrupt reasons.

620. Not even an iota of evidence was tendered, demonstrating who the handlers and/or political masters of the core group are. Similarly, not an iota of evidence was tendered to prove what political benefits were received or were to be received. The implicated officials are career prosecutors who faithfully and diligently served the NPA and the country for decades. It is highly improbable that these officials will give away their personal and professional integrity and careers for political and corrupt reasons.

621. The implicated persons beseech, the Chairperson to consider the mandate of the NPA and to that extent, deem it necessary that this recordal incorporates same, to demonstrate the potential harm that the witnesses may have brought on the institution. Hence, it was necessary that the implicated officials, take the

public into their confidence and publicly and transparently inform the public how they arrived at the decisions they took in the exercise of their duties.

(a) **<u>Mandate of the NPA</u>**

622. The National Prosecuting Authority (*"NPA"*) obtains its mandate in terms of Section 179 of the Constitution of the Republic of South Africa,1996 ("*the Constitution"*). Section 179(1) establishes the NPA as a single prosecuting authority in the Republic of South Africa and structured in terms of an Act of Parliament. The Act of Parliament referred to is the National Prosecutions Authority Act.

623. In terms of Section 179(2), the NPA has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings.

624. The preamble to the NPA Act and Section 32(1)(a) of the NPA Act, in line with Section 179(4) of the Constitution, provides for the NPA to exercise its functions without fear, favour or prejudice.

625. The National Director of Public Prosecutions (*"NDPP"*) is the Head of the NPA and is appointed by the President. In such capacity, the NDPP shall have the authority over the exercising of all the powers and the performance of all the duties and functions conferred or imposed or assigned to any member of the NPA by the Constitution, the NPA Act, or any other law.

626. In terms of Section 32(1)(a), a member of the NPA shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith, without fear, favour or prejudice and subject only to the Constitution and the law.

627. Section 32(1)(b) provides that:

> *"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, her or his powers, duties and functions."*

628. Section 41 provides that:

> *"41. Offences and penalties*
>
> *(1) Any person who contravenes the provisions of Section 32(1)(b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment."*

629. It follows from the above that the NPA has the sole preserve in instituting criminal proceedings against any person suspected of having committed an offence. Therefore, without fear, favour or prejudice, any person, regardless of his or her profile or standing, should be prosecuted if there is a reasonable prospect and/or *prima facie* evidence that such a person has committed an offence. No-one in South Africa is above the law.

630. As already indicated, the implicating witnesses have brought before the Commission unsubstantiated averments which seek to project the implicated

prosecutors' as an officers of the Court who abuse their position and authority with regard to prosecutions, to advance purposes that are ulterior to the mandate, functioning and purpose of the NPA. What is quite disturbing is that those averments are not only unsubstantiated but have been made without giving regard to the constitutional imperatives that define how the NPA is to be structured and operated, but also what considerations are to be taken in prosecutorial decisions.

631. It is important that the Commission guard against the NPA being hamstrung by popular sentiment canvassed, especially in the media, from executing on its constitutional mandate. While the witnesses complained, among others, that part of the strategy for state capture is that the targeted persons are paraded in the media as bad and corrupt persons, or that their institutions are inefficient, they are the ones who actually went to the media and also came to this Commission, making serious allegations against the implicated prosecutors without any substantiation whatsoever. Nothing in their submissions tells this Commission exactly in which respects prosecutorial decisions taken against them, deviated from the legal and constitutional mandate of the NPA.

632. Section 179(5) of the Constitution empowers the NDPP to review a prosecutorial decision after following steps which are prescribed in that section. None of the witnesses make out a case that an attempt was made then to have the NDPP review the prosecutorial decisions which they feel impacted unfairly, unnecessarily and adversely on them.

633. Considering the imperative in Section 32(1)(b) of the NPA Act set out above, anyone who seeks to challenge the decision of the NPA to charge a person, should do so through the prescribed and/or available process, with proper substantiation.

634. The implicated NPA officials take this opportunity to thank the Chairperson for at least giving them an opportunity in this Commission to put their version to the Commission and to the public.

ADV T F MATHIBEDI SC

ADV L VILAKAZI

ADV K RAMAIMELA

ADV Z MADLANGA

Dated: 26 June 2021