

**THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS
REGARDING EFFORTS OR ATTEMPTS TO STOP THE INVESTIGATION OR
PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES
(TRC CASES INQUIRY)**

HELD AT:

Sci-Bono Discovery Centre, Corner of Miriam Makeba & Helen Joseph Street
Newtown, Johannesburg

BEFORE:

COMMISSIONERS:

The Honourable Ms Justice Sisi Khampepe (Judge Ret.) – Chairperson
The Honourable Mr Justice Frans Diale Kgomo (Judge President Ret.)
Adv Andrea Gabriel (SC)

EVIDENCE LEADERS:

Adv Ishmael Semanya (SC)
Adv Vas Soni (SC)
Adv Fana Nalane (SC)
Adv Nompumelelo Seme
Ms Baitseng Rangata

REPRESENTATIVES

Adv Varney (SC) – The Calata Group
Adv D Pillay – The Calata Group
Ms A Thakor – The Calata Group
Mr J Venter – The Calata Group
Mr Sipho Tlhaole – The Calata Group
Mr Rafik Bhana (SC) (for Adv B Ngcuka)
Adv Mfundo Salukazana (for Adv B Ngcuka)
Adv Nwabisa Ntshizana (for Adv B Ngcuka)
Mr Tabata (for Adv B Ngcuka)
Adv KD Moroka (SC) – DoJ representative
Adv Gwala (SC) – NPA representative
Ad Motlalepule Rantho (for SAPS)
Adv Vivian Rikhotso (for Adv Menzi Simelane)

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PROCEEDINGS ON 11 MARCH 2026

CHAIRPERSON: Mr Semenya?

ADV SEMENYA: Chair and Commissioners, we are set down today for Mr Ngcuka's cross-examination.

CHAIRPERSON: Mr Varney?

ADV VARNEY: As the Chair pleases. Chair, just a few quick housekeeping matters, my junior counsel, Ms Senthil Pillay, is not with us today. I excused her because she has to prepare our heads of argument for the review next week and it seems a bit thin and
10 [indistinct] of time. She is not with us today and...[intervenes]

CHAIRPERSON: Yes.

ADV VARNEY: And I just kind of bring that to your attention.

ADV MOROKA: Excuse us Chair, if Mr Varney could please speak up loud? Some of us are advanced in age, we do not hear so well.

CHAIRPERSON: Yes.

ADV MOROKA: Thank you.

CHAIRPERSON: Yes, Ms Moroka, you must bring your hearing aid.
[Laughing].

ADV MOROKA: [Laughing]. I could buy it.

20 ADV VARNEY: Well, I express solidarity with Ms Moroka, I share the same drawbacks as she does, being in the same category. Can I be heard now?

ADV MOROKA: Yes.

CHAIRPERSON: Yes, you may.

ADV VARNEY: Okay. One other matter is that of the bundle that we

have provided for this morning's session and I wish to apologise for the duplication in the bundle, it does mean that about half of the bundle has been duplicated and we apologise for the waste of paper.

How that happened Chair was, in the original list we put up, we itemised the full affidavit of Adv Macadam and he had a number of annexures attached to his affidavit, and then we made reference to the different annexures that we were going to be referring to, so when the Commissioner requested a separate bundle, they were all printed including a repeat of those annexures for which we apologise. With

10 the leave of the Commissioner, I can now commence and...[intervenes]

CHAIRPERSON: Yes, you may proceed.

ADV VARNEY: Good morning, Adv Ngcuka, I hope you are doing well this morning.

CHAIRPERSON: Before you proceed may I just remind Adv Ngcuka that you are still under your former oath?

ADV NGCUKA: Thank you. I am well, thank you very much.

CHAIRPERSON: Thank you.

20 ADV VARNEY: That is good to hear and you confirm that you are still under oath?

ADV NGCUKA: Correct.

BULELANI THANDABANTU NGCUKA: still under oath

CROSS-EXAMINATION BY ADV VARNEY: So Mr Ngcuka, I first want to say to you that on behalf of the families, they recognise the significant contribution that you have made to the deliberation of

South Africa and the sacrifices that you incurred in that struggle.

ADV NGCUKA: Thank you.

ADV VARNEY: And I also wish to just give you a sense of what we hope to do this morning and I firstly want to make it clear to you that we are not here to try and catch you out or to try and trick you up, that is certainly not what our intentions are. This is an inquisitorial process, it is about putting facts on the table and reaching the truth and if I recall correctly, in your evidence-in-chief you said that you supported that process and you would do what you could to assist the

10 Commission.

ADV NGCUKA: That is correct.

ADV VARNEY: Ja, so in actual fact the bulk of my questions are going to be about clarification and follow-up. The minority of the questions will be in the category of cross-examination and the way I intend to run this morning session or at least my part of the session, is to ask you various questions in relation to your statement that you provided to the Commission.

ADV NGCUKA: Sure.

20 ADV VARNEY: I will have a few follow-up questions in relation to the evidence-in-chief, the whole evidence that you provided and then I will also ask some questions on the documents that we have provided you and your team.

ADV NGCUKA: Okay.

ADV VARNEY: So those housekeeping matters out of the way, perhaps we can just start with your statement and I assume you do

have a copy of it?

ADV NGCUKA: I do.

ADV VARNEY: So let us start on page 7 of your statement at paragraph 27. And there you speak about establishing the Human Rights Investigation Unit under the leadership of then Adv Vincent Saldanha and in that paragraph 27 you set out why it was that the HRIU was not able to make much headway, including the fact that the amnesty process was still underway and other challenges such as the availability of witnesses and the like. But to be fair to Adv Saldanha
10 as he was at the time and his team, am I right in saying that that unit was only in operation between '99 and 2000, so maybe about a year or just over a year?

ADV NGCUKA: That is correct.

ADV VARNEY: And of course we cannot really expect a unit that is only in operation for about a year, looking at cases, potentially a 100 of cases for the first time to achieve much in one year?

ADV NGCUKA: Well I thought they did a lot, actually.

ADV VARNEY: Yes.

ADV NGCUKA: So I was satisfied with the work that they did,
20 because it was really preliminary work.

ADV VARNEY: Indeed.

ADV NGCUKA: Ja.

ADV VARNEY: Although it has been pointed out that they did not commence with any prosecutions though, so I suppose that is the issue?

ADV NGCUKA: No, that was not their mandate.

ADV VARNEY: Is that so, so they were never meant to bring prosecutions?

ADV NGCUKA: No, no.

ADV VARNEY: Okay, thanks for that clarification. Then let us turn to your next paragraph, that is 28 on the same page. And you say:

“My inclination prior to receiving the HRIU report.”

And perhaps I can just pause for a moment. That report, I am not sure whether it is actually before this Commission?

10 ADV NGCUKA: It was attached to the Calata affidavit.

ADV VARNEY: Oh, I see.

ADV NGCUKA: It was in the Calata documents. I saw the report there.

ADV VARNEY: Okay, we will...[intervenes]

ADV NGCUKA: In one of the bundles.

ADV VARNEY: We will take a look for it. There were certainly many reports compiled by people like Adv Macadam and Ackermann. We will come back to you on that...[intervenes]

ADV NGCUKA: Sure.

20 ADV VARNEY: On that score.

ADV NGCUKA: Sure.

ADV VARNEY: So you said your inclination of getting that report was to farm out the investigation or prosecution of these cases to various DPP offices, but this however changed after you received that report and that is when you decided to centralise matters. So why did

you prefer centralisation after receiving that report?

ADV NGCUKA: Well I wanted to ensure that there was consistency. You see, they identified a number of the shortcomings which I thought that it will be best if they were handled nationally, so that was really the reason for me to do that.

ADV VARNEY: Right and actually in that same paragraph on the next page, you talked about ensuring a coherent and centralised approach and a consolidation was intended to avoid duplication, consolidate resources, promote efficiency, consistency in decision
10 making and enable a coordinated national strategy for those cases.

ADV NGCUKA: That is correct.

ADV VARNEY: So in that same paragraph, you mentioned that you then decided that all TRC cases should be brought to the Special National Projects Unit, the SNPU, within the Scorpions. Now what motivated your decision to move the cases from I suppose a unit within the NPA to a unit within the DSO, the Scorpions?

ADV NGCUKA: No, that unit was no longer in existence, so once Adv Brink Ferreira and Adv Saldanha handed over the document, they had done what they were supposed to do and so we created
20 therefore this entity which had investigative capacity. So that is why they were then given to Adv Chris Macadam.

ADV VARNEY: Oh okay, and in fact that was going to be my next question which you have now answered, which the NPA itself did not have investigators...[intervenes]

ADV NGCUKA: No.

ADV VARNEY: But the DSO did, so that was a more appropriate home for the pursuit of these cases simply because the Scorpions had an investigative capacity?

ADV NGCUKA: That is correct.

ADV VARNEY: And then if we can turn to the next paragraph, that is paragraph 29 and you point out that the SNPU operated in approximately 2003, it reviewed and worked on those dockets but it did not institute prosecutions because the amnesty process had not been completed. Would I be right in saying that perhaps at a policy
10 level that was one of the factors holding you back, that the amnesty process was still running and decisions were still being handed down?

ADV NGCUKA: That is correct and also to add, some of the people had been refused amnesty. They challenged that decision in the High Court and so we could not proceed until those processes had been finalised.

ADV VARNEY: Yes and we certainly saw that for example in the PEBCO Three matter.

ADV NGCUKA: Correct.

20 ADV VARNEY: Ja. Now I want to put to you a passage from the book of Mr Ole Bubenzer, the extracts are in the bundle at page, I believe it is 48.

ADV NGCUKA: Which bundle, sir, 1 of 2, 1 of 1?

ADV VARNEY: Oh okay, yes I apologise for the ocean of paper before you. You probably have a few bundles but there should be

one bundle which has the bundle for this morning, I think...[intervenes]

ADV NGCUKA: I do not have that.

ADV VARNEY: We just need to double check.

ADV NGCUKA: I do not have the bundle for this morning. The ones you gave me last time, are here.

ADV VARNEY: I see. With the leave of the Commission can we just ask one of my colleagues to check whether he has the bundle? So that bundle Adv...[intervenes]

10 CHAIRPERSON: It is page 48, Adv Ngcuka.

ADV NGCUKA: Thank you.

ADV VARNEY: It is page 48.

ADV NGCUKA: All right.

ADV VARNEY: And the particular paragraph I want to put to you here is also in bundle 1, that is the founding affidavit of Lukhanyo Calata. That is at paragraph 104 and in that bundle and perhaps we can just use this one because...[intervenes]

ADV NGCUKA: I am not sure, which bundle are you now referring me to?

20 ADV VARNEY: So you may look at the one that is just being given to you?

ADV NGCUKA: Yes, I do.

ADV VARNEY: You can go to page 4.

ADV NGCUKA: Page 4, not 48?

ADV VARNEY: I was just pointing out that the full extract from the

book are at page 48, but I am only going to put to you one extract and that is, I can refer you to page 4 of the new bundle, at the bottom of the page, paragraph 104.

ADV NGCUKA: Yes.

ADV VARNEY: And I will read it into the record:

10 “Mr Calata said it appeared that the NPA devoted few resources to the SNPU and according to the author, Ole Bubenzer, in his 2009 book *Post-TRC Prosecutions in South Africa*, this was because the NPA was concerned that some cases would have to be withdrawn if amnesty is to be granted since at that time the Amnesty Committee was still concluding its work.”

And actually you have already confirmed that, so let us carry on. And if you turn over to the next page at paragraph 105:

20 “However, according to Bubenzer, there were many cases in which amnesty had already been denied or not applied for, such as the case against former SAP General Izak Johannes Krappies Engelbrecht in which an indictment had already been prepared by the D'Oliveira Unit.”

And I will just read the last sentence:

“In 1999, the D'Oliveira Unit had reportedly already prepared about 20 charge sheets. None of these charge sheets would see the light of day in court.”

So what Mr Bubenzer says in his book is that yes, there

were some amnesty cases that were still being deliberated on by the TRC's Amnesty Committee, but some, some had been concluded. There were denials and in some cases amnesty was not applied for and he gives the example of General Krappies Engelbrecht.

And you may recall that General Engelbrecht in the 1980s he was a senior officer and a period of time he oversaw the work of Vlakplaas where Eugene de Kock was also based for some time. So there was an expectation that after the De Kock matter had been concluded, that you know, there would be cases against his
10 superiors. Did you recall the matter of General Engelbrecht?

ADV NGCUKA: No, I know about General Engelbrecht. I contest that statement, I do not think it is correct.

ADV VARNEY: Okay and just can you elaborate why you disagree?

ADV NGCUKA: Ja, I will tell you why. Chris gave me a report and you will see in all the reports that Chris, which have been tabled, the Engelbrecht case is not in any one of those that were ready for prosecution. Anton did the same thing, Anton Ackermann and none of the Engelbrecht cases appears in all those reports. So this statement from this gentleman, whatever his name is, is definitely
20 incorrect.

ADV VARNEY: Okay. Well yes, I think you are right, that the case of Engelbrecht does feature in some of the reports and we will try to highlight where that happens and perhaps come back to you on that. All right, you can return to your statement. In paragraphs 30 and 31 you refer to the creation of the PCLU, you refer to the appointment of

Anton Ackermann to head up the PCLU and that the SNPU staff and its leader, Chris Macadam, they were transferred to the PCLU.

Then on paragraph 31 at the bottom of the page and yes, you do make the point that the PCLU was also mandated to deal with a number of other cases such as mercenary activities, terrorism and the like. Then at the bottom of the page you point out that you directed all cases arising from the TRC process and which amnesty had been refused and not applied for, to be classified as priority crimes. At the time why did you decide to declare the TRC cases as
10 priority crimes?

ADV NGCUKA: I thought that would have been self-evident, because these were important cases which needed to be dealt with and they related to what I would call unfinished business of the past, so yes.

ADV VARNEY: And if they were declared priority crimes, then would I be right in saying there would be a better chance that they would receive attention?

ADV NGCUKA: Oh yes.

ADV VARNEY: Ja. You also point out that and in paragraph 32, that
20 the PCLU identified around 21 cases warranting further investigation. Am I right in saying that in those 21 cases, there was a view that there were some prospects of taking them forward?

ADV NGCUKA: Correct.

ADV VARNEY: At this point let us pause because then the timeline, you know we are now in the first quarter of 2003 and can I just refer

you to a speech of Thabo Mbeki? The extract that I want to rely on is at page 18 of this new bundle. The full speech is at page 47 of that bundle, but I think we can just look at the extract.

ADV NGCUKA: I have got it.

ADV VARNEY: Okay, I think that is at...[intervenes]

ADV MOROKA: Apologies, Chair.

CHAIRPERSON: Yes?

ADV MOROKA: Because of the amount of papers I have indicated previously, we try not get ourselves startingly confused. Mr Varney
10 refers to page 18 of the new bundle. Which bundle is this one?

CHAIRPERSON: It is the bundle that we all have.

ADV MOROKA: Chair, that does, that is not very helpful, with respect. We have a speech here that says 558, page 508 which was given to us this morning and I am trying to understand which bundle is Mr Varney referring to and which page.

CHAIRPERSON: Let Mr Salakwazana assist you.

ADV MOROKA: Sorry, sorry, where was I?

MR SALAKWAZANA: [Indistinct].

ADV MOROKA: But he says page 4?

20 MR SALAKWAZANA: Page 18.

COMMISSIONER KGOMO: You switched off your microphones.

ADV MOROKA: Yes, I am trying to understand, Chair. When we started we have got two of them, so I am trying to understand which one we are talking about.

MR SALAKWAZANA: But this is the same as... Ja, I take this is an

extract.

CHAIRPERSON: Are you on the same page now, Ms Moroka?

ADV MOROKA: I am Chair, thank you.

CHAIRPERSON: Thank you.

COMMISSIONER KGOMO: Can you switch off one of the microphones? There is a problem there.

ADV MOROKA: Yes.

