JUDICIAL COMMISSION OF INQUIRY INTO CRIMINALITY, POLITICAL INTERFERENCE AND CORRUPTION IN THE CRIMINAL JUSTICE SYSTEM

HELD AT

BRIGITTE MABANDLA JUSTICE COLLEGE

23 SEPTEMBER 2026

DAY 178

PROCEEDINGS HELD ON 23 SEPTEMBER 2026

CHAIRPERSON: Good morning, Mr Chaskalson. Good morning, Mr Masuku. I could see that you wanted to exchange pleasantries. We will do that later.

ADV MASUKU: I apologise.

CHAIRPERSON: No, no, no problem. Yes, Mr Chaskalson.

ADV CHASKALSON SC: Morning, Chair. Morning, Commissioners. Chair, Mr Masuku has come up from Cape Town to the venue and would like a few minutes just to consult with his client in advance of this application. We certainly have no objection to that. I wonder if we could stand down until 10 o'clock and then if the postponement application is going to proceed then.

CHAIRPERSON: You confirm the arrangement?

ADV MASUKU: Yes, I do confirm.

CHAIRPERSON: Thank you. Let us adjourn and resume at 10 o'clock then.

HEARING ADJOURNS

HEARING RESUMES

CHAIRPERSON: Mr Masuku?

ADV MASUKU: Thank you, Chair and Commissioners, and good morning to the Evidence Leaders who have been absolutely gracious in the way they accommodated my movement from Cape Town to here and were willing to ask for a stand down of the matter until I am here. Chair and

Commissioners, there is a new variable to the application, to the reasons that we advanced application to have this matter postponed, and that variable, unfortunately, is something that we cannot do anything about.

Our client has given us a medical certificate in which he says it is not well, and I have a copy of that medical certificate, which I have given to my colleagues for their perusal. And I am fully aware of the ...[intervenes].

CHAIRPERSON: Are there copies for us, please?

ADV MASUKU: Yes, there are. There are. I am told that there are copies, yes. And this medical, while we were told yesterday night around 10, around 10, that there may be this problem, we received the medical certificate this morning. And so it does not have the – it is not covered in the replying affidavit.

CHAIRPERSON: I was trying to read the second one of those conditions, but I think I see it now.

ADV MASUKU: Okay. So that is really the first issue. We are not abandoning the basis on which the application was sought anywhere, because that may become relevant in any event going forward with this particular witness. The comprehensive application to postpone, I am sure it has been presented, with heads of argument, which hopefully the Commissioners have.

A better way to present this information is not to

read the heads of arguments, but to just really emphasise the points that we need to emphasise in order to persuade the Commission that firstly, this is not an attempt to stall or to frustrate the work of the Commission, but it is a legitimate application which is based on guaranteed constitutional rights and legitimate fears that those constitutional rights may well be undermined if the witness' evidence is flighted in his absence, as the Evidence Leaders would want to suggest that irrespective of his absence, the evidence must just be flighted.

CHAIRPERSON: Just a minute, Mr Masuku. Mr Masuku, we have read the papers which are fairly lengthy, and the papers themselves, the affidavits already contain argument and there is even reference to case law as well. I must confess I have not seen the heads of argument. I do not know how I missed those, but I have not seen those. I am not speaking for my co-commissioners. My co-commissioners as well have not seen them.

ADV MASUKU: Yes.

CHAIRPERSON: But what I want to say, Mr Masuku, is that I will give you 45 minutes to argue the postponement application without interruption.

ADV MASUKU: Thank you.

CHAIRPERSON: And then we will engage you after the 45 minutes on whatever issues we want to raise with you, and

we are not interrupting you to make sure that you do get the 45 minutes. And so, if we start now ...[intervenes].

ADV CHASKALSON SC: Chair, before Mr Masuku's clock starts running, it might help if I just state what the position of the Evidence Leaders is in the light of the medical certificate, so that we do not waste time unnecessarily.

CHAIRPERSON: Yes.

ADV CHASKALSON SC: I considered the medical certificate and I do not take issue with it. The medical certificate says, anticipates that Mr Sindane will be able to return to duty on the 28th, which is Sunday. We would accept that in the light of the medical certificate, Mr Sindane's appearance today is unnecessary, but we would ask that it be postponed to Monday, which is the 29th.

What we would want to do is to use today in his absence to fight some of the documentary evidence, so that we do not waste the day, and so that if he has not recovered by Monday, there is evidence on record which at a later stage might be capable of, will either be admitted or not. And so, I think that the focus of, I would like Mr Masuku to know what our position is, so that he can use his 45 minutes accordingly.

CHAIRPERSON: Thank you, Mr Chaskalson. Your response just to that before the clock starts running, Mr Masuku?

ADV MASUKU: No, I am grateful for the highlight here. We have already indicated that would be the focus of what you would call maybe the remedy for today's what you would ask in the event that the postponement is – well, irrespective of the outcome, you would want some evidence flighted. We will argue that it is entirely unfair for that to be done.

CHAIRPERSON: All right, all right.

ADV MASUKU: So, I will include that aspect in the argument. I will advance starting now if the Chair will ...[intervenes].

CHAIRPERSON: Ja, please. Yes, yes. Thank you.

ADV MASUKU: Before I do that, Chair, may I just say that I appear together with Ms Mpati and Mr Simelani for ...[intervenes].

CHAIRPERSON: Mpati is the first name.

ADV MASUKU: No, sorry. She is my friend. That is why it has got a little informal. Yes, so those are the people that I appear with. So, Commissioners, let me begin by acknowledging the importance of the work entrusted to this Commission because clearly failure of governance, integrity, and accountability within the criminal justice system are matters of profound public concern.

Unchecked, these failures threaten constitutional governance and ultimately could undermine the

constitutional state itself. So, the Commission's work is therefore key to restoring public confidence in the rule of law and constitutionalism. Mr Sindane recognises that sacred constitutional mandate and commends the Commissioners for the work they have undertaken.

But it is precisely for that reason that this work, it is precisely because this work of the Commission is important that the investigative and adjudicative standards governing the Commission's own process matter so greatly. An inquiry established to investigate failures of legality and constitutional governance should itself be exemplary in its respect for constitutional rights, legality, procedural fairness, dignity, privacy, and the presumption of innocence.

Its authority will rest not only on what it uncovers but on the constitutional integrity of the means by which it does so. We therefore advance this application with respect for the Commission, but also consider that it is consistent with that respect for the Commission's work that we should be confident to advance the constitutional rights of those appearing before it, such as Mr Sindane.

This place is safe because we accord to the Commission and the Commissioners the presumption of integrity, of impartiality, and independence. The investigation and adjudication qualities that are necessary for a constitutionally credible work of the Commission such

as this one. So, respectfully, the Commission should not require silence where there is either a threat to constitutional rights or irreversible constitutional prejudice. So, a principled insistence on fairness therefore strengthens rather than obstructs the work of the Commission.

The relief we seek is very narrow. Mr Sindane asks for a postponement until two events. He is well enough to attend until the urgent High Court application is heard which is set down for the 6th of October and until he is medically fit. The other way of looking at it is the Commission could tightly control the future conduct of Mr Sindane of participation in this Commission by a tightly controlled date supported by updated medical evidence, should that occur.

The Commission loses days and, with respect, that hazard is present in every investigative and adjudicated process of this nature where legitimate constitutional questions are raised and where an intervening variable out of human control, like a medical condition of a witness, arises. If the postponement is however refused, Mr Sindane may suffer irreversible prejudice that no later ruling can remedy or restore. So, let me address the medical evidence first.

