



ENQUIRY IN TERMS OF SECTION 12(6) OF
THE NATIONAL PROSECUTING AUTHORITY
ACT 32 OF 1998
GG NO 42029 OF 9 NOVEMBER 2018



REPUBLIC OF SOUTH AFRICA

JUSTICE MOKGORO ENQUIRY

SA LAW REFORM COMMISSION
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DATE: 28/02/2019

DAY 22

PANELLISTS

- | | |
|----------------------------|-------------|
| 1. JUSTICE YVONNE MOKGORO | Chairperson |
| 2. ADV. KGOMOTSO MOROKA SC | Panellist |
| 3. MS. THENJIWE VILAKAZI | Panellist |

EVIDENCE LEADING TEAM

- | | |
|---------------------------------|---------------------------|
| 1. ADV NAZREEN BAWA SC | Evidence Leader |
| 2. ADV NDLOVUKAZI SIKHAKHANE | Assistant Evidence Leader |
| 3. ADV. NASREEN RAJAB-BUDLENDER | Assistant Evidence Leader |
| 4. ADV. ZODWA GUMEDE | Assistant Evidence Leader |

ADVOCATE MRWEBI TEAM

1. ADV. MERVYN RIP SC / Instructed by Vilakazi Tau Incorporated

ADVOCATE JIBA TEAM

1. ADV. Norman ARENDSE (SC)
2. ADV. THABANI MASUKU (SC)
3. ADV. SHAUN FERGUS
4. MR. ZOLA MAJAVU / Instructed by Majavu Incorporated

WITNESSES OF THE PANEL

Adv. Max du Plessis (SC)

Adv. Jabu Thobela-Mkhulisi / on behalf of FUL / instructed by Webber Wentzel
Attorneys

CHAired BY: JUSTICE Y MOKGORO (RETIRED CONSTITUTIONAL COURT JUDGE)
ASSISTED BY ADV. K. MOROKA SC AND MS. T VILAKAZI

JUSTICE MOKGORO: Thank you. In the absence of any questions from any of the role players we would like to thank you very much for coming forward and providing us with those views with the idea of assisting the panel okay, thank you for your willingness to do that, you
5 may stand down. Are you travelling ... okay you are not going out of town, okay but drive safely anyway, thank you ma'am, ja. Miss Bawa.

ADV. BAWA: Madam Chair I understand that Advocate Arendse is going to start and Advocate Rip is going to follow on the legal submissions.

JUSTICE MOKGORO: Yes thank you.

10 ADV. BAWA: I have prepared written argument and we have those on behalf of Advocate Mrwebi to hand up.

JUSTICE MOKGORO: Thank you. Mr Arendse we are in your hands.

ADV. ARENDSE: Thank you very much Madam Chair, honourable members of the panel. These are our closing submissions, I do not
15 intent to read through the heads of argument which you have before you I will ...(intervenes)

JUSTICE MOKGORO: We have Mrwebi's, Miss Bawa.

ADV. BAWA: I have been given Advocate Mrwebi's I have not been given Advocate ...(intervenes)

20 JUSTICE MOKGORO: We have the Mrwebi submissions before us.

ADV. RIP: There we go.

JUSTICE MOKGORO: Now we have written submissions on behalf of Advocate Jiba, you may proceed.

ADV. ARENDSE: I am not going to strictly follow those written

submissions, I am going to deal with it in a different way and hopefully speed up the submission instead of reading out some or how many pages are there, some 60 odd pages.

JUSTICE MOKGORO: It is alright I think you may, you may proceed.

5 ADV. ARENDSE: Madam Chair and honourable members, this is an unprecedented matter not because this is the first section 12 (6) enquiry of its kind, there has been such an enquiry we know about the Ginwala Enquiry into the fitness of Mr Pikoli or Advocate Pikoli to hold office, we would submit along the lines that Mr Naidoo submitted yesterday for
10 Casac that there are some very, very helpful parts of the recommendations made particularly on this panels approach to the issues at stake that this panel we would urge the panel to adopt them. Now arising from the Ginwala Enquiry Mr Simelane a previous NDPP was found to have been unlawfully appointed and he was subsequently,
15 sorry arising from the Ginwala Mr Simelane was found to have lied to the enquiry and this subsequently formed the basis of his removal in a review application brought by the DA in the Constitutional Court eventually.

It is, this matter is unprecedented because first she is the first
20 woman female and black African female to have been appointed to this position albeit in an acting position. She is the first person male or female to have been appointed at the time that she had extensive prosecutorial experience prior to her appointment and if one compares her prior experience with that of Bulelani Ngcuka, Vusi Pikoli, Menze
25 Simelane and Mr Nxasana then they had nothing like the kind of

experience she had as a prosecutor. Secondly or thirdly she is in the cases that concerns the panel and its terms of reference she is or she has been found in some of these cases to have, if we put it more neutrally, erred not as a prosecutor and not as an advocate representing
5 a client but as a client, in her capacity as a client and it is common cause in all of these cases she was represented by outside senior counsel and she would have been advised by the internal division called the Legal Affairs Division, LAD.

Notwithstanding this or it is in this capacity rather that she was the
10 subject of striking off application by the GCB on the basis that she was not a fit and proper person to be enrolled as an advocate. Now this related to four judgments, the first judgment was that by Murphy J on 23 September 2013 the Mdluli judgment, that judgment went on appeal and the judgment of the SCA was written by Brandt JA and that judgment
15 was delivered on 14 April 2014 and then there is the Gorvin J judgment in the Booysen case which was delivered on 26 February 2014 and then lastly the judgment of Navsa JA as he then was in what was called the spy tapes case and that was on 28 August 2014.

These judgments relate to as an acting National Director during
20 the period 28 December 2011 and September 2013. In the matter of the GCB vs Jiba and Others, two Judges in the Northern Gauteng High Court Legodi and Hughes Justices delivered a judgment on 14 September 2016 and found that she was not a fit and proper person and that she must be struck off the role but this judgment only related to the
25 Mdluli matter. The two Justices in the Northern Gauteng High Court did

not find that she was a fit and proper person in relation to the Booyesen matter and in relation to the spy tapes matter.