ADV VARNEY: Thank you, Chair. So on page 18, there is a reference to the fact that in March 2003, the TRC's final volume that
10 is volume 6, was released and then on 15 April 2003, President Mbeki made a statement to the Joint Houses of Parliament on the occasion of the tabling of the report of the TRC, so I just want to put certain extracts of his speech to you and seek your response. I will try not to put too many. I will start with the third paragraph on that page. President Mbeki says:

20 "Let us start off by reiterating that there shall be no general amnesty. Any such approach will apply to specific categories of people, regions on the country, fly in the face of the TRC process and subtract from the principle of accountability which is vital, not only dealing with the past but also in the creation of a new ethos within our society."

And then the next paragraph:

"Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take

part in the TRC process.”

In that paragraph he explains why many did not. At the bottom he says:

“This reality cannot be avoided.”

In the next paragraph:

“Government is of a firm conviction that we cannot resolve this matter by setting up yet another amnesty process which in effect would mean suspending constitutional rights of those who were at the receiving
10 end of gross human rights violations.”

Just on that score I am putting our legal hats on. Would you agree that in the case brought by the Biko Family and the Nkenke's, the well-known you know, the *Azapo* case that the Constitutional Court ruled on, and they upheld the amnesty that was in the Truth and Reconciliation Commission and one of the main reasons was that in the proscript to the interim Constitution, constitutional authority for that limited amnesty was provided, but that post the TRC in subsequent years, that would not apply? Would you agree?

ADV NGCUKA: Ja.

20 ADV VARNEY: Ja, so then if we turn to page 19, President Mbeki points out that therefore:

“We have therefore, left this matter in the hands of the National Director of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work

is continuing. However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.”

10 I skip the next paragraph:

“This approach leaves open the possibility for individual citizens to take up any grievance related human rights violations with the courts. Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.”

And then lastly:

20 “Our relevant departments are examining the practical modalities of dealing with this matter and they would also establish where the specific legislation is required in this regard.”

So on the one hand the President is ruling out another amnesty, but he is talking about arrangements that would need to be made with the relevant departments including the NPA, to deal with

those who had not applied for amnesty. What was your response to this speech that there were not going to be special arrangements made to deal with this special class of cases?

ADV NGCUKA: No, I did not think that there would be special arrangements, to be honest with you, but I thought the President what he was referring to, was that whoever came forward and gave information would be dealt with as we normally deal with cases. For one to make a special plea, the one to turn as witnesses, those are the arrangements that would be made in the normal course of our...

10 So I never thought there would be any special arrangements that would have been made other than in the normal course of our work.

ADV VARNEY: So at that time because it appeared that it would just be the normal course and you have raised you know, typical procedures you find in the Criminal Procedure Act...[intervenes]

ADV NGCUKA: Ja.

ADV VARNEY: That that was nothing out of the ordinary, although and we will come to it later, but it does appear that ultimately special arrangements for that category of cases was put into place with the amendments to the prosecution policy which really did single out the

20 TRC cases for different treatment to other cases.

ADV NGCUKA: Unfortunately I cannot help you there because I was gone by then.

ADV VARNEY: Yes, no, I am aware and we are not trying to attribute any responsibility on your part, you had left. That fact came a year or so later, but I am just asking for your view on the matter,

that it does amount to special treatment.

ADV NGCUKA: No, but it did happen, I mean it just did not happen during my time and so I never had the occasion to consider that.

ADV VARNEY: Ja, I suppose I am only asking you as an experienced lawyer, a former NDPP, that do you make the concession that the amendments put in place a special process for those cases?

ADV NGCUKA: I actually did not read those prosecution policies, those amendments, so I really cannot speak to them.

10 ADV VARNEY: Okay. All right, we will come to them and we will go through them in due course.

ADV NGCUKA: Sure.

COMMISSIONER KGOMO: Sorry Mr Ngcuka, for the layperson there are in paragraphs 18 and 19, President Mbeki puts a scenario and then seems to contradict himself. In your own words what part of this speech do you agree with, which part do you not agree with, in your own words? Now as National Director of Public Prosecutions, this is put before you.

20 ADV NGCUKA: Well I did not have, unfortunately Judge, I did not at that time have to apply my mind to what the President was saying, whether I agreed or did not agree with him, because I was never confronted with the issues that were raised in his speech.

COMMISSIONER KGOMO: Ja, but now it is put before you.

ADV NGCUKA: Well I will have to think about it.

COMMISSIONER KGOMO: And...[intervenes]

ADV NGCUKA: I have to consider it, I will have to consider it, what it really means.

COMMISSIONER KGOMO: Up to now you have not?

ADV NGCUKA: Sorry?

COMMISSIONER KGOMO: Up to now you have not?

ADV NGCUKA: You know what, there was never a need for me to do so, but you are raising it now to say can I think about it, I need to think about it, I need to reflect on it. I do not want to shoot from the hip.

10 COMMISSIONER GABRIEL: Mr Ngcuka, good day.

ADV NGCUKA: Yes, madam.

COMMISSIONER GABRIEL: As I recall your testimony, you said that at some point, I forget the year, it may have been 2004, at some point members of your unit were invited to discuss amendments to the policy and it was your evidence, it might have been Dr Ramaite that went to the meeting, it was, you can correct me now...[intervenes]

ADV NGCUKA: Correct, correct. No, no, sorry.

20 COMMISSIONER GABRIEL: It was your evidence that you agreed with them that there was no need for any amendments to the prosecution policy.

ADV NGCUKA: Absolutely correct.

COMMISSIONER GABRIEL: Are you able to explain that a bit more as compared to what we know came later, which is that there were in fact amendments to the policy which ostensibly arose as a result of

the President's speech?

ADV NGCUKA: Thank you...[intervenes]

COMMISSIONER GABRIEL: Why did you think there was no reason for any amendments to the existing prosecution policy?

ADV NGCUKA: I thought it covered, I thought the policy as it existed, it just covered all the issues that needed to be dealt with. I thought...[intervenes]

COMMISSIONER GABRIEL: This was despite the President's speech?

10 ADV NGCUKA: What I, yes, yes, yes, yes, insofar as I am concerned, I think the President said whoever wants to make arrangements, must go to the National Director and make those arrangements. In my view those fell within the National Prosecuting Authority Act who says people must make representations. If I find those representations at the time that were worth considering, then we looked into them.

COMMISSIONER GABRIEL: Okay.

ADV NGCUKA: And we may then decide as I mentioned, that people will enter into a plea bargain, that people will be used as
20 witnesses or in certain instances we might decide that maybe we should not bring the charges against those people given whatever the facts that were presented to me at the time. So we would look into those.

COMMISSIONER GABRIEL: Right.

ADV NGCUKA: So I did not think that it was necessary to amend the

prosecution policy.

COMMISSIONER GABRIEL: And that remained your view throughout your tenure?

ADV NGCUKA: Throughout my tenure. In fact...[intervenes]

COMMISSIONER GABRIEL: And notwithstanding the President's speech in May 2003?

ADV NGCUKA: Notwithstanding the President's speech, because as I read the President's speech at the time, he was still leaving that discretion with the National Director.

10 COMMISSIONER GABRIEL: Right, thank you.

ADV NGCUKA: So I was free to do that.

COMMISSIONER GABRIEL: Thank you.

ADV VARNEY: Mr Bulelani, sorry to take you back a little in time, but since we are still in the early days, if we can go back to the work of the Human Rights Investigation Unit, the HRIU, and I would like to refer you to a page in your book, it is at page 227 of the new bundle.

ADV NGCUKA: 227.

ADV VARNEY: 227.

ADV NGCUKA: Sure.

20 ADV VARNEY: And I will just read to you a short extract:

“Shortly after his appointment, Bulelani set up a working group led by Vincent Saldanha which served on the TRC and he went on to serve as a judge in the Western Cape to review all the cases that had been refused amnesty by the TRC. The group drew up criteria to

guide decisions on whether to investigate matters further or to make recommendations for prosecution. Bulelani said he was obliged by law to prosecute where there was enough evidence to make a case, but at the same time part of him asked if it was worth it."

And I am just going to pause there, we will come back to the paragraph a bit later but the criteria that the HRIU drew up, are you, I do not know whether you and your team are aware, whether that is currently before this Commission, is there a list of criteria that we can refer to?

ADV NGCUKA: No, I cannot.

ADV VARNEY: Okay.

ADV NGCUKA: I cannot recall that, I am sorry.

ADV VARNEY: All right and I do not think we are aware of that. We will of course ask the evidence leaders if they can try and track down those criteria but since the HRIU did develop criteria to guide decisions which I am assuming that you, do you agree with those criteria?

ADV NGCUKA: Ja, certainly.

20 ADV VARNEY: Okay.

ADV NGCUKA: Otherwise I would have said no.

ADV VARNEY: Right, so if they developed those guidelines or criteria, was there really any need for the subsequent Amnesty Task Team which was established to propose new criteria which ultimately saw their way into the amended prosecution policy? And I know

these guys [indistinct] years after you left, but what is your response to that?

ADV NGCUKA: No, maybe let us deal with it now.

ADV VARNEY: Okay.

ADV NGCUKA: Because my representatives went to that meeting, attended the meeting, came back and briefed me, and we discussed it and then we decided that it was, for us, there was no point in us continuing to participate in that process. We did not agree that that is what should happen, but also we can explain in that we were just
10 concerned that some of the people in that meeting were concerned about what came to be known as the, those 37 cases of the ANC.

And that whole participation in that process would have compromised us, because we would have had to take decisions whether to prosecute or not to prosecute them. And so we felt that it was not necessary for us to participate, in fact it would not have been wise for us to participate in that process, hence my instruction was let us pull out of it, and we did.

ADV VARNEY: And can you recall approximately and I know this is going back many years and I am sorry to put you on the spot, I mean
20 you have to recollect after so many years but approximately when did you give that instruction?

ADV NGCUKA: No, after the first meeting, whenever the first meeting was, probably it was, I think it was in 2003. So after that meeting when they came back to report what had transpired in that meeting, what had happened and so we discussed it and we felt no, it

is not a good idea for us to participate in that forum.

ADV VARNEY: Okay. All right, I think well it was after the first meeting and we should be able to give you a [indistinct]...[intervenes]

ADV NGCUKA: If you can find when the first meeting was, because that is the meeting that was convened by Mr Pikoli.

ADV VARNEY: Oh, so I am advised that the first meeting was on the 26 February 2004 and that comes from the report of the Amnesty Task Team which is at page 201 of that bundle.

ADV NGCUKA: Whatever the timing is, if that was the meeting, that
10 was the meeting that we attended if that was the first meeting.

ADV VARNEY: Okay.

ADV NGCUKA: I cannot contest that.

ADV VARNEY: So you then say you pulled your representatives from the process?

ADV NGCUKA: Ja.

ADV VARNEY: And I will have to ask my colleagues to check whether in fact the NPA was no longer represented in those meetings, I will...[intervenes]

ADV NGCUKA: During my time.

20 ADV VARNEY: During your time, yes.

ADV NGCUKA: That is correct.

ADV VARNEY: Yes, no we will only deal with...[intervenes]

ADV NGCUKA: Ja.

ADV VARNEY: I suppose from February 2004...[intervenes]

ADV NGCUKA: Until August 2004.

ADV VARNEY: Until August 2004.

ADV NGCUKA: Sure.

ADV VARNEY: Okay and I asked my attorney that question and his response is not clear, so we do not know either.

ADV NGCUKA: Okay.

ADV VARNEY: Let us continue and we will come back to the topic dealing with the process leading up to the amendment, so a bit later but just to mop up a few other matters, and I am returning now to page 9 of your statement.

10 ADV NGCUKA: Okay.

ADV VARNEY: You are talking about the fact that at the end of 2002, this was your paragraph 33, beginning 2003, you reported to parliament that there were some cases emerging and that were ready to proceed to prosecution while others were still waiting rulings from the Supreme Court of Appeal and the Amnesty Committee. And in fact we do know from the evidence that Anton Ackermann had already put before this Commission, that there were a small number of cases that did go ahead, for example the prosecution of Eugene Terre'Blanche, the prosecution of...[intervenies]

20 ADV NGCUKA: Nieuwoudt.

ADV VARNEY: Of the PEBCO Three, Nieuwoudt exactly, although that is still for reasons we are aware of. Another example is that of Ronnie Blani.

ADV NGCUKA: Yes.

ADV VARNEY: You are familiar with that case...[intervenies]

ADV NGCUKA: Yes, I am.

ADV VARNEY: Ja, but according to Anton Ackermann, the only reason why he could proceed with that small group of cases, they were going to others after you left, I think in total, it was six is the number that we have, but the reason that Ackermann put up as to why he could go ahead with those cases is that they were already investigated.

ADV NGCUKA: Correct.

ADV VARNEY: It did not require further investigations, so the ones
10 that could go ahead, did go ahead. Do you agree with that?

ADV NGCUKA: I do.

ADV VARNEY: Ja. I want to put to you another passage from the book by Ole Bubenzer and this is at page 7 of your bundle, this new bundle. As mentioned, there are several pages from his book, annexed page 48 but we will just stick to the passage on page 7 at paragraph 114. And so there and I will read it into the record:

20 "Bubenzer noted that while the D'Oliveira Unit of the 1990s constituted a well equipped team of experienced prosecutors and investigators with strong political support, support for the TRC-related prosecutions after 1998 declined drastically."

What is your response to that observation by the author Bubenzer?

ADV NGCUKA: No, I disagree with him. I mean he talks about political support.

ADV VARNEY: Okay.

ADV NGCUKA: I, if you think, if he talks about the support that I gave to the TRC cases, if he refers to that as political support, then he is wrong because I set up two units, first the Vincent Saldanha Unit to look into those cases and followed by the Macadam, and then I brought the one whom I considered to be one of the best prosecutors to look into those cases, Anton Ackermann.

So that must give you, that must give you the indication of how serious I took those cases and Chris Macadam had, he was one
10 of the best prosecutors and he had delivered for us in KZN where he had to deal with serious cases of political violence. And so appointing him to that position, was an indication by me that I am taking the best to deal with these cases.

So that is proof that I was. If he thinks if he is talking to that, but he is talking about political support as political support from government, I do not know what he is meaning by that.

ADV VARNEY: But would you agree with Mr Bubenzer in at least one respect, where he says that the D'Oliveira Unit of the 1990s had experienced prosecutors and here is the nub, and investigators?
20 Now you took the step of finding the best prosecutors you could locate in the form of Ackermann and Macadam and I think we agree with you, but is Mr Bubenzer not correct that at that PCLU you did not have investigators, let alone experienced investigators?

ADV NGCUKA: Well Chris Macadam's unit had four investigators, experienced investigators, had two researchers in that unit and that is

the unit that Anton inherited and one of the guys who was leading that, was a guy called Andrew Leask. He was the...[intervenes]

ADV VARNEY: Sorry?

ADV NGCUKA: Andrew Leask.

ADV VARNEY: Ja Andrew Leask, yes.

ADV NGCUKA: And he was a very serious, a senior investigator, so Anton inherited that unit that had that capacity. So Chris Macadam was working with those people.

ADV VARNEY: All right, that, sir you were talking about the
10 SP...[intervenes]

ADV NGCUKA: That is correct.

ADV VARNEY: Unit which at the time...[intervenes]

ADV NGCUKA: Which was then...[intervenes]

ADV VARNEY: Was it the DSO?

ADV NGCUKA: Ja, ja.

ADV VARNEY: Yes. There is evidence on record that Mr Andrew Leask was not transferred over to the PCLU, he remained in the DSO?

ADV NGCUKA: Ja, that is correct but in the DSO, remember these
20 cases started in the DSO. When Chris Macadam was there, he was working on those cases together with those investigators in the SNPU, whatever that abbreviation is, he was working together with them. That is the point I am making.

ADV VARNEY: Yes indeed, but if we now fast forward to now the creation of the PCLU, because as I understand it, you appointed

Ackermann to run it and then you brought Macadam over...[intervenes]

ADV NGCUKA: That is correct.