As I say, this is a new variable to the application. It was not present when the application was prepared, but it

seems to strike us as the easier basis on which the Commission could accept a postponement from Mr Sindane, or at least accept an application to postpone. This objective medical evidence, over and above the factors pleaded in the founding affidavit filed in support of the postponement application, we submit is compelling for an order that the application be postponed.

We pointed out that the medical evidence is a ...[indistinct] ground, but it does not replace the case that we have made out in the entire application, and we submit it cannot, therefore, be fairly dismissed by reference to either correspondence. The immediate question that now confronts the Commission is whether Mr Sindane is presently fit to attend, consult, follow the documents, make informed, privileged decisions, and give reliable evidence, even in the model that Mr Chaskalson suggests should be adopted by the Commission towards his evidence.

The issue is whether, in his current condition, he is able to follow, even if you were to flight this evidence; he is able to follow what is going on, he is able to consult, which he is entitled to when evidence is presented against him or matters that pertain to him, to follow the documents that are being flighted, and to make informed, privileged decisions and give reliable evidence.

Even if the Commission were against us on every

constitutional submission, it would still have to decide the medical issue independently. Chronology is not medical evidence. Alleged default is not medical evidence. Suspicion about motive is not a clinical assessment of capacity. If the Commission requires clarification of the medical issues, it may direct an updated report or reasonable questions to the practitioner and fix a near return date.

What would be unsafe and unfair is to compel attendance despite the medical report, or to compel the production of any form of evidence that relates to Mr Sindane, despite this medical position that Mr Sindane finds himself in, and then to attempt to repair the consequences afterwards.

There are four propositions advanced in support of the application to postpone these proceedings today. They are raised in the application itself. The first one is the constitutional objections, which did not emerge at the last moment. They were raised on the 7th of August. They were maintained on the 15th of August. The founding affidavit placed them in the structure the Commission itself required.

The second is that the relevant trigger was the subpoena of 8 September. The Commission was notified on 14 September, six days later, that postponement would be sought. That is engagement. That is not ambush. So, no

adverse inferences should be drawn from even a delay in bringing that particular issue to the attention of the Commission.

The third, which we believe presents a formidable and credible basis on which the Commission should consider a postponement, without the model of Mr Chaskalson, is that the High Court challenge concerns the very instruments and the DPCI-derived material intended for use.

We do not ask this Commission to decide the review or pretend that the review automatically suspends its powers. So, the application in the High Court does not suspend the Commission's work. We ask this Commission to preserve the position until the court's process authoritatively determines the constitutional questions raised in that application. So, we have dealt with the medical evidence.

Now, this particular issue we are dealing with now, in our submission, creates, is more profound in terms of how the Commission should address it. Essentially, the Commission, with all the Commissioners, are now respondents in an application that directly relates to the issues that Mr Chaskalson would want to flight as evidence.

You would have seen the application; it cites the Commissioners as respondents. And so, we would ask that

the court's role in moderating proceedings of this nature be accorded its place. Irrespective of what the Commission may think or may believe on the merits of the application itself, our submission is that the Commission should defer, as far as these matters are concerned, to the processes of the court.

The suggestion that Mr Chaskalson has raised, in our submission, which is in paragraph 19 of the answering affidavit, does not cure prejudice. Publicly presenting or publicly presenting private communications provisionally is still publication ...[intervenes].

CHAIRPERSON: Sorry, did I miss your fourth point?

ADV MASUKU: So the fourth point is exactly that, the one that I am raising now.

CHAIRPERSON: Sorry.

ADV MASUKU: The opposition, paragraph 19, which is the Chaskalson model does not cure the prejudice that we contend would be prevented by a postponement of this particular application. Here is a problem. Publicly presenting private communications provisionally is still publication.

It is still publication in the context of a witness who is already an accused person, a bearer of section 35 constitutional rights in a criminal court. That information, if it is presented out of context, is presented without a

response, is presented in circumstances where the witness is not well and therefore cannot give any instructions in relation to what has been presented, or cannot immediately give responses to what has been presented, is highly prejudicial.

In other words, it would be a one-sided show and essentially it creates serious prejudice to an accused person who should be presumed innocent until a credible court process finds him guilty, or otherwise, of the crimes for which he is before the criminal court.

So this evidence Mr Chaskalson seeks to present may become a national headline before Mr Sindane is able to respond, able to give any instructions to counsel or to his lawyers, or before the legal challenge in relation to that particular information is heard. So the constitutional prejudice of presenting evidence obtained in ongoing criminal proceedings in the manner suggested by the Evidence Leaders is serious.

We suggest that the Commission should not allow a process that could potentially violate the accused's rights because even though he is not an accused appearing before this Commission, the evidence that has been obtained from the DPCI is information that is meant for use in the criminal court in which he is in fact an accused person.

So the capacity in which the Commission hears, in

the public eye – sorry, it be allowed confined to the public eye, in the public eye would present insurmountable difficulties in relation to the presumption the public must have of his innocence until he speaks.

And as you would know, the highest threshold of constitutional rights is in section 35. In those rights he can decide to keep quiet and not answer a single question, but when the information is now a subject matter of a public discourse without his response, it would have the capacity to violate the many rights that are in section 35 of the Constitution.

So the exposure to constitutional prejudice is heightened by the fact that the process of presenting the evidence has no filter today, if it is allowed. It has no filter. It is one-sided and is made public in the Commission for no other reason, we submit, other than to present undue pressure on Mr Sindane to speak in circumstances where he might essentially decide not to speak on that particular evidence for many reasons, including fear of incrimination or all those other rights.

So Mr Sindane is entitled to contest evidence, to present context, to explain whatever is presented, to engage with the evidence as it is being presented in a manner that mitigates the constitutional prejudice we contend a postponement of this proceedings would cure.

The Evidence Leaders, in a way, I think, from what Mr Chaskalson has expressed, it appears to us they are moving away from the submission that there is lack of *bona fides*, but it may well remain in relation to the main application that is there, just outside the medical issues. I understand he extends the presumption of integrity insofar as the medical claims are consent, but he may still hold the view that as far as the application itself which is concerned outside the medical issues, there is lack of *bona fides*. Let me address that issue.

The Evidence Leaders asked the Commission to treat a courtesy letter as though it were a pleading and to infer bad faith because the formal affidavit was differently structured. That inference is not justified. The 14 September letter gave advance notice. The sworn affidavit then presented the legally ...[indistinct] grounds in compliance with the in the Chairperson's directive and the Commission's directive.

A person does not act in bad faith merely because he declines to place a private, spiritual, or personal matter in a televised sworn record, and that is very important that we should not place witnesses in his position. He is a criminal accused elsewhere with guaranteed constitutional rights. He appears here in this Commission, not in that capacity, but clearly tainted by that particular position, that

status of being a criminal accused in the criminal case.

Evidence that is sought to be flighted in his absence is fished from the docket, if you might put that over, from documents that are the subject matter of that criminal case. So we submit that not likely to infer bad faith. They may be criticised for being late, for not doing what they were being asked to do, and where they have given an explanation, even that explanation may be insufficient.

We do not contend that there is a perfect model of response that Mr Sindane has presented, but we contend that the Commission should not infer from his unsatisfactory conduct, if it should find that it is unsatisfactory, should infer bad faith, that he undermined, because bad faith suggests that he undermines the Commission or has a deliberate intention to sabotage the Commission's process. And I started off by saying that he absolutely adores the Commissioners, and he thinks that this Commission will correct many things that have gone wrong in the country.