Subsequently the decision of the North Gauteng High Court of 14 September 2016 was overturned by the SCA on 10 July 2018. Now just
5 while we had the benefit of Mr du Plessis presentation when I certainly recall and I always speak subject to correction that his panel would be bound by court decisions, judgments we would submit that this panel too would be bound by the SCA judgment delivered on 10 July 2018 which clears Miss Jiba. To be fair and we all have a duty to this panel to also
10 as far as possible certainly if it is within her knowledge present the objective facts to the panel. The Deputy Judge President presiding Shongwe had and we can find the paragraph but it also left open the prospect that notwithstanding the SCA's findings Miss Jiba and presumably Mr Mrwebi could still, well in the case of Miss Jiba she could
15 still be, her conduct could still be enquired into in relation to other matters.

Paragraph 18, thank you Chair. Now what is important and it is certainly not one of those objective facts that Mr Max du Plessis mentioned to you was that as far back as 1 December 2015 in the matter
20 of the DA vs the President then and Miss Jiba and Others in the Western Cape High Court which is a matter that came before Delamo J, Miss Jiba indicated in her affidavit in that case that she was willing to abide any decision by the President to institute a section 12 (6) into her fitness to hold office. At no stage did she object to such an enquiry being
25 instituted. The basis of the objection in the FUL matter was as Justice

Bogoro and honourable members you would not be surprised to know that we argued amongst other things but the matter had already been determined by Delamo J in another court where Delamo J found that the former President had acted rationally when he said I am not going to
5 order the 12 (6) enquiry because the GCB has already taken this matter to court.

Mothle and Tshiqi the two justices, was it also Hlape, Hlape and Mothle they said no there is enough before us to indicate a failure to act as required by the constitution and the law and the President should
10 have ordered a 12 (6) enquiry so that never concerned Miss Jiba because it is always what she wanted and in fact one of the issues that we raise very tangentially is you know it is almost a case of double jeopardy she was tried in the courts and now she is being tried here but we do not take that any further. Now subsequently of course as
15 articulated by Mr du Plessis in the FUL matter, that is I think in their submissions 2018 (1) SACR 436 (NG) the court said that,

"A 12 (6) enquiry must be instituted and of course that has now happened".

Now apart from the SCA having recently found that in relation to
20 Booyesen, Mdluli and spy tapes that none of the conduct complained of in that case is warranted as striking off. We also submit that *ex facie* and the judgments and what the Judges in those cases had said nowhere do they say that Miss Jiba is or was dishonest or that she lied, the closest that came was Gorvin J with his mendacious argument, not argument but
25 observation in his judgment and we submit that that was clarified or that

is clarified here in these proceedings by the memorandum from Houdes SC who acted in that matter. The panel might recall that Ala my learned friend Katz SC he likes to make new points in reply and when he does so he invites you, he says I know it is a new point but I invite you to
5 respond.

So in this case Miss Jiba did not respond but the memo from Houdes as she makes it clear she never responded because she acted on legal advice so we submit that in none of those judgments was she found to have been dishonest or lied. Now as Miss Bawa during the
10 course of her cross-examination of Miss Jiba also mentioned that a narrative has developed around these judgments and that narrative I do not claim to articulate it exactly or accurately but it goes something like this, the NPA has been weakened by amongst others Jiba and Mrwebi. The independence of the NPA has been compromised, public trust or the
15 public perception is that public trust and confidence have been eroded.

Corruption has become rampant and is unchecked and as Mr Hofmeyer observed no one seems to be jailed, good people, this is now still part of the narrative, good people like Booysen, Dramat, McBride, Gordhan, Sibiya, a few others have been marginalised, have been
20 victimised by the NPA and Miss Jiba is caught up in this narrative as being part of this what one can only describe as a conspiracy theory. Now we know it is a matter of established law, if you have a conspiracy theory you must prove it. So Miss Jiba and others like Mr Mrwebi are now paraded as the bad guy along with Richard Mdluli, along with our
25 former President, along with our former presidents relatives with Pende

and these names are just dropped very liberally during the course of evidence.

So what we now want to proceed to do is to examine this narrative with reference to the facts and we will conclude by submitting that these
5 allegations are without any factual foundation, they are based on supposition, conjecture, inference and hearsay. In many instances they are recklessly made which in itself and I think I had an exchange with Mr Hofmeyer during cross-examination which in itself brings the NPA into disrepute so we will now attempt to unpack this narrative with reference
10 to what we hope you will accept as the objective facts to determine and ascertain whether this narrative can be sustained based on the facts and we then consider the evidence later on of amongst others role players like Breytenbach, Booysen and Hofmeyer.

In fact that is dealt with in our heads of argument, it was in the old
15 pages 21 to 48 what would have been the new pages. It is, anyway it is at the back of our heads of argument. Now it is according to this narrative it is the evidence we deal with is from page 33 to the end of our heads of argument. Now Jiba and some unnamed officials were or have allegedly been appointed to top positions in the NPA to further some
20 nefarious objectives of amongst others our former President so when they made certain decisions it is alleged that they did so in furtherance of ulterior objectives with ulterior motives.

Now at the outset certainly having regard to the judgments that form a key part of the terms of reference none of the Judges, none of the
25 judgments mention this, even allude to it at all. Miss Jiba was in the, she

was part of the Scorpions from 2001 and 2008 and one of your esteemed panellists will be very familiar with the Gampepe Enquiry that looked into the Scorpions and I think the evidence there was that they had such a high rate, high success rate, something like 90 percent so many of us citizens people were quite surprised and shocked when the Scorpions were disbanded, Advocate Moroka will know this but certainly the Gampepe Commission found that the DSA was permitted in terms of the constitution, they carried out their mandate in terms of the law and then the constitution and because they were dealing essentially with complaints about overlapping jurisdictions and the use of resources between the police and Intelligence services and I think a key issues was also the Scorpions were acting as investigators and prosecutors at the same time.