ADV VARNEY: The only thing is that, is that Andrew Leask did not come over to the PCLU at that time.

ADV NGCUKA: Yes, that is correct. When Chris took over, there were of course challenges later dealing with the issue of the investigators. We can deal with that if you want us to deal with it now.

10 ADV VARNEY: Yes...[intervenes]

ADV NGCUKA: Your approach was to coming back to it.

ADV VARNEY: Just before we get to the investigators because that is an important issue, Chairperson I note that it is...[intervenes]

CHAIRPERSON: Yes.

ADV VARNEY: Just gone 11:00. Is this an appropriate time for the adjournment?

CHAIRPERSON: Yes, we will take a tea adjournment until 11:20.

ADV VARNEY: As the Commissioner pleases.

INQUIRY ADJOURNS

20 INQUIRY RESUMES

CHAIRPERSON: Mr Varney.

ADV VARNEY: As the chairperson pleases. Mr Ngcuka, just before tea time we were about to talk about investigations and I had to interrupt you. But perhaps we can kick off that discussion by looking at some of the paperwork dealing with the cases and how the Special

National Projects and then ultimately the PCLU wish to take these cases forward. So I would like to refer you to a letter, it is a styled Internal Memorandum, it is at page 102 of the new bundle. I will just wait for you to find it.

ADV NGCUKA: Correct.

ADV VARNEY: Correct. So you see it is from the head of the Special National Projects Unit, that would have been Adv MacAdam. It is addressed to yourself as NDPP, and it is copied to the head of DSO, Head of Operations, as well as Adv MacAdam. So what is
10 interesting about this memorandum is that it sets out a number of cases that the SNPU was working on, indeed it is titled Audit of TRC Cases, it is under various categories.

And I think it might have been this letter that you were referring to earlier, but you will correct me if I am wrong. So, for example, the first title, the first heading, "Cases being prepared for prosecutions", and a number of matters there, being Motherwell prosecution, sorry, Motherwell bombing, prosecution of SAP General Van Rensburg for ordering the killing of Brian Ngqulunga, PEBCO 3, which we referred to earlier, and the others that I will not list.

20 And then there is another category, "Potential further prosecutions arising from the above", and that includes PEBCO 3 and Cradock 4, then the next heading, C, "New cases being evaluated for prosecution purposes", and a number of cases there, seven. These include, for example, the murder of the COSAS 4 and the murder of Askari Strongman Sambo.

And then, D, "The high interest cases which require attention irrespective of the nature of the available evidence", the murder of Victoria Mxenge, your former boss, other well-known cases, Kubeka, Nokuthula Simelane.

I will just highlight the four, the decision by DPP Pretoria not to prosecute SAP General Engelbrecht, because you mentioned, you spoke about General Engelbrecht earlier, uninvestigated allegations against SAP General Basie Smit and others.

And then there are various other headings as well,
10 "Representations to investigate specific cases", also some well-known cases there, "Death and detention of Ahmed Timol", and others. "Cases in the process of being closed", some well-known cases, I will highlight number five, Steve Biko, crime prescribed in 1997.

So this is an indication from the head of the SNPU that they had a number of matters that were on their books, cases that were actually being prepared for prosecution, cases being potential further prosecutions and cases being evaluated. So it looked like quite an encouraging document, and I imagine that when you read it, you
20 would have been satisfied with what the SNPU had done.

ADV NGCUKA: That is correct.

ADV VARNEY: Now, as we sit here today, I must put to you that a number of these cases, some of them are very well-known ones, as we sit here today remain unresolved. So, for example, Cradock 4, that case is still before a third inquest. PEBCO 3, that prosecution

never happened, and there is only an attempt now to get an inquest going. COSAS 4, I am pleased to advise there have been indictments in that matter, but only in 2021, and that case has not proceeded for various reasons.

Strongman Bambo, this Commission has heard the evidence of Andrew Leask in relation to that matter, and that has also not gone ahead. So I want to put it to you that, notwithstanding the promising start, that virtually all these cases did not see the light of day as we are looking back into history now. And, yes, I know that you left office
10 not long after this, but I just want your view, your feelings about that.?

ADV NGCUKA: Obviously, I mean, it is regrettable that is what has happened. Obviously it is something that I do not like and so, ja, I do not feel good about it.

ADV VARNEY: Yes, on that score we certainly share your feelings. So I want to put to you a passage ...(intervenes)

ADV NGCUKA: Sorry.

ADV VARNEY: Yes.

ADV NGCUKA: You see, if you look at this memorandum, you will see nowhere does it say in cases that are ready for prosecution that
20 General Krappies Engelbrecht, you do not see his case there as being ready for prosecution, which is the point I made earlier on.

ADV VARNEY: Yes, and that is why I highlighted it for your attention.

ADV NGCUKA: Yes.

ADV VARNEY: It is sitting under high interest cases which require attention irrespective of the nature of the available evidence. So I

want to put to you a passage in the Calata affidavit, it is at paragraph 132, and let us just stick to the current bundle. It is at page 25.

ADV NGCUKA: You said page 132 or paragraph?

ADV VARNEY: I am going to read you the paragraph 132.

ADV NGCUKA: I am sorry.

ADV VARNEY: And it is at page 25 of that bundle. So Mr Calata says in that paragraph:

10 "If only a fraction of the cases listed in
 MacAdam's report have been resolved in the
 early 2000s, it would afford significant closure for
 the concerned families and given considerable
 impetus for the finalisation of the balance of the
 cases."

Do you agree with that statement?

ADV NGCUKA: Of course, yes.

20 ADV VARNEY: Then let us, while we are on that page, at paragraph
 133 reference is made of the Minutes of the Justice Portfolio
 Committee meeting on 10 June 2003. There is an extract there, but
 the actual minutes of the Portfolio Committee meeting, I believe, are
 in the same bundle at pages 178 to 180.

 So I just want to read that short paragraph and ask a
 question arising, and I understand it. So you were present at this
 meeting of the Justice and Constitutional Development Portfolio
 Committee on the 10 June 2003, and I am reading from the minutes

put together by the Parliamentary Monitoring Group. The exact extract is on page 180, but it is also reflected here:

"Some cases emerging from the Truth and Reconciliation Commission are ready to proceed. In others the NPA awaits rulings of the Supreme Court of Appeal and from the reconvened TRC Amnesty Committee. The chair interjected to ask if any legislative change was needed to deal with TRC cases where immunity from prosecution was to be afforded. Mr Ngcuka replied that he could see no need for a change in legislation."

So, firstly, what was the immunity from prosecution that was being referred to in this passage?

ADV NGCUKA: Jô, that probably was, what, 26 years. I do not think I can correctly recall what he meant, but I would imagine that it was speaking to the issue that we discussed earlier on, whether there was a need to amend the prosecutorial policy to grant amnesty to those people who had not applied, so I would imagine that is what he was referring to. But as you can see, my position has been very consistent since then. I saw no need then, I see no need now to change any legislation to deal with those cases.

COMMISSIONER GABRIEL: So that goes back to the President's speech, President Mbeki's speech in May 2003.

ADV NGCUKA: That is correct, Commissioner.

ADV VARNEY: We will return to this a bit later, but from what I hear you saying, the normal processes in the Criminal Procedure Act could be invoked, so there was no need to come up with a brand new law?

ADV NGCUKA: That is correct.

ADV VARNEY: So then let us then turn to the issue of actually investigating officers. And if we carry on with the next paragraph, reference is made to the fact that at the DSO, it was Special Director Adv MG Jeff Ledwaba, he made decisions in the opening of new investigations ...(intervenes)

10 CHAIRPERSON: On which page are you, Mr Varney?

ADV VARNEY: So I am still in the Calata affidavit, page 25.

CHAIRPERSON: Oh.

ADV VARNEY: It is the next paragraph, 134.

CHAIRPERSON: Yes.

ADV VARNEY: So it was Ledwaba who made decisions on the opening of new investigations. Accordingly, Ackerman and MacAdam met with Ledwaba to ask the DSO to conduct investigations referred to in that report we have been through, and it appeared that Ledwaba was firm in his refusal to take on the TRC cases. So I just want to
20 highlight a passage from Adv MacAdam's affidavit, and that is at page 89 of the bundle, and the paragraph in question is on page 92, I believe it starts at paragraph 18.

ADV NGCUKA: Page 92?

ADV VARNEY: Ja, I think the reference is that this paragraph is at page 92.

ADV NGCUKA: Sure.

ADV VARNEY: And just so you know, this is an affidavit that Adv MacAdam put up in litigation arising from the Ahmed Timol matter when Joao Rodriguez, a former security branch officer, was charged with the murder of Ahmed Timol. The affidavit is dated the 1 November 2018, and it was put up as part of the NPA answering papers. So at paragraph 18 MacAdam says:

10 "In terms of the DSO legislative mandate, it was
 for the special director of the DSO and not the
 head of the DSO to issue declarations to
 investigate certain matters. At that stage, the
 special director was Adv MG Ledwaba."

And in paragraph 19, he writes:

 "Ackerman and I met with Ledwaba to arrange for
 the DSO to conduct the investigation specified in
 annex RCM2..."

That is the memo we have just been through. He says:

20 "The meeting was unpleasant, as Ledwaba made
 it clear in non-certain terms that the DSO would
 not investigate any TRC matters, and that these
 should all be referred to SAPS."

Can I assume that at that time, Adv Ackerman and MacAdam would have been keeping you abreast of these developments?

ADV NGCUKA: Yes, but at a later stage.

ADV VARNEY: At a later stage, okay.

ADV NGCUKA: Ja, just remember that Adv Ackerman reported to Silas Ramaite, not to me.

ADV VARNEY: Yes.

ADV NGCUKA: So I get to know some of these things when there were problems which they could not resolve.

ADV VARNEY: Okay.

ADV NGCUKA: It would probably not have been at the same time when this happened.

ADV VARNEY: Right, there might have been a bit of a lag in time.

10 ADV NGCUKA: That is correct.

ADV VARNEY: When you heard that Ledwaba, in the words of MacAdam, was making it clear in non-certain terms that the DSO would not investigate any TRC matters, what was your response or your reaction?

ADV NGCUKA: We will come back to that later, but at that time Anton and MacAdam, they went to the police to ask for the investigators, and so I am not aware of this at the time. I only got informed after they were rebuffed also by the police. And so it is at that point when I then called Leonard McArthur, who was the head of the DSO, and
20 Ramaite to say, come on guys, resolve these issues. If that is the attitude of the police, the DSO must investigate these cases. So I said they must resolve whatever issues they had, so I left it at that at the time.

ADV VARNEY: Okay. According to the timing or sequence, at least on the versions of MacAdam and Ackerman, it appears that they first

approached the DSO. When the DSO refused, they then turned to us (indistinct) ...(intervenes)

ADV NGCUKA: That is correct. So we may as well look at MacAdam's next paragraph, that is paragraph 20 at the bottom of the page:

10 "As a result of this decision by Ledwaba, Ackerman and I met with Commissioner De Beer, the Divisional Head of the Detective Service of SAPS, and requested SAPS to take over the investigations. On 26 September 2003 De Beer replied to Ackerman, informing him that the requests had been discussed with the National Commissioner Selebi.

The letter was further to the effect that the investigation of the matters was the DSO's responsibility, and that if it was required that SAPS in fact investigate, then either Ackerman or the NDPP should approach the President and ask him to confirm which agency should conduct the
20 investigations."

And he attaches a copy of that letter. Just to wrap it up from the side of MacAdam, he says he can confirm that neither the NDPP nor Ackerman approached the President. I do want to return to that, and we will come to it, because you actually deal with that in your statement and you give a comprehensive answer.

ADV NGCUKA: That is correct.

ADV VARNEY: But before we get there, let us turn to the next document, and this is, if we can go back to the Calata affidavit. My colleagues will have to tell me, we are at page 135 of the Calata affidavit, and that is page 26 of this new bundle. So there reference is made to a letter addressed by Ledwaba to Andrew Leask. Andrew Leask was, I understand, the chief investigating officer at the DSO.

It is dated the 15 July 2003, and this is at page 107 of the bundle, and on the first page there is a section titled TRC Cases. So
10 this letter is from Adv MG Ledwaba, it is to CIO Leask, I assume CIO means Chief Investigation Officer.

ADV NGCUKA: Correct.

ADV VARNEY: It is titled SNPU Investigations, and we will just focus on that very first entry. He writes:

"Due to the recent creation of the PCLU, it has become necessary to redefine the mandate and operations of the SNPU as follows:

(i) I have decided that SAPS must take over
the investigations of all such cases
20 handled by you. Your files should be closed off, and all the material given to the PCLU."

Now, I raise this because a bit earlier you had mentioned that Andrew Leask was the officer ...(intervenes)

ADV NGCUKA: Correct.

ADV VARNEY: Who was either with the PCLU or working with them to investigate these cases. So can you see, Mr Ngcuka, that at least by the 15 July Andrew Leask was specifically ordered to close off all his files, hand them over to the PCLU in relation to the TRC cases?

ADV NGCUKA: Oh, ja, sure.

ADV VARNEY: So then I want to put to you a passage in the Calata Affidavit at paragraph 136. I believe that is at page 26, and the passage reads as follows:

10 "The refusal of the DSO to investigate the TRC
cases was a remarkable decision, given that the
DSO had previously been seized with the TRC
cases, and just weeks earlier the NDPP had
declared the TRC cases to be priority crimes."

What is your response to that passage?

ADV NGCUKA: I do not know if I can classify it as "remarkable". The
unfortunate part is that I cannot recall what the reasons were that
Ledwaba had advanced for taking that decision. But certainly he had
not consulted me, and I was not aware that is the decision that he had
taken. I became aware of it much later, and as you will come to
20 realise, I sort of reversed that decision.

ADV VARNEY: So were you in a position to order the DSO to take on
those cases?

ADV NGCUKA: Yes, yes.

ADV VARNEY: And when you say you reversed that decision,
approximately ...(intervenes)

ADV NGCUKA: I instructed, you will see later when we come to it, when the guys came to me, they would say, look, we have exhausted all these avenues, we need the investigators, we need these cases to be investigated by the DSO, not by the SAPS. I made, I declared that and I instructed the DSO to investigate the cases.

ADV VARNEY: Yes, okay. My attorney, I think, has found that passage. But as you say, that is a later development, that is later in the year, in November. So we will ...(intervenes)

ADV NGCUKA: When we, remember ...(intervenes)

10 ADV VARNEY: We will come to that...

ADV NGCUKA: There was a process before we got to that.

ADV VARNEY: Yes, indeed. So developments in the interim, so now you have the situation where Ackerman and MacAdam are told that they must "knock on the door" of the SAPS. And so an overview of those attempts are set out also at page 26 of the Calata affidavit from paragraph 137.

If one looks at Ackerman's affidavit, if we go back to page 92, and apologies for all the up and down in the pages, but that is unavoidable. In fact, we have dealt with paragraphs 20 and 21. So
20 they had this meeting with Divisional Head of the Detective Services, Commissioner Johannes De Beer, and essentially they told him, I am not going to repeat what is in paragraph 20.

But perhaps let us take a look at the letter that De Beer addressed to the NPA. No, I believe that letter is at page 296, oh, sorry, it is at 109 rather. So that is a letter from Commissioner

De Beer addressed to Adv Ackerman at the PCLU. I am not going to read the entire letter into the record, but just starting at that first paragraph.

10 "I have discussed your request for the assistance of the SAPS to investigate cases emanating from the TRC processes with the National Commissioner. It is evident from your letter that the investigation and prosecution of these cases were referred to the NDPP by the President. Our understanding was that this referral was politically inspired. As you know, a large number of cases to be investigated are those of ex-policemen. It is therefore understandable that you first endeavoured to have these cases investigated by the DSO."