Regulation 10.6, that default position that is in Regulation 10.6, does not answer the postponement question and we say that, well, the default is acknowledged and is regretted. Really, it is not something that we can shy away from. We have got to be forthright about it, but the affidavits explain why the statement was not filed

...[intervenes].

ADV BALOYI SC: Sorry to interrupt you. When you say the default is accepted, can you just explain what you mean, just so that I do not miss it?

ADV MASUKU: The default of failure to file the statement.

ADV BALOYI SC: Thank you.

ADV MASUKU: So we say that the affidavit explains why this statement that was directed by this Commission has not been filed. And we submit that one of the reasons, amongst many, is that there are unresolved objections concerning the evidential basis. There is a concern about private electronic material, self-incrimination and the case to be met. Those are serious issues that bear heavily on the constitutional rights of a witness appearing in the Commission.

The Commission may disagree with those objections and they would be perfectly within credible engagement or even a decision to disagree with the explanation given. Their consistent assertion cannot fairly be transformed into proof that they were invented. In other words, we ask that you do not infer bad faith even though, even if you were to disagree with those reasons.

Now let me deal with the pending case and the preservation that we seek. Firstly, we accept the principles of *Kalend* [?] and *Oudekraal*. The court application creates

no automatic suspension of this Commission's work, but that is not the question. The question is whether this Commission should exercise its discretion to avoid an irreversible step before a court considers urgent relief aimed at that very step.

It is a trite and uncontroversial proposition of constitutional importance that even this Commission is enjoined to respect and protect the court processes that has implications on its functioning. And we would submit that it would be a reasonable exercise of this Commission's discretion to postpone the application so as to give the court the opportunity to deal with the contentious constitutional questions that are raised in that application.

It is even more important precisely because in the court proceedings where the Commission is a respondent, the Commission may well oppose the application itself. And if the Commission does oppose, which we expect that it will, then of course the Commission must defer to that forum, which is a constitutionally credible forum, to adjudicate what is now a dispute involving the constitutional rights of Mr Sindane.

We have made issues about the Chief Justice section 47 of the Superior Court Act's consent that has been given to cite Justice Madlanga as a respondent. To my embarrassment, I would not want you to be a respondent,

but here we go. The Chief Justice's consent does not decide the case, and we do not suggest that it does. What we make, and also we do not present it as a judgment on whether the application is credible or not.

It is simply a procedural ruling that has been made by the Chief Justice that a Judge who sits as a Chairperson of the Commission can be cited for purposes of a litigant who wishes to pursue a constitutional right. So we do not suggest that the Chief Justice's consent confirms a *prima facie* case sufficient to permit proceedings against the Chairperson. The proceedings may well be regarded as having absolutely no merit at all, but that is for the court that hears the application that must decide that.

So the constitutionally conscious response is to preserve the position for the short period until the 6th of October, when the matter is heard in court, not to make the court hearing practically academic by broadcasting the material first. But more than that, it is really to give constitutional reverence to judicial institutions where a constitutional right has been raised with it.

Bearing in mind that the same attributes that this Commission enjoys, the credibility of being independent and impartial is accorded to the court as they are accorded to the Commissioners before us. So what we submit is that you stand in your own rights as officers of the court,

respectful of the court, as a custodian of an independent and fair adjudicative process.

That process cannot be usefully engaged in circumstances where this Commission decides that a postponement will not be granted, but what will be granted is the right of the Evidence Leaders to flag the very issues, the very evidence, or the very material that ultimately would become the subject matter of the contention.

So the suggestion that documents can be placed provisionally on record understates the reality of a public Commission and the publicity that this public Commission has, and the purpose for which publicity serves. Because publicity does not serve only as what we call, really the publicity serves as a conscience of the community. As the community watches this Commission, they engage with the issues that you engage with.

And you have no idea, some of us even in church, we raise the issues that you contend with, the issues that you wrestle with here, we raise them even as we preach in church and they become sermons in churches, they become political speeches in rallies, especially now that we are going to elections. They become in beer halls, people in half-drunk measures and sober ones, they all discuss what you are all discussing here.

So the intensity of publicity that this Commission

enjoys, right as that is, correct and appropriate as that is, must be balanced from the model of prejudice that a one-sided show, that Mr Chaskalson suggests, should be accepted because that has direct implications for the presumption of Mr Sindane's rights to be presumed innocent.

So if this information is flighted before the court speaks, it would be one day Mr Sindane walks into his favourite place, the church, and they stop asking him to pray on that day because evidence has been flighted here that suggests that he may be a criminal. Not he is, but he may be a criminal.

That tag, that label, even that suspicion is undesirable and this Commission should not be asked to be to be a purveyor of that public perception, of that public dialogue against a witness whom it must treat impartially, fairly, and independently.

So evidence may be broadcast live, extracted into headlines, and repeated online. The evidential qualification may disappear. The accusations remain. So even if you were to come later on and try and bring context, try and explain, the ongoing public debate that this Commission has triggered with its rigorous engagement with witnesses is already ongoing.

So he has to push back much harder than he would

push back if he was doing it live, in the process, engaged in the game, as we would put it, putting context to the evidence that would be flighted. So a letter of objection cannot un-broadcast private communications or restore the presumption of innocence in the public bind. We submit that that should be avoided.

It is a matter of public record. Mr Sindane faces a criminal trial that has not begun in earnest. So the Commission is not to that trial. It should not become a parallel forum in which untested material creates a public appearance of guilt before a criminal court has determined anything, or before this application that this interlocutory sort of application that has been brought for the 6th of October finally determines where matters should lie.

Respectfully, Commissioners, Chairperson and Commissioners, this is not a request for secrecy. It is not a request for immunity. It is a request that openness operate upon a fair and a balanced, impartial and independent basis. So here is a decisive balance that we submit the Commission must take.

On the Commission's side, as pointed out by the model that Mr Chaskalson seeks to advance for the continuous of the flighting of the evidence, so on the Commission's side is a short delay or a manageable scheduling inconvenience. It is really that. When we say

short, in the scheme of things, no one really predicts how far short becomes really short.

I accept that there may be intervening variables in the course of trying to shorten these interlocutory applications that have come up, but we can competently submit now that the idea is not to undermine by undue delay the work of the Commission. That is not in the interest of our client. Certainly, speaking as Counsel, working in the in the ...[indistinct], it would be responsible for us to try and stifle the work that this Commission does,, and that is something that I think is important to consider too.

On Mr Sindane's side is compelled participation, even if this evidence is flighted in his absence. Firstly, despite the medical evidence. So if this evidence today is flighted without him present, it means where he is right now in bed nursing himself, even if he were to be minded to watch on TV, to watch on YouTube, which is where I generally watch you guys, and any other forum that this Commission is flighted, even if he were to be minded to do that, he is in no position to influence how the evidence is presented.

There is no filter for him that balances the flighting of the evidence against his constitutional rights. So there is also the risk of unreliable testimony being flighted. There is a permanent public disclosure of that evidence, even

though the suggestion is that it is provisional. There is a real risk of reputational and dignity harm that would arise. There is a possible impairment of effective court relief, which is even more serious, and an appearance of guilt before the criminal trial even starts.