But the Gampepe Commission found that this was perfectly compliant with the constitution and it was justified but notwithstanding that, on 20 February 2009 through the SAPS Amendment Act 57 of 2008 and the NPA Amendment Act 56 of 2008 the Scorpions were dismantled, dissolved. Now it is important for this narrative for us to mention that at the time the acting President was President Botlante, he was the President for the period from 25 September 2008 to 9 May 2009. Former President Zuma became the President on 9 May 2009 and he served until 14 February 2018 so as an objective fact, unless someone can show that Miss Jiba had some extraordinary powers or influence, we have seen that I recent days you know the powers of resurrection that that will clearly be too farfetched to suggest even that Miss Jiba had

anything to do with the dismantling of the Scorpions, in fact she served in that unit with distinction.

So that all happened in 2009 and the panel will also know that she was also under suspension for quite a while in 2009 and part of 2010, she challenged her suspensions in the CCMA and in the courts and eventually there was a settlement agreement and that settlement agreement was with Advocate Mshe who is not part of this narrative and he was the acting NDP from September 2007 to December 2009. Now in terms of this settlement agreement Miss Jiba was now going to be appointed as a deputy DPP in the Pretoria regional office but she then made, and this is in her evidence, she made representation to Advocate Mshe and she then took up her position in the SCCU which was headed at the time by Advocate Breytenbach.

You will recall Miss Breytenbach's evidence, Miss Jiba came and knocked on her door one day and she said sorry there is no vacancies here so that is what happened and she worked in that unit. Important for this narrative also is to record that, so she is appointed in 2010 and prior or that before she is appointed into any position of power, of real power and influence because as we heard from Mr du Plessis part of this narrative is an abuse of power in that office. The decision to withdraw charges against Mr Zuma is taken on 6 April 2009. Now we know from the judgment which I referred to extensively in my cross-examination of Mr Hofmeyer that that decision was taken normally by Mr Mshe but Mr Hofmeyer was party to that decision, that was in 2009 and the panel will have this judgment which I referred to the judgment of Navsa ADP as he

then was which deals with the spy tapes saga and he refers to another judgment which I think is also in the Dropbox, the judgment of NDPP vs Zuma 2009 (2) SA 277 (SCA) where the litigation between the NDPP and Mr Zuma where that what is described as a long and troubled history
5 is set out in those judgments extensively.

Now we know from this judgment that I referred and that I engaged Mr Hofmeyer on that Mr Hofmeyer played a very, very critical role in one security the tapes, listening to the tapes and Miss Jiba played no role in that whatsoever. We know that as the litigation progressed
10 and the DA in the long line of litigation was also seeking to secure the tapes and the transcription of the tapes. We know that Mr Hofmeyer and then subsequently Miss Jiba formed part of what Advocate Kennedy in his memorandum that is before the panel described as a collective decision and the memorandum of Mr Kennedy also makes it clear that
15 he advised the approach which was, which then became the subject of criticism in one of the, in the spy tapes case by Navsa JA which then criticised Miss Jiba for her supine attitude.

Lacsidaisical attitude, laid back attitude and an attitude which is not warranted from one that holds such high office so this formed part of
20 the GCB's application for the striking off of Miss Jiba. Now we know on the facts before you that Miss Jiba was actually acting on legal advice, the legal advice of Advocate Kennedy. Now Miss Jiba is then appointed as the, as a deputy NDPP on 22 December 2010 and miss Breytenbach's response that he was surprised, she may have even used
25 the word shocked because notwithstanding Miss Jiba's extensive

experienced as a prosecutor she was now being, she jumped two levels.

Of course at the same time Advocate Mokhatla with no previous prosecution experience had also been appointed as a deputy. In December 2011 we have the Simelane judgment in the SCA and as a result of that Advocate Simelane goes on special leave and Miss Jiba is then appointed as the acting NDPP on 28 December 2011. Now if I may just pause at this point to deal and it is also part of the narrative is the pardon of Miss Jiba's husband Mr Nansi that is also built into this narrative. Now rightly and fairly the evidence leaders placed issues around that pardon in the Dropbox and that is at J118 and from the documents there it will become apparent that Mr Nansi had already applied for his pardon in 2009 and it is in the Dropbox.

So way before, clearly I mean, way before there could have been any suggestion or contemplation of Miss Jiba assuming an important influential position of authority in the NDPP in terms of which she would use or abuse her powers to advance some project, that application is made, it is motivated and interestingly he has, Sir Nansi has two referees, one Advocate Dumisa and Sebeza SC and also Prince Mokotedi who is the head of the NPA's integrity unit, those are his referees. Anyway the application is granted on 8 September 2010 which of course is just over two months before Miss Jiba's appointment, no more than a year before Miss Jiba's appointment as the acting NDPP. And the application you will see from

JUSTICE MOKGORO: I am so sorry let me understand the maths, pardon 2010, acting 2011, how do we get to more than a year?

ADV. ARENDSE: Ja the pardon was approved on 8 September 2011, sorry 2010, did I say 2011.

JUSTICE MOKGORO: You said 2010.

ADV. ARENDSE: Ja Miss Jiba was appointed acting NDPP on 28
5 December 2011 so more than a year before that on 8 September 2010
her husband was pardoned by President Zuma with the concurrence of
the then Minister of Justice Mr Radebe. Now just around because it is
part of this narrative that we are trying to unpack there were allegations
that Miss Jiba was on a flight on 9 September 2010 just round about the
10 time when the pardon was approved. Now there is no evidence that
Miss Jiba was on the flight, the evidence is actually that a Mr Jiba was
on the flight and in any event this was a flight that was going to go to
Durban, I think the one allegation has been conceded and falls away that
she was also allegedly spy, states spy or something like that.