And then I will just skip some paragraphs and go to the next page:

20 "In view of the nature of the investigation, the fact that the President has referred it to the National Director, and that it seems to be common cause that the initial understanding was that the DSO would have investigated, the opinion that is held by you, the National Director should approach the President to confirm the instruction of the President on who he wants to investigate these

cases."

Then he finishes off:

"If the President indicates that the SAPS should be involved in the investigations, the instruction should be obtained in writing."

So that is quite a remarkable letter, where you have an agency that is empowered under the Constitution and under law to investigate serious cases, like murder, saying to the prosecutors at the PCLU, we want to investigate this because we think it should be
10 investigated elsewhere, and if you want us to investigate, then we want you to get an instruction from the President in writing. What is your sort of gut reaction to that?

ADV NGCUKA: Well, I do deal with that in my statement. I thought it was unfortunate that Commissioner De Beer took that stance, because the President made it clear what should happen to those cases. And it is in the nature of the work that we used to do that there was cooperation between us and SAPS, we worked very closely with them. Whatever the nature of the investigation was, whenever we appealed to them for assistance, they would ordinarily assist.

20 If you take, for example, that unit you called the D'Oliveira Investigating Unit, all the investigators, they came from SAPS, and I inherited that unit. You talk about most of the investigators in the DSO themselves, they came from SAPS. So I just thought that Commissioner De Beer, the language that he used and what he was saying, that was very unfortunate.

ADV VARNEY: I think you used stronger language in your statement.

ADV NGCUKA: Quite, quite (indistinct) ...(intervenes)

ADV VARNEY: You say this demand by Commissioner De Beer was, with respect, nonsensical.

ADV NGCUKA: That is correct.

ADV VARNEY: Do you want to elaborate on that?

ADV NGCUKA: Well, I thought I have, I just did not want to use that language today.

ADV VARNEY: Okay, all right. My apologies for raising it then. And
10 I must say, I would have some sympathy with you, because, and if I can use the word, it is a nonsensical response. And one even might go so far as, how dare the head of Detective Services say that, you know, he will not investigate murders. And he already been told that the only other investigating agency in the country that could deal with it, the DSO, says they will not.

Then one would really have expected the SAPS, because they have considerable resources, perhaps much even larger than the DSO, and they are required under law and under the Constitution to investigate serious crimes, murders, kidnapping and the like.

20 ADV NGCUKA: Ja.

ADV VARNEY: So there should have been no need to go and get a higher authority in the form of the President to instruct the police to do their work.

ADV NGCUKA: That is the point I made.

ADV VARNEY: Well, we are in agreement there. But can I put this to

you, on the one hand, it does seem nonsensical to have to get an instruction from the President to tell the SAPS to investigate. But on the other hand, just to break the impasse, it would not have been advisable on your part to have said, well, I do not have to do this, but just to break the impasse and get the cases off the road, I will approach the President.

ADV NGCUKA: Oh, no, the President would have laughed me off and would have thought that I am foolish, and I did not want to appear so.

10 ADV VARNEY: Right. Well, the unfortunate outcome is that the impasse then remained. You do say in your statement and in your evidence that you directed Adv Silas Ramaite and Adv McCarthy to resolve the issue. Are you aware whether they did, and if so, what steps they took?

ADV NGCUKA: No, I am aware that they did not resolve the issue.

ADV VARNEY: Yes.

ADV NGCUKA: They complained, the DSO complained about not having enough investigators. And also that they were working in teams, but it was very difficult to break up the teams because they
20 were engaged in a number of very serious projects. And so, unfortunately, I then had to intervene and direct that they must investigate these case, which would have been unnecessary.

ADV VARNEY: Yes. So we put that question to the Adv Ackerman when he testified before this Commission last week. We put that statement in paragraph 43 of your affidavit, and he said he was not

aware that Advs Ramaite and McCarthy had been directed to resolve the issue, but as far as he was concerned, it was never resolved.

ADV NGCUKA: No, no, Anton's memory is a bit failing him, he knew that, he knew.

ADV VARNEY: Okay.

ADV NGCUKA: Anton was coming to my office regularly to talk about the frustrations that he was having. And so when they could not, when they could not resolve that issue, he, Anton, drafted that directive. You will see the directive there that I signed, it is not even
10 in the National Director's letterheads. It is in the letterheads of the PCLU, they drafted it and brought it to me. He did that, and I signed it, so he should have known that is what happened afterwards. That when I made that declaration, so I think he just forgot it.

ADV VARNEY: Yes, well, to be fair to him, he also gave evidence on the declaration, so there is no disagreement there. He was part of that process to try and get those declarations signed, but perhaps let us move on. I just want to put to you certain passages arising from the De Beer letter, and I believe it is at page 27 of the new bundle, the three paragraphs at 139 to 141. Paragraph 139 reads as follows
20 ...(intervenes)

ADV NGCUKA: One, three, sorry?

ADV VARNEY: Paragraph 139 on page ...(intervenes)

ADV NGCUKA: Thank you.

ADV VARNEY: I think it is page 27 ...(intervenes)

CHAIRPERSON: Twenty-eight.

ADV NGCUKA: It is 28.

ADV VARNEY: Twenty-eight, my apologies. I am actually working off bundle 1 with the time, and I did not know that we would have a fresh bundle. Page 28, paragraph 139:

10 "It is notable that SAPS regarded the TRC cases as a political issue. It is also noteworthy that the only State entities authorised to conduct official criminal investigations in South Africa both refused to touch the TRC cases. It is highly unlikely that their decisions were spontaneous or mere coincidences. It is apparent that by May 2003, both the SAPS and the NPA were reluctant to take on the TRC cases. In all probability, they were told not to do so from a political level."

Your response?

ADV NGCUKA: That is incorrect.

ADV VARNEY: And then the next paragraph:

20 "The fact that the NPA was told to contact the President reflected that the question of investigating the TRC cases was now a purely political one and a sensitive one at that. It appeared that only the head of State could make that decision, regardless of what the law and Constitution said about investigative authority.

Your response?

ADV NGCUKA: No, but I have already dealt with that, Mr Varney.

ADV VARNEY: Okay, all right. And to be fair, you have also dealt with the next paragraph, so I will not put that to you ...(intervenes)

COMMISSIONER GABRIEL: Can I just take you back to paragraph 139?

ADV NGCUKA: Yes, ma'am. 139, yes.

COMMISSIONER GABRIEL: The last sentence, where the deponent says:

10 "And in all probability had been told not to do so
 from a political level."

 You say that was incorrect. What are your reasons for that answer?

ADV NGCUKA: Well, I was never told, I was never told not to take these cases.

COMMISSIONER GABRIEL: So you do not, you were never told?

ADV NGCUKA: No, nobody said I must not take the cases. That is why I am saying that is wrong.

20 COMMISSIONER GABRIEL: Okay, so that is why you say the statement is incorrect?

ADV NGCUKA: The person who would have been told at a political level not to take these cases is me. I would have been told by the Minister of Justice or the President, whoever, and that never happened ...(intervenes)

COMMISSIONER GABRIEL: No, I think...

ADV NGCUKA: That is why I am saying the statement is wrong.

COMMISSIONER GABRIEL: Ja, I think the deponent is saying that SAPS and the NPA were reluctant to take on the TRC cases, and in all probability, they had been told not to do so from a political level, ja. Now, do you still maintain that that sentence is incorrect?

ADV NGCUKA: Yes, that is what I am saying, we were never told that (indistinct) ...(intervenes)

COMMISSIONER GABRIEL: They were never told that or you were never told that?

10 ADV NGCUKA: Well, I was the head of the NPA, ma'am.

COMMISSIONER GABRIEL: You were never told that?

ADV NGCUKA: I was never told. So the NPA could only have been told through me.

COMMISSIONER GABRIEL: Okay, but you do not know what had been told to SAPS?

ADV NGCUKA: I do not know what happened in SAPS.

COMMISSIONER GABRIEL: All right, Thank you.

ADV VARNEY: Thank you, Commissioner. Then if we just continue the unfolding story, And also on page 128, paragraph 142.

20 "Thereafter, Ackerman and MacAdam made a last ditch attempt to persuade Special Director Ledwaba at the DSO to reconsider his decision not to investigate the TRC cases."

ADV NGCUKA: I am sorry, I am sorry, I am not with you.

ADV VARNEY: You are not with me. So it is page 28 of the new

bundle.

ADV NGCUKA: Twenty-eight?

ADV VARNEY: Ja.

ADV NGCUKA: Not 128, okay. Yes, and paragraph?

ADV VARNEY: And at the very bottom paragraph ...(intervenes)

COMMISSIONER GABRIEL: Paragraph 142.

ADV NGCUKA: Got it, thanks.

ADV VARNEY: Paragraph 142:

10 "Whereafter, Ackerman and MacAdam made a last
ditch attempt to persuade Special Director
Ledwaba at the DSO to reconsider his decision
not to investigate the TRC cases. Ackerman sent
Ledwaba a letter styled as an internal
memorandum dated 11 November 2003,
appealing him to appoint investigating officers."

And I think let us actually go to that letter, it is at page 111 of
the bundle. So as you can see, it is from Ackerman to
Adv Jeff Ledwaba. The parties copied are yourself, as NDPP,
Dr Ramaite, as well as Adv McCarthy. It is titled "Investigation of
20 TRC Cases by the DSO". It is a fairly long letter, so we will try not to
read everything into the record. It starts off:

"Dear Jeff.

In the light of current developments, I am
constrained to document the history of the above
saga..."

And in the first paragraph he sets out the background. We have been through that background. I will just highlight (iv):

- 10 "(iv) In May 2003 I gave the NDPP its duties, a full briefing on all TRC cases identified for prosecution. My prosecution strategy was endorsed, and Adv McCarthy indicated that there would be no problem in having the cases declared in terms of section 28 of the NPA Act. The NDPP briefed the Minister and Justice Profiler Committee accordingly.
- 20 (v) Shortly thereafter, and in the same month you were presented with applications in terms of section 28 relating to the cases. In July 2003, you verbally informed me that you were not prepared to sign the declarations and you were withdrawing the DSO from the further investigation of the cases. A letter to this effect was given to the CIO Leask by you. In response thereto, I requested Commissioner De Beer to appoint the police to take over the investigations."

Okay, we have dealt with that, so I am not going to read it in, but we know the outcome of that, we needed presidential instruction:

"(viii) After receipt of De Beer's letter, I made several unsuccessful attempts to contact you to discuss the matter. Eventually I had to report the matter to Dr Ramaite.

(ix) On 3 November 2003 you informed me that you would sign the declarations in terms of section 28(1)(b)A, and would appoint SSI De Lange to conduct the necessary investigations.

10 (x) On 6 November 2003 Dr Ramaite informed Adv MacAdam that he had discussed the matter with Adv McCarthy, who had indicated that the DSO would investigate. On 10 November 2003 MacAdam presented you with the section 28(1)(b) declarations.

20 You informed him, (a), that you are not prepared to sign any declarations, (b), De Lange would not be appointed, despite the fact that it was explained to you that he was part of the initial investigation and familiar with all the witnesses and the facts of the cases, (c), that during the course of 10 November 2003 another investigator would be appointed, (d), the

President should not be approached to involve SAPS."

2. As at the date of this letter, I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003, no investigations have been conducted."

And then he sort of expresses his alarm in the next paragraph:

- 10 "There are certain cases which could have been prosecuted which have prescribed. There is both national and international pressure to institute prosecutions, for example, Simelane's case. An amnesty hearing for the Motherwell matter has been set down for early March 2004, and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee."

He then raises concerns around:

- 20 "The availability of witnesses and high public interest, that the other cases will be brought to trial as soon as possible. The failure to do so will bring the *bona fides* of the NPA into serious dispute and do irreplaceable damage.
Since I do not have any investigative capacity, I

am powerless to deliver on my mandate. For the sake of justice and expediency, I appeal to you to assign De Lange and another investigator to investigate these cases, and to sign the declarations in terms of section 28(1)(b). This chapter in our country's history must be closed without further delay."

So would you agree that there is a sense of desperation with MacAdam and the PCLU, and that he is now pleading with
10 Adv Ledwaba to change course?

ADV NGCUKA: That is correct.

ADV VARNEY: And you were copied on that letter, so at the time you would have been familiar with it?

ADV NGCUKA: Yes, but let me just say this.

ADV VARNEY: Yes.

ADV NGCUKA: It is not an excuse, but it is a fact. At the time these things were happening, the NPA was going through a very, very difficult time. For example, that November I was busy with the Hefer Commission in Bloemfontein, where I was dealing with the allegations
20 that were made against me by Mo Sheikh and Mac Maharaj that I was an apartheid spy, that was one.

Two, I was dealing with the case of the arms deal matter involving the deputy president at the time. Three, I was also dealing with the case of the late Brett Kebble, who had hired a journalist to write nasty articles about me almost every week in the *Business Day*.

Four, I was dealing with serious attempts to discredit the Scorpions by senior members of the ANC, including the Secretary General thereof.

And so I am dealing with all these matters at the same time. So you are dealing with, you are talking to somebody who is not just sitting at the office and waiting for Ackerman. And in a sense I was frustrated that these guys are not dealing with these issues that they should be dealing with, because there I was defending the organisation from all the attacks that it was getting.

10 And some of you may be old enough to remember that there was a period in this country when my name was in every newspaper every other day because of the work that the Scorpions were doing. So I was busy defending the organisation, and I expected my juniors to be able to deal with these matters. So there was a sense of frustration from me too that we are not able to resolve this, but I want you to understand the context or the period in which we were living at the time when these matters were happening. Thank you.

ADV VARNEY: Yes, and we accept, Mr Ngcuka, that you were carrying a lot on your shoulders, you had a lot on your plate. And I
20 think we should place on record that the allegations made against you were fabricated allegations. But nonetheless, what was set out in the letter, would you agree that was not an unreasonable request?

ADV NGCUKA: No, no.

ADV VARNEY: And, in fact, he was not asking for huge resources.

ADV NGCUKA: No.

ADV VARNEY: He was asking for one detective by the name of De Lange and one other, so he was only asking for two investigators.

ADV NGCUKA: Yes.

ADV VARNEY: So I want to go back to the Calata affidavit and just put certain passages to you to see whether you agree with them. So back in the Calata affidavit at 143, actually it is at page 31 of the new bundle.

10 "Ackerman's heartfelt plea fell on deaf ears.
 Ledwaba was not moved to act, even though he
 was advised that the NPA was under local and
 international pressure and cases were
 prescribing. Ackerman's warning that the failure
 to proceed with the TRC cases would bring the
 NPA into disrepute and do irreparable harm to its
 image was precisely what happened."

Do you agree with that passage?

ADV NGCUKA: Ja, no, that is correct.

ADV VARNEY: And then the next passage of 144:

20 "The DSO persisted in its refusal to appoint
 investigators, as did the SAPS. According to
 MacAdam, this effectively brought an end to the
 TRC cases, as it meant that no new
 investigations of the TRC matters could be
 opened. (145) The TRC cases were effectively
 closed down before the end of 2003, before the

PCLU could commence real casework. A few cases taken forward subsequently were those in which investigation dockets had already been completed..."

And we have discussed that. So do you agree that MacAdam appears to be saying that, effectively, before the end of 2003, they were stopped from taking, what we can call the "uninvestigated cases" forward, because SAPS and DSO were not providing investigators?

10 ADV NGCUKA: No, no, no, I do not agree with that, I do not agree, That is incorrect.

ADV VARNEY: Okay, can you elaborate?

ADV NGCUKA: That is incorrect, Because I have told you that after he was unsuccessful with Ledwaba, they then came to me, and then I ordered that those matters be investigated, I made that order. And not only did I do it once, I did it twice in respect, the matters that were brought to me in December, the others were brought to me in February, so it can be correct.

COMMISSIONER GABRIEL: Why did you order twice?

20 ADV NGCUKA: It is separate matters.

COMMISSIONER GABRIEL: Separate matters.

ADV NGCUKA: Separate matters, yes.