So the Commission can hear the evidence later when he is fit to follow the process of the Commission and to give the Commission the full attention that he is enjoined to give it, and to respond to the Commission's requirements and the urgent proceedings have been addressed. So the Commission can hear the evidence later when he is fit, and the urgent proceedings have been addressed. It cannot undo an unsafe appearance.

So today, if you appeared, you would be wearing maybe a – ja, you would basically be unable to speak. That would be an unsafe appearance. Or un-broadcast evidence later, evidence that is already been broadcast. You would be unable to un-broadcast it. That asymmetry we submit decides this application. Thank you.

CHAIRPERSON: Please continue.

ADV MASUKU: Thank you. So the postponement does not diminish the Commission. It does not weaken the programme of the Commission. If the application to postpone is granted, it simply demonstrates that the Commission as a body investigating failures of

constitutional governance is itself prepared to model constitutional restraint.

It protects the Commission's record. It also protects the High Court's process, and we say fundamentally holds the balance that is needed to protect Mr Sindane's rights. So we ask that the appearance of Mr Sindane be postponed until that urgent hearing on the 6th of October 2026, or until Mr Sindane is medically fit with an updated report, and perhaps in between a case management meeting if required.

We ask for an order that no specific, no Sindane-specific evidence derived from the disputed DPCI docket or cell phone material be publicly presented in the interim. That all rights be preserved. I am not sure about cost, but if there are any costs, of course, that should be a non-issue.

ADV KHUMALO SC: You are tendering.

ADV MASUKU: Ja. So there are many questions I had in mind that the Commission could ask. One of them, which is that the medical ground comes in at a late stage. We cannot predict how a medical condition evolves or comes up. It could come as I sit here, and there is nothing we can do. Those are live issues. And so we would ask that you look at this issue as a present fitness or present unfitness to be here.

And then, of course, the medical issue shifts the ground significantly in favour of postponement. Another question you would have asked is why the High Court application was not filed earlier, which is an important question that could be asked.

Chairperson and Commissioners, you know, when you are going to bring an application against a universally credible and universally enjoyed Commission of Inquiry, you have to watch what you say. You have to go into the recesses of your own abilities of thought and caution and ensure that when you bring into court process a universally credible, a, I would say, universally enjoyed. I mean, if you had run for presidency today, I think you would win the elections as a Commission.

CHAIRPERSON: Forget it.

ADV MASUKU: No, but I am just pointing out that I am trying to explain why it would be responsible to really go into your own sense of integrity as a practitioner to say, do we really want to do this? Should we really do this? Is it really a necessary step to protect what are rights that we see them as rights that he is entitled to have?

So, we would say, accept that there is possibly an unsatisfactory explanation to it, but the matter is a complex matter. As you engage with the contentions raised in that particular application, it might well be that it is so complex

that the Commission may decide we are not opposing this thing or we concede on the relief that is sought. But more importantly, the postponement urgency was triggered by the subpoena of the 8th of September and the notice followed within six days of that subpoena.

And of course, the question may be asked, does the review suspend the subpoena? We have answered that question. The answer is no, it does not suspend the subpoena. What we request is a discretionary preservation measure, not a claim of automatic suspension.

And of course, the other question you may ask is, but why do you not raise questions and object question to question? In the circumstances, it is impossible. The model that Mr Chaskalson seeks would not present us with that opportunity to ask a question by question based on the evidence that is presented.

But we also submit that because the challenge concerns acquisition and public deployment of the source material itself, it is important that the preservation order that we seek be granted. By the time a question is asked in future, private material, prejudicial material, perhaps even incorrect material would have enjoyed extensive public exposure.

I suspect without any just hunch that my learned friend, Mr Chaskalson, would say, well, we are placing

these documents provisionally on record, but the elephant in the room, as they would say, is that there is no provisional placing of documents that are flighted publicly. Once they are in the public domain, they are permanently in the public domain because broadcast and media repetition are not provisional in effect.

A later ruling, even to the benefit of Mr Sindane, cannot erase disclosure or reverse a public appearance of guilt. I have addressed the question of whether this would obstruct the Commission. I have said that it does not, because the Commission can continue with unrelated work and retain every power to question Mr Sindane after the processes that we seek to engage in.

So the practical alternative that we suggest could preserve the – could present a balance, as a balance of the Commission going ahead with this work in terms of this programme and the Evidence Leaders being able to present the evidence and our client or the witness being able to engage with that evidence, is to postpone to a date after the 6th of October and maybe to hold a prompt case management meeting and preserve only the disputed Mr Sindane specific material in the interim.

So I would ask that even the model that Mr Chaskalson seeks to encourage or to submit to the Commission as a viable procedure or option be denied, as

we submit it would not be in the interest of justice to do it that way. Those are our submissions, but can I just perhaps – thank you for your indulgence, Chair and Commissioners. I think the first issue that should swing the Commission's discretion ...[intervenes].

CHAIRPERSON: You should do that within two minutes.

ADV MASUKU: Yes, thank you. So what should swing the Commission's discretion in favour of granting a postponement is also the fact that there is clear evidence from the Commission's side that Mr Sindane has not been implicated. So in a way, what we submit is that there is no urgency in absolutely getting this evidence here in the format that Mr Chaskalson suggested should be presented. Because it is one if there had been evidence in the past by some other witness that the Commission would be anxious to have, as they put it, to have the dots connected together.

In this case you are told by the Commission itself that no one has implicated him in any wrongdoing and, therefore, we submit that in that light, Mr Sindane enjoys a credibility that would be destroyed today if the evidence is flighted in his absence, as we have submitted.

And then there is a suggestion that, or an allegation that Mr Sindane's reliance on his spiritual seclusion is being abandoned. That is not correct. Spiritual seclusion is very important for many people and

we should not force or coerce individuals who are seeking spiritual enlightenment through spiritual seclusion. The fact that he decided not to disclose his personal, private secret matters, the nature of which that spiritual exclusion, that the nature of which is entirely private really, should not attract adverse inference.

It simply means that the Commission should accept that when he says he is a spiritual seclusion, that is a sufficient basis on which to accept that, well, there you go, ...[indistinct] sangoma, that is fine, we will respect that. Then the last one really relates to the WhatsApp chats. We would have no idea of how to deal with those sitting here, even if they were flighted. We would have no idea, no context, we have no chronology, we have nothing. So a WhatsApp message can be flighted here that says I want to kill that man.

CHAIRPERSON: Your time is up, Mr Masuku.

ADV MASUKU: Those are the submissions, Chair. Thank you.

CHAIRPERSON: Thank you. Can you just clarify your reference to the 6th of October? What I know from what is before us is that the urgent application is set down for that date, am I mistaken?

ADV MASUKU: Yes.

CHAIRPERSON: Ja, but for purposes of what is to go on

when before us, I just want to understand your reference to the 6th of October.

ADV MASUKU: Sorry, what precedes before the 6th of October?

CHAIRPERSON: You referred to the 6th of October. Can you just clarify the point you were making about the 6th of October?

ADV MASUKU: Yes. So what I was suggesting as a remedy from the Commission's side is that after the 6th of October, when everything is crystallised in that application, then the Commission can direct that a case management meeting be held. It can issue further directives that relate to Mr Sindane, and then we can take it from there and ...[intervenes].

CHAIRPERSON: Basically the point is the High Court will have determined the urgent one way or the other ...[intervenes].

ADV MASUKU: One way or the other, yes.

CHAIRPERSON: Then after the 6th, we know better what to do or what not to do.

ADV MASUKU: Yes, that is correct.