15 I was not present at the time when this evidence was led so I defer
to my colleagues on the score and it was a flight to Durban where she
was allegedly on the plane with Mr Mdluli and they were going to meet
some ANC officials, not the President then but some ANC officials. Now
it is apparent from the pardon that it appears to have been signed in
20 Cape Town and there is also an exchange of letters between Mr
Labuschagne and another state official in the time in Pretoria so we
submit that any suggestion, allegation that somehow this pardon plays a
role in the appointment of Miss Jiba and what she subsequently should
be rejected on the basis of the evidence.

25 In fact at the time Advocate Simelane would still have been the

NDPP, he was the NDPP from December 2009 to December 2011. Now we move on to Miss Jiba's tenure as the acting NDPP and as I said that is from 28 December 2011 to September/October 2013. Now she inherits the withdrawal of the fraud and corruption charges against Mr Mdluli by Mr Mrwebi because the withdrawal of the charges, those charges against Mr Mdluli by Mr Mrwebi takes place on 4 December 2011, she is appointed on 28 December 2011. Now she was criticised by Justices Legodi and Hughes in the North Gauteng High Court in relation to the Mdluli matter and Mr Justice Legodi who wrote the judgment said that Miss Jiba would do anything to help Mr Mdluli and to prevent him from being prosecuted.

And amongst others he refers to a letter that Mr Mdluli wrote to the President, now he writes that letter, maybe the evidence leaders can assist, we were not able to find that letter, it is dated 3 November 2011 where Mdluli says, my chief I will do anything for you. Now that is on 3 November 2011, Miss Jiba has not been appointed as the acting NDPP, Miss Jiba the decision to withdraw the charges against Mdluli by Mr Mrwebi was done on 4 December also before her appointment and we submit that on the facts to somehow to connect Miss Jiba to this would be farfetched.

Now on 30 September 2011 the prosecutor in the Mdluli case, that is now the fraud and corruption charges, one Smith writes a letter to, a memo to Breytenbach where he makes out a case that there are prospects of a successful prosecution so he obviously is informing his line manager Mr Mrwebi of his views and this memo is also copied to

miss Breytenbach who is his immediate line manager. On 4 December Mr Mrwebi writes to Mr Mzinyathi and Miss Breytenbach and he informs them of his decision to withdraw the charges. On the same day 4 December and that is at K, is it K2011 items 3 and 4 in the Dropbox ja.
5 On 4 December Mr Mrwebi also writes to Mr Mdluli's attorneys that is at K2011 item 7 to inform them of the withdrawal of the charges.

Now this is something that Miss Jiba inherits when she assumes office as the acting NDPP, now upon finding out about the withdrawal Miss Jiba calls Mr Mrwebi and Mr Chauke for a briefing and that would
10 have been round about 24, 25 January 2012. Now at that briefing and of course we know that Mr Chauke was responsible for withdrawal of the murder charges which is not the subject of any JCB application to strike off or does not form part of the terms of reference here but in relation to the withdrawal of the charges the other charges against Mr Mdluli, Mr
15 Mrwebi informs Miss Jiba that the investigation is still continuing, that the withdrawal is a provisional one, there are certain aspects that require further investigation and that the matter would be re-enrolled in due course.

This, the reference here is the transcript at page 34 of the
20 transcript of 21 February 2011, sorry this year 2019. And so we submit there is nothing untoward Miss Jiba accepting the say so of Mr Mrwebi given the hierarchical nature of the NPA, he is the head of special projects and the prosecutor in the case Smith and Miss Breytenbach are accountable to him. Miss Jiba's understanding of Mr Mrwebi's decision
25 to withdraw but only on a provisional basis subject to further

investigation is reinforced by Mr Dramat's letter to Miss Jiba of 23 March 2012 where Mr Dramat talks about an ongoing investigation.

On 30 March 2012 Mr Mrwebi writes to Miss Breytenbach and to Mr Mzinyathi and he informs them that the decision to withdraw stands
5 and that the matter is closed. We submit that this is nothing to do with Miss Jiba. It is then only on the, in the meantime Miss Jiba had also inherited the complaint against Miss Breytenbach, that is the Imperial, that mining dispute, the Mendelow complaint the attorney that coal dispute seems to be ongoing these coal disputes. We heard the
10 evidence of Miss Breytenbach there, it involves Advocate Helens and because Helens was acting for one of the parties and so on.

So the suspension of Miss Breytenbach was recommended by HR at the end of February 2012 and in this regard we ask the panel to refer to the evidence of Miss van Rensburg who was the then CEO so it is
15 recommended by HR but the letter of suspension is signed by Miss Jiba on 23 April and delivered to Miss Breytenbach on 30 April. According to Miss van Rensburg the process, due process was followed and there was nothing untoward about the suspension of Miss Breytenbach. We also know that Miss Breytenbach challenged her suspension both in the
20 Labour Court and then subsequently, in the Labour Court she was found to be non suited because a suspension is an unfair labour practice and the LRA requires that an unfair labour practice must be adjudicated in the CCMA.

But there is some useful comment made by Justice Rapkin
25 Naicker in the Labour Court judgment it is at B4. And there Miss Rapkin

Naicker presiding said there was no evidence to support the conclusion that Miss Breytenbach's suspension and later her transfer were for ulterior purposes or had an ulterior motive so the reason why I mention this now is because there is the Breytenbach memorandum which
5 formed part of the Mdluli matter taken up by the GCB, that memorandum is dated 24 April 2012 and it has been claimed by Miss Breytenbach that she was suspended because she had written this memorandum to Miss Jiba.

So we submit that you will find that this was not the case at all, her
10 suspension related to a complaint that preceded Miss Jiba assuming office as the acting NDPP. The suspension had been recommended by the Human Resources or Human Relations Department of the NPA was presented to her by miss van Rensburg and was signed off I would submit as a matter of routine. Just to round off the issue of the
15 suspension and Miss Breytenbach's hearing the evidence of Miss van Rensburg was that everything was done according to the book, due process was followed and as far as she is concerned the hearing was a fair hearing. Of course Miss Breytenbach said her hearing was only fair because of the quality counsel that she had in the matter.