ADV VARNEY: So we are just struggling to find where you ordered the DSO to investigate. Is that reflected somewhere in a document?

ADV NGCUKA: You will find it in the, I think it is in the MacAdam

affidavit.

CHAIRPERSON: So do I understand your evidence, Adv Nacka, to be saying that TRC cases were not effectively closed down before the end of 2003?

ADV NGCUKA: Absolutely correct, Commissioner.

ADV VARNEY: So I think we have found a document we would like to put to you, and I am advised that it was attached to MacAdam's affidavit before this Commission. And that is not part of the bundle, but perhaps would my learned friends be willing to share that bundle
10 with the witness?

ADV NGCUKA: Thank you.

ADV VARNEY: Commissioners, I do not know whether you have access to the statement by Adv MacAdam before the Commission. It is his affidavit, it looks like an unsigned version that was signed on the 3 March of 2026. I thank my colleagues for making it available. We just wish to refer to two internal memos. So the first one is an annex to that MacAdam statement before this Commission. It is from the head of Priority Crimes Litigation Unit, it is from the NDPP to the Head of Operations, DSO. It is dated 8 December 2003, it is titled
20 "Investigation of TRC Cases by the DSO", and it reads:

"I have decided in terms of Section 28(1)(b) of Act
32 of 1998..." (intervenes)

ADV MOROKA SC: Apologies, Chair. Where are we reading from? We have got the document, mister...

COMMISSIONER KGOMO: You are not audible.

ADV MOROKA SC: Apologies, Chair. I am saying Mr Varney is referring to this document that has just been handed up.

CHAIRPERSON: Yes.

ADV MOROKA SC: And I was just asking for pages?

CHAIRPERSON: 815.

ADV MOROKA SC: Thank you.

ADV VARNEY: To be fair to my learned colleagues, this particular statement of MacAdam is not part of the bundle that we have put up, so that is ...(intervenes)

10 CHAIRPERSON: Yes, but it has been handed up to us.

ADV VARNEY: Yes, it has been handed up to you.

CHAIRPERSON: Yes.

ADV VARNEY: I do not know whether a copy has been handed up to them.

CHAIRPERSON: Yes, it has.

ADV VARNEY: Okay. All right, then I will carry on, it is annex AD13, and I will carry on reading:

20 "I have decided in terms of section 28(1)(b) of Act 32 of 1998 that the following three cases arising from the TRC be investigated by the DSO:

1. Kidnapping, assault and murder of the PEBCO 3.
2. Murder of Brian Ngqulunga.
3. Murder of Motherwell 4.
4. Attempted murder of Reverend

Frank Chikane."

It is signed by the NDPP Ngcuka, dated the 24 February 2004. There does seem to be a difference in the dates between the signature and the date on the top, but do you confirm that you signed this letter authorising those four investigations?

ADV NGCUKA: I do, I do.

ADV VARNEY: And then we want to put another one ...(intervenes)

CHAIRPERSON: How do you explain the discrepancy, Adv Ngcuka, to the date reflected in the internal memorandum, being the
10 8 December 2003, and the one reflected below your signature, being the 24 February 2004?

ADV NGCUKA: I suppose the 8th will be the date when it was prepared.

CHAIRPERSON: Okay.

ADV NGCUKA: And then the 24 is the date when it was approved.

CHAIRPERSON: Yes, when you signed it.

ADV NGCUKA: When I signed it, yes.

ADV VARNEY: And then the other one we want to put to you is over the page, it is at Annex AD15. It is from the Office of the NDPP, and
20 it is addressed to Adv MG Ledwaba, Head of Operations, and it is dated the 26 February 2004. It is also titled:

"Referral of TRC Cases to the DSO in terms of
Section 28B of Act 32 of 1998.

I have decided to refer the following matter to the
DSO for investigation in terms of Section 28 of

Act 32: crimes of murder, attempted murder, conspiracy or incitement to commit murder committed in an organised fashion by Letlapa Mphahlele with reference to the APLA attacks on the St. James Church and Heidelberg Tavern situated in Cape Town."

You confirm that instruction?

ADV NGCUKA: I do, sir.

ADV VARNEY: Okay. So in February of 2004, you had instructed
10 the DSO to investigate those six matters in total.

ADV NGCUKA: That is correct.

ADV VARNEY: All right, so at that point, in early 2004, you then had an expectation that those six matters would be taken forward by the DSO.

ADV NGCUKA: That is correct.

ADV VARNEY: Now, let us turn back to your statement. In paragraph 41 you have repeated what you have said here in your evidence:

20 "At no stage did I receive, tolerate or act on any instruction designed to shield any individual, organisation or political actor from lawful prosecution."

And the rest of the paragraph deals with sticking to your constitutional mandate. And one of the reasons why we wanted to cross-examine you was to put to you that there were certain

developments that had taken place while you were NDPP. Now, we are not suggesting that anybody picked up the phone to tell you to stop, that is not the allegation.

But we are saying that while you were NDPP, there were other developments taking place, which we would want to suggest amounted to at least an initiation of steps to curtail or control the pursuit of the TRC cases, and I would like to take you through those.

ADV NGCUKA: All right, let us hear you, sir.

ADV VARNEY: So let us then turn to the reference in the Calata
10 affidavit to the Amnesty Task Team. It is on page 33, and here we are going to be relying on various documents. I will just indicate up front what they are. They are the original Terms of Reference of the Amnesty Task Team, and that is at page 200. We will also be relying on the original secret report of the Amnesty Task Team in 2004, that is at page 201.

And then, finally, we will be relying on the secret further report of the Amnesty Task Team, and that is at page 213. So if we can perhaps start with the Terms of Reference, that is at page 200. So let us just, luckily there is not too many paragraphs here. The
20 Terms of Reference, at least those that were attached to Adv MacAdam's affidavit says that:

"The Terms of Reference are:

1. The criteria the NPA applies in deciding on current and impending prosecution of cases flowing from the conflicts of the

past.

2. The formulation of guidelines that will inform current, impending, and future prosecution of such cases.

And bearing in mind, the above-mentioned guidelines, whether legislative enactments were required and whether any of the two bills that have already been formulated can be taken forward while taking into account the views of the intelligence agencies."

10

So I just want to put it to you that, you know, for example, that very first term of reference, the criteria the NPA applies in deciding on current and impending prosecution of those cases, let us call them the "TRC cases", and the formulation of guidelines to deal with the prosecution of those cases. Would you agree that the Terms of Reference are in fact demarcating or proposing possible special treatment or different treatment of those cases?

ADV NGCUKA: Yes, they do.

ADV VARNEY: So then if we move on. Now, there is a reference to two bills. The Terms of Reference do not explain or do not give the names of those bills, although we think that one of them was the Indemnity Bill. Adv Ackerman only attached the cover and the preamble of that bill, and that is at page 154 of your bundle. Perhaps you can just look at the long title of that bill, it is on the next page, 155:

20

"To provide for the granting of indemnity by the President to persons who make full disclosure of all relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past..."

It gives the dates:

10 "For the said purpose to establish a committee on indemnity, to consider and investigate applications for indemnity, and to make recommendations to the President, and to provide for matters connected therewith."

Were you aware of this, what might be a draft Indemnity Bill at that time?

ADV NGCUKA: No.

ADV VARNEY: And when they made reference to two ...(intervenes)

ADV NGCUKA: And also just to make it clear that I was not a party to those Terms of Reference.

20 ADV VARNEY: Yes, yes indeed, and we are aware of that. So the reference in the Terms of Reference to two bills, and we are speculating that the Indemnity Bill might be one of them, would you have any idea what the other bill might have been?

ADV NGCUKA: No idea.

ADV VARNEY: And then if we turn to the to the Amnesty Task Team itself, and that is on page 202, there is a report, a secret report of the Amnesty Task Team. Now, it is undated, however, if we look at the

next report, the further secret report of the Amnesty Task Team on page 214, at paragraph 1.1 it says:

"On 3 March 2004 the Amnesty Task Team submitted a report to the heads of Department Forum for consideration."

So I think we can assume that it is likely that the first report of the Amnesty Task Team was delivered on that day, the 3 March 2004. And I want to draw your attention to paragraph 1.2:

"The task team comprises the following members:

10 Deon Rudman, Chairperson, Department of Justice.

Yvonne Mabula..."

ADV NGCUKA: Sorry, where are you?

ADV VARNEY: Oh, sorry, I am on page 202.

ADV NGCUKA: 202, sorry. All right.

ADV VARNEY: And we are looking at paragraph 1.2, the composition of the task team:

"Deon Rudman, Chairperson, Department of Justice.

20 Yvonne Mabula, National Intelligence Agency.

Vincent Mogotloane, National Intelligence Agency.

Gerhard Nel, NPA.

Lungisa Dyosi, NPA.

Ray Lalla, SAPS.

Joy Rathebe, Department of Defence."

So you can see that two of the members of the Amnesty Task Team, at least at that time, were NPA members.

ADV NGCUKA: That is correct.

ADV VARNEY: Now, you had mentioned that you had received a report or perhaps you had met with Gerhard Nel and Lungisa Dyosi following their first meeting.

ADV NGCUKA: That is correct.

10 ADV VARNEY: And you will see that the first meeting from paragraph 1.3, at the bottom of the page, the task team met for the first time on 26 February 2004, and again on 1 March 2004.

ADV NGCUKA: Sure.

ADV VARNEY: So it does seem as if those two NPA members were present at both those meetings and then were party to this report.

ADV NGCUKA: As far as I know, they did not attend the second meeting.

ADV VARNEY: They did not attend the second meeting?

ADV NGCUKA: No.

ADV VARNEY: Okay.

20 ADV NGCUKA: My instructions were very clear, that they should not participate any further in the Amnesty Task Team.

ADV VARNEY: Right. Is there a possibility that they might have attended anyway?

ADV NGCUKA: I do not know. It is possible, human beings can act contrary to instructions, but my instructions were very clear.

ADV VARNEY: Yes, so ...(intervenes)

ADV NGCUKA: In fact, not just my instructions, it was a considered view of us in the NPA that it would be unwise for us to participate in that forum, for reasons that I also mentioned earlier.

ADV VARNEY: Okay.

ADV NGCUKA: We thought that some of the people who were participating in this thing, some of the DGs, for example, that it may well be that they may be implicated in the investigation that was being conducted into the ANC 37. And so for us to participate, therefore,
10 that forum would have caused a conflict.

ADV VARNEY: Yes. And, of course, you make reference to the Director's General Forum, and it was that forum that actually established this task team, the Amnesty Task Team.

ADV NGCUKA: That is correct.

COMMISSIONER KGOMO: Can you just help us to put the searchlight on? If at all you gave your directive in writing, if you could refer it to us?

ADV NGCUKA: No, no, I ...(intervenes)

COMMISSIONER KGOMO: I may have missed it.

20 ADV NGCUKA: No, no, it was not in writing. They gave a report, an oral report, and we discussed it in the office. We agreed that we are not going to participate, that was it.

COMMISSIONER KGOMO: Oh, You are not worried that you give them such pertinent instructions, and they might come and say but you did not ...(intervenes)

ADV NGCUKA: No, this...

COMMISSIONER KGOMO: And then you could refer them to the directive ...(intervenes)

ADV NGCUKA: No, Commissioner...

COMMISSIONER KGOMO: The written directive.

ADV NGCUKA: No, I was working with loyal and trusted people.

COMMISSIONER KGOMO: Okay, Thank you.

ADV VARNEY: And perhaps if we just rewind a little bit. Am I correct in saying that it was a Director's General Forum chaired by the then
10 DG of the Department of Justice, Adv Vusi Pikoli, who instructed the setting up of this Amnesty Task Team?

ADV NGCUKA: Yes.

ADV VARNEY: And references made to that in the Calata affidavit at paragraph 148. It reads:

"A Director's General Forum chaired by
Adv Pikoli, the then Director General of the DOJ
met on 23 February 2004 to consider how to give
effect to the President's objectives set out in his
speech the year before."

20 So that gives the context for the establishment of the Amnesty Task Team. So you have set out your concerns and why you withdrew the NPA from this body. Would I be correct in saying that you had reservations about effectively an executive body meeting to discuss matters that were exclusively the purview of the NPA?

ADV NGCUKA: That is correct.

COMMISSIONER GABRIEL: Explain that? What made you uncomfortable?

ADV NGCUKA: Because they were discussing the criteria that should be applied in deciding who should be prosecuted or not.
...(intervenes)

COMMISSIONER GABRIEL: And that was (indistinct) ...(intervenes)

ADV NGCUKA: And that was the exclusive domain of the NPA.

COMMISSIONER GABRIEL: Was that made clear to them, can you
10 recall?

ADV NGCUKA: No, no, I did not participate in that, so those are the reasons for us to pull out.

COMMISSIONER GABRIEL: Okay.

ADV VARNEY: And already by then you had a set of criteria that was developed by the HRIU, the Human Rights Investigation Unit?

ADV NGCUKA: Yes.

ADV VARNEY: And would it be correct in saying that those criteria were consistent with the existing prosecution policy?

ADV NGCUKA: Correct.

20 ADV VARNEY: So perhaps I will, you know, aside from the composition of the DG's Forum and the Amnesty Task Team, let us look at some of the functions of the proposed Departmental Task Team. An overview of that is given in from paragraph 156 onwards, but it is also set out at 206 from paragraph 3.2.2, where it
...(intervenes)

ADV NGCUKA: Can you bear with me, sir? I need to fix my bundle before it is falling apart.

ADV VARNEY: Yes, of course. Maybe somebody can assist you with that?

ADV NGCUKA: No, no, it will not be necessary. You were saying page?

ADV VARNEY: So it is page 206 of that bundle. So we are now a few pages into the report of the Amnesty Task Team. And at the bottom of page 206, it is paragraph 3.2.2.

10 ADV NGCUKA: All right, got it.

ADV VARNEY: Yes. And my attorney just advises me to highlight the preceding paragraph. It is titled:

"Ad paragraph 1 of Terms of Reference.

In order to give effect to the arrangements contemplated in the President's statement, as reflected in paragraph one of the Terms of Reference."

And you will recall that was the developing criteria for these cases. So under 3.2.2.2, or hold on, before we get there. So they
20 recommend that a further body be created and, that is set out in 3.2.1. It is called a Departmental Task Team. At a later stage, it is also called the Interdepartmental Task Team:

"It is recommended that a Departmental Task Team be appointed comprising members of the following departments or institutions:

1. Department of Justice.
2. Intelligence Agencies.
3. South African National Defence Force.
4. South African Police Service.
5. Correctional Services.
6. National Prosecuting Authority; and
7. Office of the President."

And then we turn to the functions at 3.2.2:

10 "Before the institution of any criminal proceedings
for an offence committed during the conflict of the
past, to consider the advisability of the institution
of such criminal proceedings and make
recommendations to the NDPP in this regard."

Firstly, your response to the creation of a Departmental Task
Team comprising those individuals, several members of the
executive, including the Office of the President, and that one of their
functions would be to advise the NDPP on the advisability of
instituting criminal proceedings in these cases?

20 ADV NGCUKA: That would have been wrong, unless, of course, you
have no confidence in your National Director.

ADV VARNEY: All right, aside from that fact, which I am sure was
not the case, but why would it have been wrong?

ADV NGCUKA: Precisely for the reasons I am saying, that the
decision whether to prosecute, when to prosecute, what to prosecute
for are all prerogatives of the National Prosecuting Authority. Now,

you want to fetter that discretion, so why do you need to have an independent institution?

ADV VARNEY: Then if we move to the next page, that is 207 paragraph (b):

10 "To consider applications received from convicted persons alleging that they have been convicted of political offences with a view to making recommendations for their parole or pardon, and in making such recommendations to consider various criteria."