CHAIRPERSON: All right, I get it. On the very last point you made, spiritual seclusion, which in correspondence was the ground for postponement that was raised specifically on behalf of Mr Sindane, which you say is not abandoned and

that is so contrary to what the affidavit of the Evidence Leader says. The difficulty I have with that submission is that I have not seen, if I missed it you will direct me to the relevant part, I have not seen any reliance in the affidavit supporting the application for a postponement, reliance on the need for Mr Sindane's spiritual seclusion. That is the difficulty.

In the letter it is detailed and so on, and once one heard that there was going to be a postponement application, in my mind it was uppermost that there was a ground that was going to be raised specifically in the postponement application, and it is simply not there, if I am correct in my reading of the papers. So on what basis can you say it is not abandoned?

ADV MASUKU: Well, Chair and Commissioners, it has not been withdrawn. It is detailed, as you say, in the letter, but because it is a matter that we would rather not have anybody digging a little more on it, we would rather not present it as a strong basis for a postponement. I think we have got other stronger grounds for postponement than this ...[intervenes].

CHAIRPERSON: When you say stronger, it is as if it is there, but not argued with as much vigour as Mr Sindane might otherwise have wanted to. So it is not there at all. So you cannot even talk stronger or weaker, it is not there.

I do know, no, no, no, if Ms Qofa is pointing you to where there is mention, there is definitely mention of it, passing mention of it, and it is not mentioned as a ground for the postponement. I am quite aware of that ...[intervenes].

ADV MASUKU: No ...[intervenes].

CHAIRPERSON: Because I hope I read the founding ...[intervenes].

ADV MASUKU: No, you did read it correctly.

CHAIRPERSON: Yes.

ADV MASUKU: But what I am submitting, Chair, is that often in these applications you want to emphasise what you would regard as more compelling grounds, but the matter of spiritual seclusion is dealt with in the reply. It is a reply to the ...[intervenes].

CHAIRPERSON: Which you and I know you cannot do in an application ...[intervenes].

ADV MASUKU: No, I think ...[intervenes].

CHAIRPERSON: You make your case in your founding papers, not in reply.

ADV MASUKU: No, Chair, I think the commission proceedings stand in a little bit of a different footing than your court process. I have a feeling that as a Commission you can admit inadmissible hearsay evidence, you can hear – not admit, sorry. You can hear certain types of unsatisfactory evidence, you really wanted to say masters,

but then that is – you are the authors of your own process.

But in the reply, what I am trying to suggest is that it is there in the letter the Commission has sent. We cannot ask the Commission not to see it, to unsee it, because it is not in the affidavit.

CHAIRPERSON: You see, what would have happened, I think, is that if the answering affidavit had not said what it says about spiritual seclusion, there would have been nothing at all in Ms Sindane's affidavits about it. Now there is something in Ms Sindane's affidavits about it because the Evidence Leaders have raised what they raise about spiritual seclusion.

So we now have it perchance, but I know your point is perchance or however else, it is there in front of us. But I guess the short point I am making is that even if we are to take cognisance of it, I doubt that we can take it seriously. Not because I do not consider spiritual seclusion to be a serious subject which should be accorded the necessary respect, not at all, but on the basis that for purposes of this application, this postponement application, Mr Sindane himself did not consider it important enough to have it in the founding affidavit.

ADV MASUKU: I suppose what I am submitting, Chair, is that once Mr Sindane engages lawyers to advise him on how to present the best foot forward, so far as the

application to postpone is concerned, there are matters that can be emphasised, there are matters that can be de-emphasised.

And the effect of the matter I accept entirely that in the founding affidavit should have featured if it indeed was the only reason for a postponement, but it is one amongst others. And what he has chosen to do in the founding affidavit is to, essentially to raise those questions that would not intrigue the public insofar as spirituality and spiritual exclusion is concerned.

So we would rather not have eNCA or any media house digging around a mountain looking for Mr Sindane to see exactly who he is dancing with and how he is doing it or which pot he is pocking and that kind of thing. So it is really not because I want that to be in the forefront of the Commission itself, but I think we have made submissions that the Commission can consider in the ...[intervenes].

CHAIRPERSON: All right, all right. Let me move on to what I consider to be a more substantive issue and which presents me with serious difficulty, and that is Mr Sindane did not think about the constitutional issues in particular close to or on the 20th of September 2026 when he brought this postponement application.

He thought of them as far back as the 7th of August when he wrote to the Commission's attorneys raising these

constitutional issues, and that was not the end. He raised them again on the 15th of August. So he has known about these constitutional issues for quite some time now.

And to add to this, the approach to the Chief Justice for the section 47 consent was on the 18th of August. The Chief Justice responded to that within a very short space of time, only seven days. She responded on the 25 August, granting the consent. And in the request for the consent, the substance or the ...[indistinct] of what Mr Sindane said he wanted to raise were exactly these constitutional issues.

Now, it is close to a month now after the Chief Justice, it is just under a month from the time that the Chief Justice granted consent that I may be cited in the High Court application, but Mr Sindane has been sitting, doing nothing, not coming to seek the postponement that he now seeks on the basis that there is to be the High Court application.

Even that High Court application, not talking just about the postponement application, even that High Court application itself was launched when? Yes, on the 20th of September. Only three days ago, after consent was granted on the 25th of August. So how can we be expected to grant a postponement when Mr Sindane himself never took the issue of the postponement seriously?

Subject to what you say, of course, but from where I am sitting, it does not look like he took it seriously. If he did, he would have moved as soon as he knew that he wanted to go to the High Court. And indeed he would have moved with expedition, even in bringing the High Court application. So why must we postpone now, at the last hour as it were?

ADV MASUKU: Chairperson and Commissioners, I did say that I am not bringing to you a model of perfection insofar as the expedition aspects are concerned. I am not going to defend the fact that the matter was brought urgently, or that Mr Sindane acted as expeditiously in one way or another. You can criticise him for that.

But there are explanations that are given in the affidavits relating to what exactly triggered him to consider bringing this application as he has done, one of which is the subpoena of the 7th of September. Ja, the subpoena of the 7th of September. And even that must not be understood to suggest that that is a good explanation worth the Commission's – I mean, the Commission is correct to criticise Mr Sindane for not being meticulous in how he has brought the application.

I am not suggesting by any stretch that there is an explanation for it. All I am saying is now we are here, and these are the issues he has raised. Should the

Commission, in its discretion, close its eyes towards that? Critical as it may be of the fact that he has presented an unsatisfactory model of acting expeditiously, and I do not even want to suggest that I can present a spirited defence of what you are putting to me and I am sure that my learned friend is going to emphasise that aspect too. But as I say, what the Commission has faced is what is present before it ...[intervenes].

CHAIRPERSON: We – no, continue, continue.

ADV MASUKU: Ja, what is presently before it.

CHAIRPERSON: Yes, yes.

ADV MASUKU: And the reality that is there at the moment, irrespective of the imperfections of events preceding them, and we suggest that you can criticise it. You can say that Mr Sindane did not act expeditiously, and he should have. And you can even go as far as saying it gives the impression that he does not want to cooperate with the Commission, but that is the reality of the panel, of the Commission now, is that there are certain objective facts that are before it.

I mean, objective procedural steps that have been activated. So historical imperfections are there, and we cannot wish them away. In your reasoning of how you deal with the postponement application, you should engage with them. And as I say, there is an explanation for why he has

acted as he does, as he has, and that explanation may well be unsatisfactory from how you have pitched the question to me.