20 Of course that hearing was chaired by an independent Chairperson, I think now Judge Shelby Benengwe. FUL then launches the Mdluli matter on 15 May 2012 and we see the judgment of Murphy J being delivered on 23 September 2013. The decision was taken on appeal and that judgment of Brandt JA was delivered on 14 April 2014.
25 Then there is the GCB matter in respect of Mdluli which went before

Justices Legodi and Hughes and we now know that there was a majority decision in the SCA. So, so far I was just talking about Mdluli matter one that she inherited, she never took a decision, she has been criticised for not responding and for not taking account of the Breytenbach and
5 Ferreira memorandum.

The next matter, a matter that she also inherits is the spy tapes matter and we have already referred to the long history of that matter which is recorded in the SCA decisions. We would submit that in the light of the uncontested statement that is part of the record the statement
10 of Advocate Kennedy SC that that matter is beyond debate, Miss Jiba was not an active participant in the spy tapes decision to the extent that she was the acting head of the NDPP when it came to the DA asking for the tapes, she followed the advice of senior counsel and acted accordingly and we submit that that cannot possibly be a basis for either
15 finding that she was not fit and proper or that she somehow misconducted herself in relation to her duties as the ANDPP.

There clearly cannot be any issue of her having any ulterior motive or purpose or some nefarious agenda because the decision not to charge the President which was now being reviewed and of course we
20 know it has been successfully reviewed by the DA was a decision not taken by Miss Jiba, it was a decision taken by Advocates Mshe and Mr Willie Hofmeyer. That brings us to the Booysen matter, now the, we submit that what should put this issue beyond debate is the prosecutorial memorandum of Advocate Maema which we will find at G5.3.6. of the
25 Dropbox, let me just find it.

Now may I just mention, I am not sure whether it is actually in our written heads but the test, the test to be applied for authorisations under section 2 (1) (E) and (F) or section 2 (4) of the Poca Act, that that test is laid down in the two cases of Chao and de Vries, they are both Cape High Court cases and there the High Courts have laid down quite a low threshold and as we know from that section 2 itself that even hearsay evidence may be taken into account and with respect Legodi J in his judgment written together with Justice Hughes deal with this quite effectively in their judgment already dismissing the complaint against Miss Jiba in relation to Booysen.

Now if one looks at this memorandum it is a detailed memorandum, there is an introduction, in paragraph 2 the unlawful activities of the enterprise began to manifest themselves from May 2008 to 2011 through a pattern of racketeering activities, they killed members of the Kwamaphmulo Taxi Association which was in conflict with the Stanger Taxi Association ordinary civilians and suspects and criminal gangs suspected of ATM bombings. In some of their killings the unlawful activities were motivated by the desire to enrich themselves through state monetary awards and/or certificates for excellent performance and financial benefits.

The state has grouped the preferred predicate offences by association and/or method of operation as killings related to taxi violence. Ordinary civilians or suspects and ATM bombing suspects as described below is it is a long memorandum which I am sure the panel will have regard to and at paragraph, after paragraph 16 the accused

persons are identified, accused 1 Johan Wessel Booyesen and just while I am scrolling Madam Chair, honourable members I think it is also important to bear in mind that this matter is still before the courts, in fact it is coming before the court again on 4 October this year.

5 The analysis of the evidence is described from paragraph 17 onwards, a list of proposed charges are incorporated in the memorandum and now I do not have the two cases Chao and de Vries but I can assure the panel that what those cases say it is enough for the NDPP or in this case the acting NDPP to have a memorandum in front of
10 him or her in the kind of memorandum that you see in front of you and here Advocate Maema who was the prosecutor summarises the case, it is sufficient for the NDPP to satisfy himself or herself that there is indeed a *prima facie* case that must be answered and to issue the authorisation.

In fact maybe this response ma'am is long overdue but here is, we
15 are assisted here with the reference to the Poca racketeering policy, Mr Maema records at paragraph 33,

"It will be impossible to charge the accused individually with the offences they have committed, charging the accused together outside the ambit of Poca will result in misjoinder. The Poca prosecution will allow the joining of different participating accused which is otherwise not permissible. A Poca prosecution will enable the state to charge the accused with all offences committed through a pattern of racketeering activity distinctly and separately".

20

25 Section 2.2. of Poca,

"Allows the court to hear evidence with regard to hearsay, similar facts or previous convictions relating to offences contemplated against the accused. The placing of firearms on the crime scene is similar fact evidence".

5 Then anticipated defences at paragraph 37 section (I),

"The accused will argue self defence and rely on section 42 (9) of the Criminal Procedure Act. They will also argue that they not participants in some of the crime scenes, essentially relying on disassociation. The accused would also raise a defence of bare denial on the charge of theft, assault, possession of unlicensed firearms and ammunitions and malicious damage to property. The state will counter these defences with direct evidence, circumstantial evidence, expert evidence, real evidence, documentary evidence, some of the deceased were not suspects. Some of the deceased were shot in a supine position, they acted maliciously in a quest for personal benefits and the list is not exhaustive".

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Ma'am I am just referred, if you do not mind if you can just record the references to these cases, S. versus Chao and Others 2009.

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JUSTICE MOKGORO: S vs?

ADV. ARENDSE: Chao, C.h.a.u.

JUSTICE MOKGORO: C.h.a.u.

ADV. ARENDSE: C.h.a.o. maybe I am thinking of chow, I am from Cape Town we think about chow all the time, 2009 (2) SA 595 (C) paragraphs

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32 to 33 and paragraph and paragraph 35 and the other cases is the case of de Vries, S vs de Vries 2008 (4) SA 441 (C) paragraph 27, 28 and 33.

JUSTICE MOKGORO: How long are you going to be on that point?

5 ADV. ARENDSE: I am rounding this point off now.

JUSTICE MOKGORO: I just wanted to determine when to break for lunch.