And then those criteria are then listed in the sub-paragraphs that follow. They include the amnesty criteria from paragraph (d). So, ja, those are the amnesty criteria which we are all familiar with, so we will not need to deal with those. And then on the next page, 208, there is a range of proposed criteria, and I am not going to go through all of them, but it does include:

20 "Whether prosecution politically reflects the aims of the TRC Act and is not in conflict with the requirements of objectivity. Whether there are humanitarian concerns. Whether prosecution could lead to conflict and traumatising of victims. The perpetrator's sensitivity to the need for restitution.

The degree of remorse shown by the offender and his attitude towards reconciliation. The

degree of indoctrination to which an alleged offender was subjected. The extent to which the perpetrator carried out instructions. Whether he or she renunciate to violence and a willingness to abide by the Constitution..."

And there are others, we do not have to go through every single one of them. What is your reaction to the proposal that a number of additional criteria, like the ones I have highlighted, are being proposed for these cases?

10 ADV NGCUKA: Well, remember this, at the time when this, I was not there. So you are just asking me for my opinion?

ADV VARNEY: Yes, indeed, just your opinion.

ADV NGCUKA: Well, as I have stated already, I thought that those are matters that should have been left to the discretion of the National Director. I did not see the need for that to happen.

ADV VARNEY: Right.

COMMISSIONER GABRIEL: Mr Varney, can I interrupt you?

ADV VARNEY: Yes.

20 COMMISSIONER GABRIEL: On these cases, can you think of any reason why the National Intelligence Agency would be involved, would want to be involved? I am trying to understand that. I am hoping you can help me.

ADV NGCUKA: I would imagine that it was from a state security angle, that these people would have given information which would have been very important for the National Intelligence Agencies in the

work that they do in protecting the State. So I would imagine, therefore, the thinking was that if these people would go and give information, credible information, it should be of assistance in the intelligence work.

COMMISSIONER GABRIEL: I see, I see. Yes, thank you.

COMMISSIONER KGOMO: So that would have been the reason for the inclusion of Ms Yvonne Mabule?

ADV NGCUKA: Yes, I would imagine so, Commissioner.

COMMISSIONER KGOMO: Yes, I see here, because I see opposite
10 her name, "National Intelligence Agency". Thank you.

ADV VARNEY: And then if we can just highlight a few other issues that the Task Team alluded to. You can turn to page 210, paragraph 3.2.4. It says:

"The task team realises that the proposed process will have the following shortcomings/ concerns:

A possible negation of the constitutional rights of victims, the public at large, and alleged offenders."

20 Do you agree that the proposal could have impacted the constitutional rights of victims and the public?

ADV NGCUKA: It could have.

ADV VARNEY: And then they say:

"The possibility of the institution of private prosecutions."

So here it seems what they are trying to say is, well, if we implement this, potentially somebody aggrieved could still try to bring a private prosecution.

ADV NGCUKA: That is correct.

ADV VARNEY: And does that indicate to you that the underlying end goal was actually to curtail all prosecutions?

ADV NGCUKA: I am not sure, I do not know.

ADV VARNEY: Okay. All right, let us then turn to secret further report of the Amnesty Task Team, that is at page 213. So I want to
10 draw your attention to paragraph 1.2. As we have indicated, it makes reference in 1.1 to the first report, which was delivered on 3 March 2004. And then:

"The heads of department discussed the report with members of the task team, where after they deliberated the task team's proposals and recommendations *in camera*. Following these deliberations, the heads of department indicated that they prefer the Task Team's recommendations relating to the establishment of
20 a Departmental Task Team. They, however, requested the Task Team to give further consideration to the following aspects..."

I want to highlight paragraph (b):

"Consider whether there is a way in which private prosecution and civil litigation can be eliminated if

the NDPP decides not to prosecute. Investigate the possibility and desirability of legislation if required."

So the DG's Forum or heads of departments, they make this remarkable request: is there a way of eliminating private prosecutions and civil litigations in respect to the TRC cases? And if so, do we need a law? What does that say to you about their intentions?

ADV NGCUKA: It is – you are putting me on the spot, because I did not participate in that deliberations, and so I do not know what
10 motivated them to come to that. But reading between the lines, you could see that they wanted to bring about finality. So there should be no private prosecutions, no approach to the International Court, and that the matter must be brought to an end and that there must be closure. That is what seems to stick out to me from these paragraphs that you have read.

COMMISSIONER KGOMO: And that does not put you on the spot, sir.

ADV NGCUKA: I am sorry, sorry, Commissioner.

ADV VARNEY: And I think, Adv, Ngcuka, it might go a bit further
20 than that, you know, if there were closure and finality, well, then I suppose we would want to see prosecutions expedited as quickly as possible. But my reading of it is that it goes further than that. One, they are proposing a process in which they would have some involvement, at least, in the decisions of the NDPP.

But they are also looking at ways of stopping matters that

would be beyond their control, and so private prosecution and civil litigation, that is potentially beyond their control. So now they are saying are there ways of eliminating those two measures, and if so, we need a law. So it seems as if it is not just a question of reaching closure, it is a question of stopping those kinds of measures which could be pursued without their involvement ...(intervenes)

COMMISSIONER GABRIEL: In other words, denying rights ...(intervenes)

ADV NGCUKA: It could well be so. Sorry, sorry, ma'am.

10 COMMISSIONER GABRIEL: I am sorry, I interrupted you.

ADV NGCUKA: Sorry, sorry, go ahead, Commissioner.

COMMISSIONER GABRIEL: In other words, denying whatever rights might be available to the citizens, affected citizens ...(intervenes)

ADV NGCUKA: It could well be so.

COMMISSIONER GABRIEL: Would you agree with that?

ADV NGCUKA: It could well be so.

ADV VARNEY: Then let us look at the next two paragraphs:

20 "The proposed task team should work under the
direct supervision of an Inter-Ministerial
Committee."

And then paragraph D:

"It is important that the proposed task team, the
Inter-Ministerial Committee and the national
director, in performing their functions and
reaching decisions, should take the national

interest into account."

So, one, they are saying the task team in turn must be directly supervised by the Inter-Ministerial Committee. And then all these bodies, the task team itself, the Inter-Ministerial Committee and the NDPP, when dealing with these cases, must take the national interest into account. What would, in your view, and again, I am only asking for your opinion, what would that national interest be?

ADV NGCUKA: Well, probably the decision that would have led to public violence and caused a massive uprising in the country, you
10 know. I do not know, that is what I think.

ADV VARNEY: All right. Well, I think that is probably debatable, but let us move on. And I want to make a reference to the fact that they approached the State law advisers. We will just find the reference there. And actually, before we move on, and just to finish off on 214, paragraph (e):

"Advise the forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court."

So, would you agree that they were concerned that even if
20 they managed to curtail prosecutions at a local level, there might be a danger that an aggrieved person may go international, to the ICC?

ADV NGCUKA: Yes.

ADV VARNEY: And then if we can move to page 215, at paragraph 2.4. And that is dealing with:

"The establishment of an Inter-Ministerial

Committee. The task team supports this proposal. However, it wishes to point out that the State Law Adviser is of the view that the establishment of such a further structure may constitute a cumbersome process and increase the possibility of conflicting views between the various role players and structures. Furthermore they pointed out that the process might be seen as an attempt by the government to put undue pressure on the NDPP in reaching an independent decision."

Would you agree with the opinion of the State Law Adviser?

ADV NGCUKA: Yes.

ADV VARNEY: So just to wrap up the work of this Amnesty Task Team, and, of course, we speak with the proviso we know that you were not involved, and it is your evidence that you pulled your NPA members from that task team, And we have heard your evidence in relation to it.

So bearing that in mind, which we accept, Nonetheless, while you were NDPP, there was this outside body in the form of the DG's Forum and this amnesty task team that were putting together proposals to effectively ensure a measure of control over the TRC cases. Do you at least accept that that was happening and that constituted an attempt to undermine the independence of the NPA?

ADV NGCUKA: I am not sure. I know there were attempts, I know

there were attempts. I am not sure if that was the intention. I think that what they were trying to do was to resolve what they considered to be a problem that they had. But the method in which they went about it, I think it was, or the result that came out of it was not correct, and so, ja.

ADV VARNEY: Yes. Well, I think you might be a little generous, but let us leave it at that. And we are going to, in fact, turn to the actual amendments that were introduced later following your departure from the NPA to see what was the result of the work of these bodies. But
10 Commissioner, I see it, it is almost lunchtime. Would this be an appropriate time to take the lunch break?

CHAIRPERSON: Yes. How long are you going to be with Adv Ngcuka, Mr Varney, if we may just get an indication?

ADV VARNEY: If I were to guess, I would think about an hour.

CHAIRPERSON: About an hour?

ADV VARNEY: Ja.

CHAIRPERSON: We will take a lunch adjournment until 2 o'clock.

ADV VARNEY: As the Commission pleases.

INQUIRY ADJOURNS

20 INQUIRY RESUMES

CHAIRPERSON: Mr Varney?

ADV VARNEY: As the Chairperson pleases. Mr Ngcuka, just before we adjourned for lunch, we had wrapped up a discussion on the work of the Amnesty task team and the various proposals that they had made.

ADV NGCUKA: Yes sir.

ADV VARNEY: Great, you can hear me?

ADV NGCUKA: Yes, I can.

ADV VARNEY: Great.

ADV NGCUKA: Thank you.

ADV VARNEY: Just before lunch, I said I would make reference in passing to what the outcome of their deliberations were. One of the main products that emerged were in fact the amendments to the prosecution policy. And I just want to refer you to it. Unfortunately, It
10 is not in that new bundle, but it is in bundle 1, that I believe is on your desk. The amended prosecution policy is at page 634 of bundle 1. Sorry, I beg your pardon, page 537 of bundle 1. It says FA27 in the corner as well. So bundle 1 would be the...

ADV NGCUKA: Bundle 1 of 1 is, for me, It is up to page 300.

ADV VARNEY: Page 537.

ADV NGCUKA: So let me check on this one. Yeah. 537?

ADV VARNEY: Yes.

ADV NGCUKA: Got it.

ADV VARNEY: And is that the one that says FA27 and then it says
20 Appendix A?

ADV NGCUKA: Appendix A, got it.

ADV VARNEY: Yes, okay. So those are the amendments to the prosecution policy in relation to the TRC cases. And I will just draw your attention, if you could turn to page 539, and then at the bottom of the page, there is a paragraph 6, and this falls under part B, which is

titled procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. And you will see in paragraph 6, the PCLU shall be assisted in the execution of its duties by a senior designated official from the following state departments or other components of the NPA, and then those organisations we are familiar with, National Intelligence Agency, Detective Division SAPS, Department of Justice, and Director of Special Operations.

10 And we know from the evidence of Anton Ackerman as well as other documentation that is before the Commission that another task team, sometimes referred to as the interdepartmental task team, was set up comprising those individuals as well as sometimes individuals from other departments. And then if I can draw your attention to part C on the next page, that is page 540, and that is titled criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past. And it says, you know, apart from the general criteria set on paragraph 4 of the prosecution policy, that being the existing policy, the following criteria determined for the prosecution of cases arising from the past.

20 And if we go to the next page, that is page 541, you will see that many of the proposals suggested by the amnesty task team are included. So for example, the TRC criteria at the top of the page. And then if we look at around the middle of the page, D, under personal circumstances, it includes humanitarian considerations, the offender's sensitivity to the need for restitution, degree of remorse

shown, attitude towards reconciliation, renunciation of violence, a willingness to abide by the constitution, degree of indoctrination to which the offender was subjected.

Then at F, the extent to which prosecution or non-prosecution will facilitate or undermine the national project of nation building through transformation and reconciliation and so on. And then the last, there is even a catch-all criteria at the next page, 542 at J, any further criteria which might be deemed necessary by the prosecuting authority for reaching a decision.

10 So do you agree that you can see quite a big overlap between what was proposed by the amnesty task team and what was ultimately proclaimed in the amendments to the prosecution policy?

ADV NGCUKA: Yes, I do see that now.

ADV VARNEY: And again, this is not a criticism of you, but you accept that what has happened here with the amendments is that a different regime has been set up in relation to prosecution decision-making, in relation to that category of cases?

ADV NGCUKA: Yes.

20 ADV VARNEY: Then we just want to deal with a few matters that arose this morning before we proceed. And I want to direct your attention again to those two declarations in which you identified four cases and then another two cases. And the instruction was that the DSA should investigate those cases.

So my first enquiry is, any reason why you were not able to, or you decided not to issue a declaration that the DSA investigate all

the TRC cases?

ADV NGCUKA: I am trying to think why. I suppose that was the advice I received from the people who are involved, that those are the ones that they wanted to deal with at that particular point in time. Okay.

ADV VARNEY: And then just looking at the six cases, we obviously were interested to see what had happened to them. And some of them, they're quite well-known, so we do know what happened. So for example, the PEPCO 3, there was quite a lot of publicity.

10 There was a review of the amnesty decision, and then unfortunately that stilled, but that was all post your term. In relation to the Chikane matter, we know that one went ahead. There was a plea- and sentence agreement, but I want to, and that took place in 2007, again, post your term.

 But I want to draw your attention to a reference that McAdam made to the investigation of that case, and that is at page 93 of the new bundle in his affidavit. So we can abandon bundle 1 for the moment and go back to the new bundle. Sorry, it is at page 93, and it is at paragraph 26 of his affidavit.

20 I am told that the live stream is not running. Is there a way of repairing that? Anyway, I am sure that the technicians will deal with that.

 So paragraph 26 at the bottom of page 93, McAdam says,
 "At a certain stage, Ackerman informed me that he
 intended prosecuting three former security branch

members for their role in the poisoning of
Reverend Frank Chikane.”

This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary. We heard that evidence also from Ackerman, so they appear to be saying that in that case, it did not need to be investigated. It was already investigated in the Wouter Basson case.

ADV NGCUKA: Yes.

10 ADV VARNEY: Then if we turn to the Motherwell 4 case, that was a little more difficult to get to the bottom of, but we did establish that there had been convictions of certain accused in 1996, and that there were applications by nine applicants in 1999, and this included people such as Gideon Nieuwoudt, Wynand du Toit. You're probably familiar with those names.

ADV NGCUKA: Yes, I am.

ADV VARNEY: And they were all refused. And then it looks like Du Toit went to court to review the refusal, and it looks like the court ordered the reinstatement of the Amnesty Committee, and from what
20 we can establish, Du Toit was granted amnesty in 2005, Nieuwoudt was refused. That is all we were able to find out on that case.

In relation to, Ingelunga, and that was an investigation against, so the suspects there were General Engelbrecht and General Nick van Rensburg. Unfortunately, we have not been able to find anything. We searched high and low, so it is not clear whether that

investigation proceeded or not, and if so, what the outcome was.

And then lastly, the investigation that you directed to happen in relation to the massacres that took place at various hotels in the Western Cape, St James and, I do not have the other one with me right now, but I'd like to refer you to page 150 of the new bundle. It was the St James Hotel and the Heidelberg Tavern.

ADV NGCUKA: Yeah, got it.

ADV VARNEY: So there is a report on that case, in the document, it commences at page 142, and it is prepared by Advocate Ackerman.

10 It is directed to Dr Emmes Ramaite, subject is Audit of cases emanating from the TRC process. Date is 24 October 2006, so some years after you had left.

ADV NGCUKA: Yes.

ADV VARNEY: And at page 150, at the bottom of that page.

ADV NGCUKA: Page of, page?

ADV VARNEY: So it is 150 of the same bundle.

ADV NGCUKA: Okay.

ADV VARNEY: So Ackerman is now reporting to Ramaite about progress in various cases, and he then deals with the Heidelberg
20 Tavern and St James massacres at 411, Lethlape Methlathlele and then he refers to the two places. And I will just skip to paragraph 411.3.

“As soon as an investigator is appointed for the case, a decision will be made on whether to prosecute or not.”

So on the face of it from that statement, it may be that an investigator was not appointed to that particular case, because the allegation is that in 2006 they were waiting for an investigator to be appointed.

Anyway, so I just wanted to let you have the outcome of those six cases, something of a mixed bag. And in fact, I suppose the only real successful outcome was that of Chikane. Anyway, let us move on.