And let me say, as counsellor, I must accept that it could have been done better. It could have been done with expedition, but what I am asking the Commission is to consider present reality and ask itself, can we be fair and credible if we are to overlook what is before us now, on the basis of this imperfect record of Mr Sindane's past response to the requirements of the Commission? Trying to spiritedly defend myself on that is sinking myself into a deep hole. I do not like doing that.

CHAIRPERSON: You say we must look at the here and now, the present, and not so much on what happened historically. I think you will accept that the fact that the Commission's attorneys wrote to Mr Sindane's attorneys on the 16th of September, suggesting to them that Mr Sindane must apply for a postponement which should be filed not later than the 18th of September, I am sure that you will accept that that is the here and now and the present and not past, past history.

But Mr Sindane still did not do that. I mean, the Commission's attorneys had no obligation to even suggest to Mr Sindane that he must apply for a postponement. That is something he ought to have done of his own accord, but

he still did not, and that adds to what I refer to as a serious difficulty that I have.

ADV MASUKU: No, I understand that, Chair. So, Ms Qofa says that it was a two-day delay, and it is not as justification. It is an explanation.

CHAIRPERSON: It is not a two-day delay. From the 16th to the time that the application was eventually filed, it is not a two-day delay.

ADV MASUKU: No, actually, let me try and get the precise dates and all that. Chair, I think you have an incisive appreciation of this issue. Often, as a judge, you would have been confronted with similar circumstances, and you would have been able to deal with them. All I am asking is that you do not ask us to clean up the mess by sinking ourselves even further.

I think my acceptance of the imperfections should count as a responsible response to the questions that are raised. I said right from the beginning, it is an imperfect record, but a number of other submissions have made that this is not a lack of *bona fides*. Some of it, Chair, is really just being overwhelmed by things.

You know, you are frozen in time because now you have got to appear before this Commission and you now have a spiritual catharsis. You know, there is a moment of something that just – so I am not even trying to explain

what I am trying to explain, but I am only saying, accept that the best foot I can put on this aspect is to concede that I have not presented to you a perfect record that explains blow-by-blow what should have happened. What I am appealing to is your discretionary power and your sense of what the interest of justice would be, even in this imperfect record that you have, and that is what Sindane would be asking.

And to make the remarks that would effectively guide not just Mr Sindane, every other witness who comes before the Commission and has a similar engagement with the Commission, on the importance of timely responses to the Commission's directives and if you say you are going to do something on a particular day, do it. If you are not able to, communicate. And I am not suggesting that that is what happened.

And so, yes, this is an imperfect record. But what I am appealing to is more powerful and more mightier than the imperfect record, which is your power to determine what is just and equitable in the circumstances of what is presently before you.

CHAIRPERSON: With the exception or exclusion of you and Mr Simelane, I think the legal team remains by and large the same as that representing Mr Sibanyoni. I wonder if what was happening here is not a case of Mr Sindane,

like Mr Sibanyoni, having accepted that he too will just let the Commission run its process, and that the postponement application was a last minute thought. Is that not what possibly happened here? Because as you concede, it is difficult to explain what has been happening on any logical basis.

ADV MASUKU: No, Chair. I think what would be fair is to engage with the constitutional issues as framed, and to see whether they are frivolous constitutional questions that are raised.

CHAIRPERSON: No, I am raising this because the two of them were raising those same constitutional issues ...[intervenes].

ADV MASUKU: No, no ...[intervenes].

CHAIRPERSON: Even when consent was sought from the Chief Justice, it was sought for or on behalf of both of them.

ADV MASUKU: No, no, that is correct. So I do not think I can take the matters further than I have. I think, Chair, you are correct. But the postponement application is not a strategy. He is not here because he is sick, but he has also genuinely put an application in the High Court. He has got a case number.

He has taken steps to ensure that you are properly cited as the Chair of the Commission, and all the Commissioners. He has raised a relief that he seeks

against the Commission. It is going to be heard by a Judge. If in the event of this ongoing process it turns out that this was a ruse, then I would be horrified, because when I got engaged, it did not come across to me like a ruse to try and, you know, tell in grand, which maybe I will not say what I was going to say, but it is that style of litigation that seeks to undermine or that keeps throwing in interlocutory applications in order to stifle. The issues raised in the application are legitimate.

They will engage a Judge. Whether Mr Sindane loses or wins, ultimately, they will not be dismissed as frivolous or silly attempts to avoid being here. And quite frankly, when I had the opportunity to speak to Mr Sindane, he said if everything else fails, we will appear before the Commission. So I would like to believe that he can stand on his word, especially when he is encouraged to do so by the lawyers he has engaged for this difficult application. Ja.

CHAIRPERSON: Just one last question on the issue of the timing. I will have another question, and I hope that one will be my very last question. On the timing, it was I who suggested that a substantive application should be brought. That did not come from Mr Sindane. I think it was right at the tail end after we were done with Mr Sibanyoni's testimony. Then I said, what happens on Wednesday? And

it became clear that we were not going to go ahead.

And it was then I, I just hope and pray that the transcript will bear me out on this, but Ms Qofa can correct me if I am wrong. It was I who then said, bring a substantive application. So to me, this adds to Mr Sindane's lack of action, or Mr Sindane's inaction with regards to seeking a postponement application timeously.

Why should it be this Commission that suggests on the 11th hour, as it were, that a substantive postponement application should be brought? You know, when you add all of these, the cumulative effect is, should we really grant this postponement application?

ADV MASUKU: Yes, Chair, I appreciate the dilemma, but I want to submit that, and to also, from what Ms Qofa said, has whispered in my ear, you are correct that you directed that a substantive application be brought. And part of that is, I mean, it is important that the Commission gives directives of the nature that you are giving on a regular basis, because that is the only way you are going to get things done.

And we should not read into the fact that the Commission ended up doing that as a sign that the person who was being directed to do that lacks the *bona fides*, even with an imperfect record. But sometimes you have to use subpoena powers, you have to use cohesive powers to

get people to come here and to answer questions. So I submit that the fact that you had to do that, yes, that is part of how you regulate the processes here, and how the public will learn about how this process of the Commission should be engaged. It does not extricate Mr Sindane's imperfect record, no, and I will not try to do that.

But what I am trying to do is to move your thinking, Chair, perhaps the Commissioners too, away from an overemphasis on the faults of Mr Sindane, fault as they are, but on what is before us now as an interest of justice balancing effect. If there was a court order, I would immediately concede that perhaps a court order is a sign of displeasure, or do something to show your displeasure on that aspect.

I mean, it is a Commission of Inquiry and part of what we are trying to learn is to be candid where we have gone wrong and where we have not been tidy in how we engage with the Commission. So as counsel, I can only apologise for that imperfect record, but ask strongly that the Commission exercise its discretion in the manner in which I have suggested in my address originally.

CHAIRPERSON: Lastly, I heard your argument on the prejudice that Mr Sindane will suffer if the chats are flighted in his absence. I listened to every word carefully, but I just want to make sure that I understand why it is. Because you

basically say, amongst others, because the explanation was quite lengthy, but amongst others you say, once these are flighted, they are out there, they cannot be reversed, and to an extent they may even suggest criminality on the part of Mr Sindane, and that too cannot be reversed.

Why is it that when Mr Sindane takes the stand, he is or will not be in a position to clarify what the true position is, and therefore disabuse the minds of those who may already have had a particular impression about him? Why is it that that cannot be done? Bear in mind that the Commission is operating under very strict timelines, but of course strict timelines can never mean that Mr Sindane should be treated unfairly.