ADV. ARENDSE: Then perhaps it is a convenient point to.

JUSTICE MOKGORO: Ja.

10 ADV. ARENDSE: So the prosecutor In the case then at the end of this lengthy memorandum he concludes and he recommends that authority be granted for the prosecution of the accused as proposed in the indictment and that certificates in terms of 3 (4) of Poca be issued and the proposed indictment is attached and it is signed by the prosecutor.

15 So just to round of there, no direct involvement by Miss Jiba at all, these are done by prosecutors and of course before that by policy investigating these charges and she has requested by the prosecuting tem to sign the authority and she signs the authorisation and we submit that absent any evidence of *mala fides* or bad faith or ulterior motive or purpose, absent

20 any such evidence that the panel will also find that the authorisation to charge General Booysen was entirely appropriate and in accordance with the law. As was found by Justices Legodi and Hughes and endorsed by the majority of the SCA subsequently.

JUSTICE MOKGORO: So that is it for now ja thank you and I think we

25 can adjourn for lunch, would it be appropriate if we take a shorter lunch,

we come back at quarter to okay thank you, we adjourn until 3:45

ENQUIRY ADJOURNS

ENQUIRY

RESUMES

FILE: 190228-081

5 **JUSTICE MOKGORO**: Sorry about that thank you. Shall we continue
Mr Arendse thank you.

ADV. ARENDSE: Thank you Madam Chair honourable members. Just
to round off on the evidence may we refer you to our heads of argument
at page 34 where we make some general comments before dealing in
10 some detail with the evidence of some of the witnesses that in our view
when you assess the conduct of Miss Jiba, we make the general
observation at paragraph 77 of our heads that in addition to the affidavits
of various persons including those of Advocate Jiba which are contained
in the Dropbox and which in terms of rule 3.3. of the rules for the conduct
15 of the enquiry would constitute evidence save where the Chairperson
decided otherwise the evidence leaders procured a number of additional
statements for the specific purposes of the enquiry not all of the
witnesses who provided statements were called to give oral evidence, in
some instances this was because the information contained in the
20 relevant statements is not contested.

In other instances this was because the witnesses refusal to give
oral evidence at the enquiry and in the latter category for the affidavits of
Mr Mxolisi Nxasana and Mr Angelo Agrizzi. The affidavits of both these
witnesses make damning allegations against Miss Jiba, neither witness
25 was however willing to give oral testimony and to be subjected to cross-

examination as contemplated by rule 3.4. Miss Jiba did deal with the material allegations made by each of these witnesses in oral testimony and we submit that those were not challenged under cross-examination and therefore stands.

5 The affidavits of Mr Nxasana and Mr Agrizzi can in those circumstances carry no weight and can in fact be disregarded by the enquiry. This is especially so in the light of Advocate Jiba's own evidence presented to the enquiry. We then go on to deal with the individual witnesses from starting with Advocate Ferreira on page 35 and
10 that runs through the bulk of her heads to page 63 and if I may just read from our conclusions. We have sought to highlight above the evidence which contained the most serious of the allegations against Advocate Jiba and to demonstrate that at its high watermark there is insufficient evidence fro the enquiry to conclude that Advocate Jiba is no longer fit
15 and proper to occupy the office of the Deputy National Director with regard to her honesty, integrity and conscientiousness.

 The institution of this enquiry as I mentioned at the outset was fuelled by the ongoing narrative in the public domain that one of the senior leaders of the NPA was not fit and proper to hold office as a result
20 of allegations of misconduct against her arising out of certain judicial criticism and that this narrative and the allegations accompanying it are damaging the image of the NPA. The rules for the conduct of the enquiry make it clear that there is no onus on any party to discharge. The report of the Ginwala Enquiry into the fitness of Advocate Vusi Pikoli to hold
25 office of November 2008 is instructive in which it assessed the evidence

and the weight to be afforded to it.

And we then repeat what is said in paragraph 1 of the Ginwala report, 41 sorry, I must emphasise that the analysis of the evidence was not done on the basis of any onus, I approach the evidence on whether
5 any aspect relevant to the terms of reference had been established or not without reference to any party bearing the onus to establish any aspect. Where the objective facts supported a particular conclusion relevant to any particular term of reference I have gone ahead to make that finding.

10 I have given due weight to the evidence of the witnesses that elected to provide oral evidence and be cross-examined in relation to a contested assertion made on affidavit by a person who had elected not to testify. I have also accepted where appropriate the uncontested evidence tendered on affidavit relevant to any findings that are made.
15 We submit Madam Chair, honourable members that the evidence placed before this enquiry is circumstantial at best. Much of the evidence is of a general and unspecified nature, that the NPA has somehow been captured, the implication presumably being that Advocate Jiba is guilty by association.

20 There has been no evidence whatsoever of any involvement by her in the abuse of power and in the furtherance of any political agenda and neither do any of the judgments containing the judicial criticisms make mention of this. While there may have been mistakes by her in her leadership or in decisions taken by her that can never be sufficient to
25 find that she is no longer fit and proper bearing in mind the protected

tenure of the Deputy National Directors without a finding of *mala fides* that impacts on the honesty and integrity on her honesty and integrity it would be unjustified to recommend that she be removed from office.

To find otherwise would with respect be a grave intrusion into
5 prosecutorial independence. In the circumstances we submit that this enquiry limited as it is to the decision of the majority of the SCA in the GCB matter should not conclude that Advocate Jiba is no longer fit and proper to hold office of the National Director. We deal with the legal framework and the test for determining unfitness at page 12 of our
10 heads, determining unfitness under a section 12 (6) enquiry we agree with both Casac and FUL in their submissions, we however would stress which, and I think at least here Mr Naidoo had accepted that in his own analysis and in coming to assist the panel to determine what framework should be followed that he had not factored in section 42 of the Act
15 which provides for prosecutorial immunity, that whatever decisions they make unless it can be demonstrated that they acted in bad faith or *mala fide* or something worse, that they were driven by ulterior motive purpose or corruption then those decisions are immune from scrutiny.