And I want to... Hold on. Before we go any further, I
10 reminded myself that there might be a few things arriving from your evidence-in-chief, and there are just a couple of short ones.

In the late 1990s, during your oral testimony, you made reference to the fact that in relation to a number of, I suppose, priority crimes, for example, political violence in KZN around Richmond, you decided to bring investigators, prosecutors and analysts under one roof, and that the investigations in the KZN Midlands were very successful. I have the same recollection being from KZN myself.

Would I be right in saying that most of those investigated, prosecuted, and I know there were several convictions as well, that
20 most of those were actually of ANC members?

ADV NGCUKA: That is correct.

ADV VARNEY: Because there has been an allegation put up or suggested by organisations such as Afriforum that post 1994, there were few, if any, cases against organisations such as the ANC. Would you agree those investigations and convictions suggest

otherwise?

ADV NGCUKA: Indeed.

ADV VARNEY: In your evidence in chief, you highlighted the Biko case, Steve Biko, who died in detention. You said you wanted to take that case ahead, but you did not have sufficient evidence, and that if you had gone ahead, they would have been acquitted. The Biko family would like more information, and if you and your team are in possession of any reports, documents or opinions relating to the Biko matter, would you be willing to disclose those to the family?

10 ADV NGCUKA: Oh, certainly. But unfortunately, I no longer have. But I think what I can do is to make them contract Vincent and Chris McAdam, people who reviewed those files.

ADV VARNEY: Thank you. I do recall a reference, and I forget where it is, maybe my team can help me, where it mentioned that the crimes had prescribed.

ADV NGCUKA: That is correct. The culpable homicide ones had prescribed.

ADV VARNEY: Culpable homicide?

ADV NGCUKA: Yes.

20 ADV VARNEY: Although presumably murder itself, that does not prescribe?

ADV NGCUKA: Yes, that is the one we could not succeed in prosecuting, because the evidence was not sufficient. I think you will find in one of the bundles, there is reference made to that. I think it would be Chris McAdam's report. I cannot remember exactly where it

is, where he states categorically these are the challenges. There was only one doctor who remained and there were problems with his evidence. I think it is in one of the bundles, I cannot recall which one. But I think it will be in one of the reports that were submitted to me.

COMMISSIONER KGOMO: You could not call Ms Helen Zille to give evidence in the BICO matter?

ADV NGCUKA: Sorry, Commissioner, I did not get you.

COMMISSIONER KGOMO: I said in the BICO matter, you could not call Ms Helen Zille to give evidence.

10 ADV NGCUKA: Unfortunately, she did not have any credible evidence that you could rely on.

COMMISSIONER KGOMO: Yes, okay.

ADV VARNEY: So we have found a reference in one of the documents, I think one party by McAdam, it is at page 105 of the bundle and It is from, yes, It is from McAdam to the deputy head of the DSO, copied to Leask, and he, page 105, he says Steve Biko, crime prescribed in 1997. And I think there are also some other references which we will look at. But if there is any information that you and your team have that could assist the Biko family?

20 ADV NGCUKA: I do not have any independent information other than what I received from the team.

ADV VARNEY: Thank you. And then, also in your evidence-in-chief, in a similar vein, you outlined the various practical and evidential challenges of pursuing, I suppose we could call them old cases or cold cases. And I think investigators and lawyers are familiar that the

older the case, the more difficult it becomes to investigate.

ADV NGCUKA: Yes.

ADV VARNEY: So we certainly recognise that, but we want to put it to you that, yes, they are difficult. It is difficult to find witnesses who are alive and who can testify. It is difficult to find documents. But we want to put it to you that, with the help of thorough, rigorous investigation and particularly forensic investigation, even cold cases can be solved many years later, sometimes even decades later.

ADV NGCUKA: That is true.

- 10 ADV VARNEY: So for example, the Ahmed Timo case before the reopened inquest in 2017, that case managed to be resolved. Same with Neil Agat case, which was before an inquest in 2021, the Hussein Hafeji matter and the Imam Harun matter, which were also held in recent years. And all those inquests managed to get to the bottom of what happened to those detainees.

- ADV NGCUKA: Yeah, I agree with you. And then lastly, from your evidence-in-chief, you were giving some numbers of investigators, lawyers, and accountants. And I just wanted to check. I was assuming that you were talking about the DSO. Just to remind you,
- 20 you mentioned 300 investigators, 55 lawyers, and five accountants. Was that the rough staff complement of the DSO?

ADV NGCUKA: Approximately, yes.

ADV VARNEY: Okay, if we can then, or perhaps we can deal with this now since my attorney has drawn it to my attention. And we will just have to quickly go back to President Mbeki's speech. And it is a

sentence in question I have already read to you. So I will just read the one sentence again.

“However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to cooperate in unearthing the truth.”

And so on. Now, the reference to intelligence agencies, did
10 you have an idea of what the president had in mind? Or did you perhaps approach him to find out?

ADV NGCUKA: No, no, I did not.

ADV VARNEY: Okay.

ADV NGCUKA: No, I did not. I suppose it speaks to the issue that was raised by the Commissioner before lunch. Why would you involve the national intelligence? In some of the difficult cases that I have dealt with, we relied on the intelligence that we received from them, which we were then able to convert into evidence. So I would imagine that is the reason why the president was referring to.

20 ADV VARNEY: Yes, indeed. And I suppose that the NPA is entitled to gather evidence from wherever, leads and the like. So if it is simply a question of the intelligence agencies helping with the investigation, giving you facts.

ADV NGCUKA: With the investigation.

ADV VARNEY: So that would be no issue. Although as we have

seen from subsequent developments, it went further than that. It was not just a question of handing over information. It was sitting on committees. Anyway, we have dealt with that. We won't go down that particular road.

ADV NGCUKA: Sure.

ADV VARNEY: But perhaps what I think what I will do though is quote what McAdams said in relation to the role of the NIA on those committees. And we will just find it. That is part of the bundle, the McAdam affidavit. So we just have to find that, if you bear with us.

10 Okay, so it is in page 94. And yeah, he is referring to that task team that got created after the amendments were put in place. So page 94 at paragraph 30. He says:

20 "Advocate Pikoli was appointed as the NDPP. I was informed by Ackerman that Pikoli had set up an interdepartmental task team that would advise Pikoli on making decisions in TRC matters. Ackerman and Ramaite were the NPA representatives on the task team. On one or two occasions, I stood in for Ackerman in meetings on the task team when he was not available. I noticed that the task team was predominantly comprised of members of the intelligence community, who were more intent on cross-examining me as to why matters should be investigated rather than addressing the issue of all the outstanding cases.

So from McAdam's perspective, he was not getting support. They were intent on establishing why McAdam wanted to go ahead with these cases.

ADV NGCUKA: This probably would strengthen the decision that we took earlier.

ADV VARNEY: Yes.

ADV NGCUKA: Not to participate in that forum.

ADV VARNEY: Yes, indeed.

ADV NGCUKA: If this is what happened to Chris McAdam.

- 10 ADV VARNEY: It certainly reinforces that decision. And while we are on McAdam, I will just put one last paragraph to you. It is on page 98 at paragraph 47 at the bottom of the page. And this is on the question of investigations. McAdam spends a few pages setting out the attempts he and Ackerman made to get investigations on the TRC cases. And so his penultimate paragraph, he says:

These documents speak for themselves and go a long way in explaining why from 2003, the PCLU constantly struggled to have TRC cases investigated.

- 20 So he seems to be confirming that some years later, towards 2009, 2010, they were still battling to get investigators onto these cases. But again, post your term.

ADV NGCUKA: Yes.

ADV VARNEY: All right, then let us move to an internal memo. That is at page 267 of this new bundle. And this is a secret internal memo

that Advocate Ackerman addressed to Advocate Pikoli, who was then NDPP. It is dated 16 May 2006. And the subject is National Intelligence Agency Incidents. If I can draw your attention to paragraphs 13 and 14, at page 271, because your name appears.

So I will just read these into the record and then you can respond to them.

ADV NGCUKA: You said paragraph 13?

ADV VARNEY: Yeah, I will start reading at 13 just to give it a bit of context.

10 ADV NGCUKA: Just a minute, just a minute.

ADV VARNEY: It is at page 271.

ADV NGCUKA: Thank you, got it.

ADV VARNEY: Okay.

20 “Due to the difficulties encountered with the DSO, my two deputies and I met with Commissioner Lalla to inform him of my unit’s mandate and to request him to channel any intelligence relating to the cases to my unit. During the course of these discussions, I did express my dissatisfaction with the DSO and informed him of the allegations being made against the president. McAdam also asked his assistance concerning the Motherwell case, where the accused were alleging that the deceased had been killed because they were MK operatives. As I subsequently discovered, this

conversation was clandestinely recorded both on audio and video.”

Just so you know, this meeting took place in August of 2003.

And then in paragraph 14:

10 “At a later stage, my two deputies and I were at short notice summoned to a meeting with Mr Ngcuka. Mr Ngcuka informed me that Commissioner Selebi had addressed a meeting of the Directors General and alleged that Mr Ngcuka was preparing to have the president and six generals arrested and charged with terrorism. Mr Ngcuka further informed me that Commissioner Selebi was in possession of a video recording in which I had admitted that the president was due to be arrested. I was then shown the video recording of my meeting with Commissioner Lalla. And this is how I learned that the meeting had been recorded.”

20 Perhaps let us also do, since It is connected, we will do as well.

“Mr Ngcuka further informed me that Commissioner Selebi had complained about the NPA being in possession of SAPS dockets. Apparently, the allegation was that these dockets contained the evidence that would be used to

prosecute the president and other high-profile ANC leaders. I denied the existence of both an attempt to arrest the president and others, as well as the existence of the so-called relevant police dockets against them. Mr Ngcuka then made arrangements for you and the three police commissioners to be present at Advocate Mpshe's office the next day for an inspection of the dockets to be carried out."

10 Do you recall any of these developments?

ADV NGCUKA: Yes, I do.

ADV VARNEY: And is this roughly an accurate portrayal of what transpired?

ADV NGCUKA: Yes. You want me to comment on it?

ADV VARNEY: If you can offer comment, then please go ahead.

ADV NGCUKA: No, no, indeed, it is true. What Anton here says is true. And I heard him testify that I was quite annoyed with him. That indeed is an understatement. I was angry. These things happened in August. And you will recall that I earlier testified about the period,
20 what we are going through during that period. And for Anton to go and badmouth us to the police who were refusing at that time to cooperate with us, I found that to have been an act of betrayal. And so the people who had gone to see the video and some of my guys in the office were very angry and just like me. And wanted us to take disciplinary action against Anton. I said, no, people must be allowed

to gossip about their leaders. And you too, I am sure you do gossip about me when you sit in shipience with your friends.

I did not hire Anton to love me. And he must continue as long as he does the good work. I am not going to take any action against him. And that is why he remained there. I had good respect for him, and as far as I am concerned, my attitude never changed to him because he did that. That is it.

ADV VARNEY: Indeed, it was Advocate Ackerman's evidence before this Commission that he was very lucky not to have been suspended.

10 On the question of the clandestine recording of that meeting, did you take that up with Commissioner Selebi?

ADV NGCUKA: Oh, no. No, not at all. We knew these are the things that were happening. These are the texts that were directed to the organisation. It would have been futile to go and talk to him about something that I knew he knew about. So, no.

ADV VARNEY: Okay. Then let us carry on. I think we are going to go up to paragraph 18. Sorry, paragraph 16.

ADV NGCUKA: Sorry, sorry. I closed my bundle.

ADV VARNEY: Oh, you closed it.

20 ADV NGCUKA: Where, page 260?

ADV VARNEY: You can turn to page 272.

ADV NGCUKA: 272, Thank you. Thank you.

ADV VARNEY: So, paragraph 16:

Advocate Mpshe's, at Advocate Mpshe's office,
Mr Ngcuka invited SAPS to identify the dockets

relating to the president and others, which they were unable to do. Mr Ngcuka then instructed the SAPS commissioners to have all the SAPS dockets removed forthwith, and for the two SAPS members working with Advocate Fick to vacate their offices at the DPP's premises."

You recall that?

ADV NGCUKA: Correct.

ADV VARNEY: In paragraph 17:

10 "Shortly thereafter, Minister Maduna personally visited Mr Ngcuka and myself and McAdam, and was fully briefed on all these developments. McAdam had compiled a report to Mr Ngcuka, in which he had expressed the opinion that having perused all the relevant TRC material, there was no case against the president or the other prominent ANC members who had been refused amnesty. A copy of the report is attached hereto."

Unfortunately, it is not attached to our version.

20 "Minister Maduna also satisfied himself and said that the allegations made by Commissioner Selebi were untrue and undertook to inform the president accordingly."

Do you have a recollection of that?

ADV NGCUKA: Yes, I do. It is correct.

ADV VARNEY: And then, paragraph 18:

“While I was absent from the office, I was informed by McAdam that Mr Ngcuka had summoned him to a meeting with Mr Billy Masetla.”

I believe at that time, Mr Masetla was the DG of National Intelligence.

ADV NGCUKA: That is correct.

10 “I was further informed that the purpose of the meeting was to satisfy the office of the president that there was no intention to prosecute the president. McAdam finally advised me that he had given Masetla a copy of his report and that he was satisfied with the manner in which the manner had been dealt with.”

Is that correct, to the best of your recollection?

ADV NGCUKA: That is absolutely correct.

ADV VARNEY: Now, again, we are dealing with events post your term of office, but did you then get to hear about the forged letter that Ackerman discovered had been put up in his name?

20 ADV NGCUKA: No, I was not aware of the letter. I just saw it in the bundles. I had never been told about it. That happened after my time.

ADV VARNEY: Yes, it happened after your time. In 2006, according to Advocate McAdam, this letter was forged to suggest that he was about to go ahead with the arrests or prosecutions of the ANC

leaders. Did you get to hear about that?

ADV NGCUKA: No.

ADV VARNEY: Can we then turn to a few pages from your book?

The book is part of a bundle. At page 227, it is titled, Bulelani and Ngcuka, The Sting in the Tail. The author is Marion Sparg. I just want

to put a passage to you, halfway down the page. And this is at the

time when you had set up the working group under Vincent Saldana.

And it reads:

10 “Bulelani said he was obliged by law to prosecute
 where there was enough evidence to make a case.
 But at the same time, part of him asked if it was
 worth it. Part of him wanted to go for them, but
 another part asked whether these apartheid
 perpetrators, many of whom were broken or about
 to die, were really a threat to society.”

So that passage piqued our attention, because in your evidence-in-chief, you made it clear that you did want to go after these perpetrators.

ADV NGCUKA: Of course.

20 ADV VARNEY: So can I have your response to the passage in the Mandewina book that at the same time, you were asking whether it was worth it. That these apartheid perpetrators, many who were broken about to die, were really a threat to society?

ADV NGCUKA: Yes. That is true. These are some of the things that went through my mind at the time. We are thinking about it. Wanted

to go for them. Really did. But at the same time, there was this nagging at the back of my head. Should we spend the mega resources that we have going for these people who are already old, who might die during the prosecution, or shortly thereafter? What do we do? But at the end of the day, I said, no, let us go ahead. Let there be accountability. And let us follow what the law is. Of course, I had those doubts in my head.

ADV VARNEY: And on that score, I am sure you appreciate that for the families attempting to still pursue justice at this late stage, 10 perpetrators have died. Many are ill, unable to appear in court. And some, of course, end up dying just before they can make their appearance.

ADV NGCUKA: Indeed. I think those were the concerns that I had.

ADV VARNEY: Ja. Although, from the perspective of the families, you had those concerns in the late 1990s. And here we are some 25 years later, even more years later, and the families are still wishing to pursue. And the challenges they face are even greater because with the passage of time, there will be fewer and fewer suspects and witnesses left.