That I do realise. But if the chats can be flighted, and if Mr Sindane can come back here, give us the true factual position, give the context that you say these will be flighted in the absence of, and do all of the other things that you say are necessary, why is it that what prejudice he may initially have suffered can be undone so far as that is humanly possible?

ADV MASUKU: Chair and Commissioners, I think it is an important question, and the best answer I can give is that Mr Sindane should not have to be placed in a position of undoing any prejudice. In other words, he should not be placed in a situation where he is undoing stuff that is

already in rotation and that is already being recycled. He should not have to be presented with that because the Commission has got a discretion of fashioning a procedure that allows a real-time presentation of evidence in which that potential prejudice is avoided, where he has to try and undo in the hearts and the minds of people things that have already been said in public, which may not be believed.

And I am not suggesting that he would be unable to do that. No, that is not the question. The question is that I do not think that the Commission should become that platform in terms of which there is already negative publicity around him, and what he needs to do is to come and undo that which has been done by the Commission.

Because the Commission has got a discretion to fashion a procedural remedy to his dilemma that could avoid that situation and that, we submit, the procedure we are asking for would be a fair one because it does not have to put him under that pressure that the Chair suggests it should be brought. Sorry, Chair, can I?

So, in a way, what I am submitting really is that the Commission, of the options that it has in terms of how to regulate the further conduct of this matter, we would submit the one that sits comfortably with constitutional rights is the one where Mr Sindane does not have to undo anything but can sit, hear the evidence being flighted, and in real time,

offer a rebuttal or a confirmation or whatever else that he would be enjoined to do.

A procedure in terms of which a one-sided show, the Chair would be inimical, basically, to your whole identity and your whole judicial philosophy, flighting evidence in a one-sided show to a person who, in fact, faces a criminal prosecution. That would be dangerous for even his presumption of innocence.

CHAIRPERSON: Of course, I put the question to you assuming the prejudice because that is how your argument was framed.

ADV MASUKU: Yes.

CHAIRPERSON: At this stage, it is not necessarily that I accept that there will be prejudice.

ADV MASUKU: Yes.

CHAIRPERSON: I do not even know what submissions Mr Chaskalson will present in that regard. Thank you, Mr Masuku.

ADV MASUKU: I understand, Chair.

ADV BALOYI SC: Mr Masuku, maybe to your last conversation with the Chairperson is a good place to start. We have before us a medical certificate. Is that the explanation for Mr Sindane not being here? Because I am not sure. A letter was sent which said he is in seclusion and the impression that I got from that letter was he would

not appear today, because that is what the letter says. He will not be appearing today because he is in seclusion and he cannot be disturbed. Now you give us a medical certificate. What is the basis for him not being here today? And I ask that for my own clarification.

ADV MASUKU: Commissioner Baloyi, I did not give you a medical certificate. He did.

ADV BALOYI SC: We received a medical certificate.

ADV MASUKU: Yes.

ADV BALOYI SC: I thought you would understand that is what I am saying ...[intervenes].

ADV MASUKU: Yes, no, I understand that you are saying ...[intervenes].

ADV BALOYI SC: His team has given us a medical certificate that bears his name from his doctor ...[intervenes].

ADV MASUKU: No, but that is his medical certificate.

ADV BALOYI SC: Yes.

ADV MASUKU: He is the one who went to the doctor and was examined by the doctor.

ADV BALOYI SC: Mr Masuku, I did not expect there would be controversy about this. I thought you would understand when I say you have given us. I am happy to rephrase it to the extent it may be making you concerned. Mr Sindane has given us a medical certificate. We have a letter

previously from his attorneys that he cannot appear because he will be in seclusion. I am simply seeking clarification at this point, what is the reason for him not being here today?

ADV MASUKU: So there is a combination of factors, one of which is this medical certificate that you have, which explains his medical condition, but I am instructed that he is in fact still in spiritual seclusion. So that may well be another reason. But as I said when I responded to the Chair on the spiritual seclusion issue, I do want to tread very cautiously and not over-emphasise that journey he is going through.

What I would like Commissioner Baloyi to understand from my submission is that Mr Sindane is asking for a postponement based on his current medical condition and is also asking for a postponement based on the application itself that he has submitted before you, which is that there is a pending court challenge that directly bears on the material that may well be flighted today. And what we are asking the Commission to do is to grant a postponement that would give credibility to the judicial process.

ADV BALOYI SC: Okay. Can I just share my observation of this? The first reason that was provided, which is that he is in seclusion, it seems in my view it is undermined by the

fact that he has deposed two affidavits. So he has broken that seclusion. The impression that was created was he is completely unavailable. That is why he will not be here.

The impression that I have gained from this process, including the affidavit for the postponement, is that he was available to consult with his legal representatives and to give instructions and to prepare affidavits. That, in my view, undermines the initial suggestion that he was completely unavailable. That is an observation.

The second is about the medical certificate. In your submissions, you have said that he is unable to provide instructions, to follow proceedings, because of his medical condition as per this medical certificate. The observation that I make about it is this medical certificate does not say he is incapacitated to follow proceedings. It does not say he is incapacitated to give instructions.

In fact, if it said that, that would be deeply problematic, because he has given instructions. That is why you have got these comprehensive affidavits that are deposed to him in his name. So my observation is the medical certificate does not, in my view, and I accept Mr Chaskalson has happily accepted that it provides an explanation, but from where I am sitting, the medical certificate does not explain why he is not here, he cannot sit here today, because it does not speak to an incapacity.

The further observation that relates to the medical certificate is that it says he will resume duty on the 28th. Again, it says nothing about his inability to participate in our proceedings. I have no idea what duty he does. So he may well be disqualified to resume duties, whatever his duties are, in the normal course, because of that condition. It does not speak to whether that condition that is described there incapacitates him from sitting through our proceedings and participating. Those are my observations about the medical certificate.

The second thing that is not clear to me is you, and I am trying to – you may respond if you want to. I do apologise at this point. If you want to take it bit by bit, you can respond to my observations.

ADV MASUKU: No, Commissioner Baloyi, thanks for those observations. I think they are reasonable observations. What I am asking Commissioner Baloyi, that you, in evaluating what has happened, is to accept that there are certain areas of – well, I think any human person, especially where it concerns their spiritual seclusion decisions, where he said he had limited, not complete unavailability, where it is limited availability.

These things are deeply personal. The health of a person, if you want him here, in whatever condition he is in, you would be entitled to call him if he is not able to come.

Because the observation appears to suggest that the claim to ill health does not necessarily mean that he cannot comprehend the proceedings, but a medical doctor often simply diagnoses what the condition is.

It is up to the individual who is sick to decide whether that condition, with that condition, he can still walk in here and follow the processes. I am inviting the court – sorry, the Commission to give primacy to the dignity that is associated with medical conditions of witnesses that have met those medical conditions.

That there are aspects of dignity that are implicated there for which, however one sees it, and you do not have to believe them, but ultimately you say normal human experience is that when someone says he is sick, to try and dig a bit more and find that thing that will force him to be here may well just cross the line on the issue of the inherent dignity that a person has.

ADV BALOYI SC: Yes. I have been, Mr Masuku, very intentional not to speak about disbelieving the medical certificate. I am not going there with it. I am commenting on the face of what is contained and sharing with you my observations that it does not tell us, or at least me, that he is therefore unable to come and sit through his testimony. I do not take it any further than that. That is my observations.