And I think everyone will agree and I will be the first to say this
20 now that clearly, and we have seen our courts on the principle of legality reviewed the prosecutorial decisions where there was evidence to show that decisions were taken irrationality or for a proper purpose or motive, so we are not arguing that that is the end of the enquiry we are saying that the panel will (1) take into account the objective facts (2) consider
25 whether there was *mala fides* or improper motive or purpose or even

corruption or fraud but (3) will take into account prosecutorial independence and prosecutorial immunity.

And we deal with that from pages 12 through to 15 and at page 16 under the subheading the appropriate test we submit that the test which
5 an enquiry under 12 (6) must determine the question of unfitness, must be fashioned against the principles of prosecutorial independence, immunity and accountability. In other words the conduct justifying the removal decision must be grave, it must be such as to undermine the very constitutional premise on which the NPA is founded. So Madam
10 Chair and honourable members we agree that at this end of the enquiry as opposed to when you are appointed as an NDPP or an acting NDPP that at this end of the enquiry the enquiry is a lot more robust and the test more stringent.

We cannot agree perhaps subject to a caveat but we cannot agree
15 with Mr du Plessis submission that even if you find that there is no reason to have her removed because she is not fit and proper even if you find that then somehow you can find on the basis of public perception that is no longer in the interest of the NPA for Miss Jiba or any other senior prosecutor to stay in the job because this raises the
20 debate which I thought we got great assistance yesterday from Mr Naidoo from Casac in relation to issues of public perception and public trust. We know that by definition a perception whether it is a private or a public perception is not always based on the facts it is fuelled by some other narrative whether it is in the media, the electronic media or the
25 print media or social media these are the things that fuel public

perception.

And similarly the public trust are also affected by what people read and hear in the public, that is in the public domain. You however as a panel sit in a unique position that all the facts, all the relevant facts have
5 been placed before you so there is no need for you to consider the public perception or the public trust save where this public perception and public trust have been informed by the correct facts and we submit that we have demonstrated to the panel with respect that this public perception which I summarised at the outset of my presentation is not
10 based on the true facts.

Just to mention that we submit that the case of Ndlameza is very different from the situation we are dealing with, there General Ndlameza was actually found guilty of lying and dishonesty and the references to that case to the extent that it may be helpful in terms of both for your
15 own reference and future reference in determining what a framework should be as to what constitute fit and proper is not however applicable in the case of Miss Jiba. For a start one of the most distinguishing factor from Ndlameza and Jiba is that the complaints against Miss Jiba is rooted in four judgments and then what we have heard in this enquiry
20 are some further or additional facts to those four judgments and that is really the framework within which, the factual framework which will guide the panel whereas in the case of Ndlameza there is a finding of mendacity, there is a finding of dishonesty and untruthfulness and that is why the two cases are different.

25 We want to be cautious in saying to the panel that because the

SCA and of course we know the matter is now on appeal to the Con
Court on 14 March we want to be cautious about saying that the SCA
has now decided and that should be the end of the matter. We think
because of the opening that was provided by the SCA that it is possible
5 that where further and additional information came out of this hearing
and obviously that information must pass the test of admissibility,
relevance, credibility and so on, if there is then it is quite possible that
the panel, well as we say for example the one with respect slam-dunk
issue, if I may use my basketball, is Advocate Kennedy saying that my
10 client Miss Jiba acted on my advice, she followed my advice, that if I
speak subject to correct to my colleagues I think that has not quite come
out in the court papers.

So equally there may be some other adverse evidence, adverse to
Miss Jiba which you would take into account but it is interesting that
15 Advocate du Plessis, Mr du Plessis placed absolutely no store on the
SCA majority judgment, he makes the submission which we all
understand that court decisions are binding certainly on the parties
involved in those matters and in his own, I know this word narrative is
getting a bad name but in his own delivery, his own presentation he
20 keeps on referring to the four judgments where there is judicial criticism
but as things stand now as I speak there is an SCA judgment which has
cleared Miss Jiba of that, of any type of misconduct and we would submit
that you would lend a, I think the highest we want to percent it is you
would give a lot of weight to the findings of the SCA in that regard and
25 where there is any deviation from it, it would only be because there is

information before you that may not have been before the courts. Madam Chair unless there is any further, any questions for further questions those are our submissions.

JUSTICE MOKGORO: Thank you Mr Arendse just one question, you
5 say Miss Jiba acted on the advice of her counsel Mr Kennedy, how different is it from the notion or the situation where an officer follows let us say unlawful instructions from a senior, how different is it, show me the difference here.

ADV. ARENDSE: I think with respect there is a difference.

10 JUSTICE MOKGORO: Ja I want you to show me the difference.

ADV. ARENDSE: Ja.

JUSTICE MOKGORO: You obviously think there is a difference ja so show me the difference.

ADV. ARENDSE: I think without trying to avoid dealing directly with the
15 question the context is clearly important, in the case of whether or not the record should be filed you Madam Chair and colleagues, honourable members and the lawyers in this room you will recall that at the time there was a big debate firstly about whether prosecution decisions are reviewable in the courts. They appeared and I speak subject to my
20 colleagues on the other side and this side, there appear to be immune from Paja review or that is certainly what it says but then the courts had established in the past, I do not know maybe 7, 8, 9 years that under the principle of legality, those decisions, the Presidents decisions any decision because it is part of the rule of law is subject so in the case of
25 Miss Jiba the legal advice at that time was well you do not have to

provide the record and these are the reasons and she accepts that advice whereas I think that a lawful instruction or an unlawful instruction whether to follow it or not to follow it I think it is in a different category, I am unable to at this stage of the day think of a practical example.

5 JUSTICE MOKGORO: Thank you.

ADV. ARENDSE: I think with respect Mr Masuku my colleague points out is an important touchstone, at the end of the day it is always going to depend on good faith or bad faith, if there is malice or if there is improper motive, improper purpose or of course corruption and fraud that
10 influence a decision I think that will also be an important deciding fact.