20 ADV NGCUKA: Certainly. But as you would know, at no point in time did I tell my people that they must not do these cases because of what I was thinking. So it did not influence whatever the guys were doing. All those doubts that I had in my head. And I would never have acted without consulting the victims. Whatever decision I may have taken at the end of the case. It would have been a matter that

would have involved consultations with the victims.

ADV VARNEY: Thank you, Mr Nkuku. I am just looking at whether there is anything else we need to... perhaps I can draw attention to 229. And I would like to read the bottom two paragraphs to you:

10 “In 2006, an insider noted that the unit’s ability to handle TRC cases was severely hampered by a standoff between the Scorpions and the SAPS about who was going to investigate the cases. And said that this matter had not been resolved at the time but Bulelani resigned in August, 2004. The PCLU itself did not have any investigators.”

You make reference to an insider noted. Any chance you can tell us who the insider is?

ADV NGCUKA: No, I do not know. But the truth of the matter is what we have been discussing here. That these were the challenges that we had at the time. The refusal to second the investigators either from the Scorpions or from the, from SAPs at the time, those were the challenges that we had.

ADV VARNEY: Yes, then the next paragraph:

20 “After Bulelani had quit the NPA, acting NDPP Silas Ramaite, called a moratorium on TRC-related cases. Bulelani's successor, Vusi Pikoli, complained later about improper interference in his work on the TRC cases and said, legally, I have reached a dead end. The failure of the NPA to

prosecute TRC-related crimes remains a sore point for many families and comrades of those who died at the hands of apartheid security forces.”

So, on that score, I just want to turn to what Silas Ramaite and Vusi Pikoli had to say. And let us start with Sias Ramaite. His statement is in this bundle from page 240. And I just want to bring to your attention a paragraph in Advocate Ramaite's statement in relation to a moratorium that got imposed on the TRC cases, again, post your term of office. So, paragraph 32:

10 I advised Advocate Ackerman SC, that it would be better to wait and have a better understanding of what was happening.

Just to give you the context, this was after an attempt had been made to carry out the arrests of certain suspects in the Frank Chikane matter. And what had happened is that the attorney for the suspects had gotten hold of Advocate Ackerman and asked him to not carry out the arrests. When Ackerman declined, he was then called by somebody within the Department of Justice. And then, ultimately, he was called by Advocate Ramaite and he was told not to
20 pursue with the case at that time, pending the formulation of guidelines, eventually the amendments to the prosecution policy.

So, Ramaite says:

Shortly after I'd spoken with Advocate Ackerman, I received a telephone call from the Minister of Justice, Mrs Bridget Mabandla. She told me that there is a task team which was appointed by the

Director's General Forum to develop a mechanism to deal with the TRC cases. I expressed to the Minister my concern that any process or mechanism which involves the executive or the justice and security cluster would amount to encroaching in prosecutorial decision-making and would be a violation of prosecutorial independence as enshrined in Section 179 of the Constitution. The Minister nevertheless insisted that the prosecution of all TRC-related cases must be put on hold until the development and adoption of guidelines.

10 So, that is the context in which I want to put his concluding paragraphs to you to see if you agree with Advocate Ramaite. So, if you could turn now to page 254. And I am going to read those final four paragraphs:

I regard the imposition of a moratorium by the executive or a member of the executive on the prosecution of TRC cases purely on the basis of developing and adopting guidelines to deal specifically with these cases as a form of political interference.

20 51. The development and formulation of prosecution guidelines by a committee consisting of Directors General of the security clusters inconsistent with Section 179(5)(A) and (B) of the Constitution and Section 22(1) of the NPA Act and is unlawful.

52. I also regard the attempt to involve a body

consisting of Directors General to make recommendations on who to prosecute and who not to prosecute as an encroachment into prosecutorial independence.”

And lastly:

“There is no doubt in my mind that the effective investigation and prosecution of TRC cases was severely hampered by political interference.”

Do you agree with the sentiments of Advocate Ramaite?

10 ADV NGCUKA: Sorry? Oh, I thought you were saying something, Commissioner.

CHAIRPERSON: No, it was a question, do you agree with the statement of Ramaite.

ADV NGCUKA: No, no, I heard something emanating from your side, Commissioner, so I thought there was something. Ja, if...ja. I said yes.

ADV VARNEY: You agree with those paragraphs?

ADV NGCUKA: Ja.

20 ADV VARNEY: And then lastly, let us turn to what Vusi Pikoli said in an internal memorandum that he addressed to Minister Bridget Mabandla. And I believe that is at... I think it starts at page 256. It is a secret internal memorandum addressed by then NDPP Advocate VP Pikoli to Minister of Justice Ms BS Mabandla. The subject is Prosecution of Offences Emanating from Conflicts of the Past, Interpretation of Prosecution Policy and Guidelines. It is a long

memo, so I am not going to read all of it into the record, but let us just deal with the purpose of the memorandum in paragraph 1:

10 “The purpose of this memorandum is to inform the Minister about the NPA's understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past, committed on or before 11 May 1994. Inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines, and then propose a way forward.”

So Advocate Pikoli then, in that memorandum, he sets out in nuts and bolts fashion the history of the challenges that he had faced, as well as the PCLU, in particular that he was expected to wait for a recommendation from the DG's forum before he could proceed with prosecution on the TRC cases. And so ultimately, under his conclusion and way forward, and this is now on page 266, he says the following, in paragraph 5.2:

20 “I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and obstructed from carrying out my functions on this particular matter. Legally, I have reached a dead end. It would appear that there is a general expectation on the part of the Department of Justice for Development,

SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took does not allow that.

Based on the above, I cannot proceed further with these TRC matters in accordance with the normal legal processes and prosecuting mandate of the NPA as originally envisaged by government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the state, I am awaiting government's direction on this matter."

10

As a former NDPP, reading such extracts from the then NDPP, what response do you have?

ADV NGCUKA: You know, I hesitate to comment about decisions that were taken by the guys who followed after me, because it is going to be difficult. You do not know the circumstances under which they were operating. One is not in possession of all the full facts. And I do not want to be seen to be critical of my successors. But let me say this. I cannot find any reason why the National Director can say he does not know what to do. The law is clear. You take the decision. You prosecute. You do not ask for the advice from other people. That would have been my view. And I thought I explained this. But most of the time, you get approached by various people who want you to change your decision and want you to behave in a particular fashion, be it politicians, be it business people, ordinary people. It happens all the time. But at the end of the day, it is your

20

decision alone.

So I do not know what caused my colleague to take that decision. But at the end of the day, he should have been the one to say no. That is my view.

ADV VARNEY: Well, you probably are aware that not long after that, later in the same year, he was suspended. And you might also be aware that Anton Ackermann, who was still the head of the PCLU, he was relieved of his duties in relation to the TRC cases by acting NDPP Mpshe. Does that not indicate an approach that the two of
10 them, at least that government was taking, that the two of them should not be involved in these cases?

ADV NGCUKA: I am not qualified to comment on those. Because indeed, I do not know what were the pertinent facts which led to their suspension or to Anton being relieved of his duties. I am not aware of the facts.

ADV VARNEY: Okay. I am not going to press you further on that. Just for clarification, he was not relieved of his duties generally, just in relation to the TRC cases.

And then lastly, Minister Bridget Mabandla, she was
20 appointed Minister of Justice on 29 April 2004. So a few months before you resigned from office. Did you have any discussions with her prior to your departure on the question of the prosecution of the TRC cases?

ADV NGCUKA: I may have. I may have. Because I reported to the Minister regularly and we had a very good working relationship. So

not just on the TRC cases, in my normal reports to the Minister, I may have mentioned these TRC cases.

ADV VARNEY: But you're unable to recollect the nature of the discussion?

ADV NGCUKA: No, no. I would have given the report about what is happening. What are we doing? Where are we with these cases? Where are we with respect, in respect of many other issues that we are dealing with?

ADV VARNEY: Right. My attorney has just reminded me of one
10 further matter. And then we promised the Commissioners one hour and then we will pause from our side.

When I asked you somewhat earlier about, or rather I put to you what Laconia Calata had said in his affidavit, that in all likelihood, a direction was coming from a political level in relation to these cases. And your response was that that was not so, or that was unlikely or something to that effect?

ADV NGCUKA: I said that was not so, during my time.

ADV VARNEY: Certainly not in your time?

ADV NGCUKA: Yes.

20 ADV VARNEY: But would you agree that from the perspective of SAPS, the fact that their response was that they would only investigate if the President directed them in writing, that from their perspective, it had to come from a political level?

ADV NGCUKA: [Speaker 2]

Not necessarily so, not necessarily. You must remember that we had

these problems of turfs between us and between the police and the Scorpions. And the police had taken a view that it was not necessary for the President to have established the DSO, that they were capable of doing all these cases.

And so writing that note, in my view, from Commissioner DPA, was to say, go and tell the President that you do not have capacity to do these cases. And so it had nothing to do with political interference at all, in my thinking. It was purely to say, the President must trust us, we can do this work other than you guys.

- 10 ADV VARNEY: We, on that score, Mr Ngcuka, we will be submitting at the appropriate time that, that was yet further evidence of the fact that at a very high political level, these cases were receiving attention and that an entity like the SAPS were not willing to get involved without that kind of political instruction. That is what we will be submitting to the Commission.

ADV NGCUKA: Sure, ja.

ADV VARNEY: Mr Ngcuka, many thanks for your time and the support that you have given this Commission. No further questions, Commissioners.

- 20 CHAIRPERSON: Thank you, Mr Varney. You have been true to your undertaking that it will take you an hour to conclude your cross-examination. We commend you on that one.

ADV VARNEY: Thank you Commissioner.

CHAIRPERSON: Mr Semenza?

ADV SEMENYA: Chair, I do not know if there won't be any

clarificatory questions asked of the witness before I come.

CHAIRPERSON: No, this is cross-examination. There are no clarificatory questions allowed.

ADV SEMENYA: Mr Ngcuka, good afternoon to you.

ADV NGCUKA: Good afternoon, sir.

ADV SEMENYA: You have been very emphatic within the meaning of the terms of reference that there was never any external effort or attempts at making the prosecutions of TRC cases to be stopped. I am right, eh?

10 ADV NGCUKA: That is correct. And we have trawled through the papers and could not see any suggestion that during your tenure any effort was done to stop the prosecution of these TRC cases. That we can accept?

ADV NGCUKA: That is correct, sir.

ADV SEMENYA: There is a small area which I want to test with you, and I have listened throughout to the questions put to you on behalf of the Calata Group. For ease of reference, I have given a document that is A-15, which is supposed to be a media release.

20 ADV NGCUKA: Just bear with me, I had it here. I must have swapped it in this files. Ah, I have got it, thanks.

ADV SEMENYA: All right. That purports to be an MPA media release. You would see it is dated 13 May 2004.

ADV NGCUKA: That is correct. And it is on its reading issued by Sipho Ngwenya, Executive Manager, MPA Communications.

ADV NGCUKA: Correct.

ADV SEMENYA: I just want to read the first paragraph and then have a conversation with you about it.

ADV NGCUKA: Sure.

ADV SEMENYA: It reads:

The National Prosecuting Authority, NPA, has decided not to launch any investigation into 37 ANC leaders who were refused amnesty by the TRC. Do you see that?

ADV NGCUKA: Correct.

10 ADV SEMENYA: Were you familiar with this press release at the time?

ADV NGCUKA: Correct.

ADV SEMENYA: It would have emanated from your office?

ADV NGCUKA: I authorised it.

ADV SEMENYA: You authorised it. What I did try to establish was whether that decision ever was made in writing outside of this media release.

ADV NGCUKA: Whether the decision was?

ADV SEMENYA: Was in writing.

20 ADV NGCUKA: The recommendation was in writing. It came from that unit, the PC, Anton Ackerman's unit.

ADV SEMENYA: Yes. But their decision itself was never in writing if I understand Mr McAdam. It says it was a decision that was made after they gave you a briefing.

ADV NGCUKA: No, they both, they wrote a report which they sent to

my office, which was accompanied by a briefing. And so the statement was then drawn out of that.

ADV SEMENYA: Or he might just be mistaken to think that the briefing was verbal, where he uses the word oral. He might be mistaken. There was something in writing.

ADV NGCUKA: Yes, there was. There was a report that they have controlled all the files and they cannot find any evidence whatsoever to proceed.

ADV SEMENYA: Yes, I have seen.

10 ADV NGCUKA: That report was initially submitted. McAdam prepared the report and he gave it to Anton, who then confirmed it and gave it to me. And then they came to brief me about it and we agreed that we need to release the press statement.

ADV SEMENYA: Both may be consistent with one another. I am alive to the fact that the advocates had written down documents suggesting there is no evidence against the ANC 37.

ADV NGCUKA: Yes.

ADV SEMENYA: Now, one of the recommendations that would have come from the TRC was that investigations of those matters must
20 happen.

ADV NGCUKA: Correct.

ADV SEMENYA: And by 13 May, the decision was that there is no evidence. I am interested to enquire what investigation had happened between the release of this TRC recommendation for the investigation of these matters, and the decision not to investigate.

ADV NGCUKA: These cases were investigated prior to coming to my office. They were in the TBP's office in Pretoria and there had been a thorough investigation, which was done. And so what my office did was to go through the dockets which were there and they followed up with the people who were mentioned in the dockets. I cannot recall now. I think there was an entity that called Equality before the Law. I cannot remember. Followed with them to say, please give us the information that you have and others. So there was that investigation that was done and there was not enough evidence to even declare

10 that in terms of Section 28.

ADV SEMENYA: What I am trying to establish is, would the investigations have also included things like warning statements of the 37?

ADV NGCUKA: I am not, I would imagine so, Counsel, but I personally, of course, the dockets. I think Chris and Anton will be able to assist you there.

ADV SEMENYA: Yes, we will engage them about that. There are dockets that are said to be at Visagie offices in Pretoria. You do not know about those, do you?

20 ADV NGCUKA: There is no office in Visagie, as far as I know. This would have been either in the DPP's office or in my office.

ADV SEMENYA: All right.

ADV NGCUKA: And those dockets that were in the DPP's office are the ones that were taken over to my office.

ADV SEMENYA: Yes. Okay, I will take that journey with the two

advocates when they come. What could have been in those dockets to sustain the conclusion that is reflected in this media report?

ADV NGCUKA: Sure.

ADV SEMENYA: I have no further questions to you.

CHAIRPERSON: Thank you.

COMMISSIONER GABRIEL: Mr Nuka, I have a hypothetical question.

ADV NGCUKA: All right.

10 COMMISSIONER GABRIEL: Given the important role that you played in our country as the NDPP, if you had taken a decision to prosecute one of these TRC matters, and subsequently the Committee of Directors General was put together to advise you after you had taken the decision to prosecute, would you, in your role, have regarded that as an effort or an attempt to influence or to pressure you to stop prosecuting?

ADV NGCUKA: Yes, I could have regarded it as such, but in my case, I would have listened to them.

COMMISSIONER GABRIEL: You would have listened, and you...
(intervenes)

20 ADV NGCUKA: I would have listened to them.

COMMISSIONER GABRIEL: And your response to them would have been?

ADV NGCUKA: Thank you very much.

COMMISSIONER GABRIEL: Goodbye.

ADV NGCUKA: Thank you.

COMMISSIONER GABRIEL: Okay, thanks. You have made your position perfectly clear. Thank you.

CHAIRPERSON: Mr Bhana?

MR BHANA: We have no questions, clearly for (indistinct), or by way of re-examination.

CHAIRPERSON: Thank you. Mr Ngcuka, we thank you for having availed yourself to come and give evidence before this Commission, given your hectic schedule. We appreciate it. You are now excused as a witness.

10 ADV NGCUKA: Thank you. Thank you, Commissioner.

CHAIRPERSON: These proceedings are adjourned until tomorrow at 10:00.

INQUIRY ADJOURNS TO 12 MARCH 2026

CERTIFICATE OF VERACITY

We, the undersigned, hereby certify that **as far as it is audible**, the foregoing is a true and correct transcript of the digitally recorded proceedings in the matter of:

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