JUSTICE MOKGORO: In this case.

ADV. ARENDSE: And in this case also, there is no question because of course Advocate Kennedy as a colleague he himself is constrained to conduct himself according to the rules of court and he must conduct
15 himself ethically so the client in this case Miss Jiba is entitled to accept that his evidence is made in good faith and she followed that advice. Of course we also know that there are instances where she has not like in the case of Advocate Halgrain where she has not and some other advocates are employed but of course then again that is the right of the
20 client and again unless some *mala fides*, ulterior motive or whatever can be attributed to Miss Jiba she is exercising her right as a client the right to choose which doctor to employ or which Advocate to employ to do your case.

JUSTICE MOKGORO: Thank you.

25 ADV. ARENDSE: Thank you very much ma'am.

JUSTICE MOKGORO: Any questions, question.

ADV. MOROKA: Just one. You tell the panel that you accept the scenario you sketch by Mr Naidoo about the difference between the beginning and the end when you examine the question of fitness and
5 right now before you finish you make reference to the SCA judgment and you say the SCA judgment has cleared Miss Jiba and that we must take cognizance of that and then you make the point that and what I am trying to understand is the SCA was preoccupied as it were with her fitness to be admitted as an advocate so when we examine her fitness in terms of
10 section 12 (1) (C) where do you see what we are supposed to be looking at and what we are supposed to do and the difference between the two and whether there is a difference or there is no difference in that enquiry.

ADV. ARENDSE: Ja, I think that is an important distinction but with respect we say at the end of the day on a proper analysis a distinction
15 without a difference because your fitness as an advocate is predicated upon integrity and honesty, very importantly and to that extent the SCA has found that but none of the conduct complained of amounts to dishonesty and it also does not impugn her integrity as that is part of the test. Now what we have here and we have dealt with it from page 12
20 determining unfitness under the 12 (6) enquiry because additionally you have independence, you have experience and then you have conscientiousness and integrity and in addition under the Act what we would submit also qualifies the test adopted in the GCB cases is issues of independence and immunity.

25 But having said all that I am inclined just to the view that

something bad needs to be demonstrated, you were dishonest because you lied now we cannot have degrees of dishonesty either you lied or you did not lie. We, but for example where *mala fides* is demonstrated *mala fides* is demonstrated, ulterior motive is demonstrated, ulterior
5 purpose is demonstrated or here was worse an act of corruption then all of that goes to integrity and honesty and they will impact similarly whether you apply the test for the fitness of an advocate to be enrolled or to practice as an advocate or whether you practice as the head of the NPA.

10 That is why in addition the 12 (6) enquiry also talks about other categories of unfitness, misconduct, good old fashion misconduct, incapacity, you are incapable of doing the work so you are honest, you are a person of integrity but shame uniform are just not able to do the job and that would be a grounds for removing you from the office and of
15 course there is ill health so there are discreet categories and then the fitness and properness is more located on honesty and integrity and those kinds of issues.

ADV. MOROKA: So your view is you need no more to serve in the position that Miss Jiba is serving at the NPA then you need to be a
20 member of the bar, you are not saying that?

ADV. ARENDSE: Well for a start you must be admitted as an advocate, so if there is a finding in the courts that you are not fit and proper and therefore you cannot be admitted as an advocate that is the end of the enquiry but for what we are not saying because we think you have more
25 latitude and a bit more discretion because you also now have further

facts and additional facts is that there are also other issues and to that extent Mr du Plessis could be right, there is issues of public trust and, but then they must call the witnesses and they must say you know they calling a witness, I brought this case to the attention of the policy or to the NPA and you know nothing has happened and there is just a whole string of members of the public for example and that they are a public interest organisation but there was no evidence from them to show the public perception which they say exists and the public distrust and the lack of public confidence are based on these four cases and that is Mr du Plessis submission and we said those four cases subject only to what the Constitutional Court may decide have been dealt with decisively by the SCA and then an additional argument he makes is well if you can find fitness and properness but in addition if you still find that it is not a good idea to have a person there like Miss Jiba because of a lack of public confidence, public distrust you must still remove her, that may be possible but then the facts must be placed before the enquiry and those facts we submit are not there and I think we have with respect demonstrated that those facts are not there.

ADV. MOROKA: Thank you.

20 JUSTICE MOKGORO: Thank you Mr Arendse.

MS. VILAKAZI: I want to ask something.

ADV. ARENDSE: Miss Vilakazi was going to ask me a racketeering question.

JUSTICE MOKGORO: She has more questions.

25 MS. VILAKAZI: No, no, no I do not.

JUSTICE MOKGORO: No please.

MS. VILAKAZI: I do however still remember my one request to you which you, the last time we spoke about it you said you would re-come (?) more than five minutes and we left it happening, I think it relate to
5 Booyesen and the incident about the charge sheet, that part is the part that was never dealt with.

ADV. ARENDSE: Can we hand up, there is a Constitutional Court decision of, what is that guy, Savoy, I think the Savoy Constitutional Court decision explains how those charges and racketeering, the offence
10 how that works, perhaps we can make that available if it is not available yet.

ADV. ARENDSE: Okay we will make it available thank you.

JUSTICE MOKGORO: Mr Rip.

ADV. RIP: Thank you Madam Chair and honourable members of the
15 panel. We have prepared written submissions which have been made available to yourself and should be in front of you, I am going to take you through them but we are not going to read them out I am just going to stand still at certain pages and emphasise certain areas. You will see that it starts off, the first few pages just sets out the basic referral and
20 where the enquiry is supposed to be at this stage and what it is that you have to try and do and the first place I wanted to stand still for a moment is at page 4 paragraph 4, one called relevance of evidence and this touches to a certain extent on my failed *amicus curiae* application a few days ago ma'am.

25 In essence what we are submitting here is that and you can read it