ADV MASUKU: I accept that point.

ADV BALOYI SC: The second issue is you say we should defer, the Commission should defer to the court process. I am assuming it is quite deliberate that you do not assert any authority for that. It seems to me, and please correct me if I am wrong, that you are asking us out of courtesy to defer to the court, no more than, you do not place it higher than it is the thing to do now that we have got pending proceedings, maybe hold your horses. You do not do more than asking us out of courtesy, no?

ADV MASUKU: Yes. No, Commissioner Baloyi, I am not asking for courtesy. It is not a courtesy. It is a procedural, it is a consideration on an appropriate procedure that balances the status of the court and the status of the Commission. And what I am asking the Commission to do is to defer to the courts because the issue that the court now seized with is an issue that may implicate how the Commission performs its ultimate duties in relation to Mr Sindane.

So in that way, when the Commission respects the judicial authority, which it must, which is entrenched in section 165 of the Constitution, and essentially what the Commission does, given that it is the President's Commission of Inquiry and the court is in fact an institution established in terms of section 165 of the Constitution, what

I am saying is that there is comity between the two institutions that are performing an adjudicative or investigative function.

You perform an investigative or adjudicative function. The court performs an adjudicative function. But what they adjudicate is something that may be relevant for your investigative capacity, and I am asking for comity. It sounds to me that it does not require specific authority. It sounds to me like an argument that is anchored on how our Constitution has arranged our institutions to work in a way that allows for comity between them.

ADV BALOYI SC: I think what I want to clarify is you are not suggesting that there is anything that precludes us from proceeding pending that application. You are not placing it as high as that.

ADV MASUKU: In my submissions, I specifically said that I did not say that the application presents a barrier to this Commission proceeding.

ADV BALOYI SC: Thank you. You say we must defer until the 6th of October, but we know in the normal course judgment could be, maybe it is an urgent, you get a judgment the following day, on the 7th or the same day, there are appeal processes, and, and, and. How do you see it unfolding beyond? Assuming an outcome either way, what do you say we do?

ADV MASUKU: Well, Chair, Commissioner Baloyi and Chair ...[intervenes].

ADV BALOYI SC: No, you can address me through Chair.

ADV MASUKU: Yes.

ADV BALOYI SC: We do accept that.

ADV MASUKU: Thank you for that, Commissioner Baloyi. I mean, as a practitioner, I can sort of sense how things may turn out. I am not oblivious to the possibility that it could spiral into days and months and all that. I am aware of that possibility. But the fork clears a little bit better once the arguments have been made before the court.

And let us assume two variables come out of the process. The first one being that the application is dismissed. Mr Sindane will have to take advice on whether to appeal it or not, and that is really within his constitutional rights to decide that question. But let us assume that the Commission, in fact, ...[indistinct] the application. The Commission is similarly placed in that position of deciding whether to go ahead and appeal or not to appeal.

So I accept entirely that what we have triggered does have a certain level of uncertainty, but the comfort I do have is that, as I say, the fork clears a little bit better on the 6th when the matter has been argued and we can figure out a way forward that may be in our mutual interest.

It may well be that in the course of time, Mr

Sindane says, you know what, I will just come and deal with these issues in the Commission and abandons the right of appeal or whatever. If he has lost, he might decide, well, look guys, we have lost in the court, let us go and deal with this matter. That is still an open avenue, but I accept entirely the unpredictability of the pathway that we have triggered, that it does have unpredictable consequences that you should be concerned about. I am not going to shy away from that possibility.

ADV BALOYI SC: Yes, which takes me to, you have not addressed the balance of convenience. We are a Commission with a defined lifespan. And what you call unpredictability, I call it uncertainty. That beyond the 6th of October, there is a whole field of uncertainty of how this could play out. There is little comfort when you say Mr Sindane could choose, if he loses, assuming he is not successful, when you say he may choose to abandon an appeal, there is very little comfort. Nobody controls that except him, Mr Sindane. So he could appeal all the way to the Constitutional Court.

I say that simply to make the point that the balance of convenience would be an important factor that I would have wanted to hear you, who is asking for us to defer to a future unknown, what you say, given what you know about the limited lifespan of the Commission.

ADV MASUKU: So Commissioner Baloyi, through you, Chair, I thought I had addressed the issue of balance of convenience and in my address, I said that, or I submitted that the Commission will invariably, insofar as this particular witness is concerned, will have to deal with a delay and manage a scheduling inconvenience. That is the one prejudice that the Commission would suffer.

But on Mr Sindane's side, the compelled participation, despite the factors that he has raised, the risk of unreliable testimony, the permanent public disclosure of documents that may well not be, that may be quite prejudicial to him, reputational and dignity harm, including what I said was a fairly important consideration in the balancing exercise that I invited the Commission to have a look at. The impairment of effective court relief, and an appearance of guilt before the criminal trial even proceeds.

So I said, well, the prejudice to the Commission is really a scheduling delay that the Commission suffers. But Commissioner Baloyi, as you would well appreciate, the weighty principle would be fairness to the party who is likely to suffer constitutional prejudice. And also just accepting that in the scheme of things, Commissions of Inquiries like this one, will face at some point this kind of predictable response from the witnesses that it seeks to deal with.

And as I said, the Commission has extensive

powers of determining how to balance these competing interests that they have and I accept that there is an inconvenience, which I cannot take further than saying that inconvenience must be balanced against the other inconveniences that I have enumerated.

ADV BALOYI SC: Well, I am raising more than just an inconvenience. I am raising the possibility that Mr Sindane may never testify ever. So it is not scheduling. Scheduling is easy. That is not what I am raising with you. You have already heard Mr Chaskalson saying we can even come back on Monday.

So it is not a scheduling inconvenience when I invite you to speak to the balance of convenience. It is about if we defer to the court, to use your language, if it is possible. Let me say that because I do not think there is a basis. There is no legal basis that is being asserted that we must defer to the court, and I appreciate that is not what you are saying.

If it is postponed from today to the 6th, it could play out. There are all sorts of possibilities of what could happen. We have a defined lifespan. Mr Sindane may never come back to testify. That is what I am raising with you. That is against the purpose and mandate of the Commission, that is where I say, how do we balance this?

But maybe let me add to this also that I do not see

how you could address the balance of convenience issue or concern without addressing the questions that are raised in the notice, because not all of it has to do with a criminal trial that he is facing, for example. Not all of the questions have to do with the gadgets or the information that has been obtained from the DPCI that he is disputing the Commission's entitlement to deal with.

There are questions here that on their face look like they are capable of being answered without implicating. Look at paragraph 2.1, for example. A list of names just wants to know what is your relationship with those people. You have not said to us in your submissions that those names are implicated in the criminal trial that he is facing. You have not said that.

You have not said to us those names come from the gadgets, his cell phone, I think it is his cell phone records that the DPCI got and the Commission has access to. You have not said that. So I do not know that you could fully answer the balance of convenience question and concern without addressing how the questions that are put here or the information that is being sought in the 10.6 notice implicates these two things, the criminal trial.

Well, I think in parts you say, or he says that some of the questions being asked of him are not relevant to our terms of reference. I do not see that you can answer that in

a blanket way without going through these. And that is my difficulty with his not wanting to file a statement at all, or his failure to file a statement, and the application also says he should not be required to file a statement until the court has decided.

That is my difficulty with that, that there is no discrimination arising from the 10.6 notice. And I do not know that you can answer a balance of convenience concern without discriminating the different topics that are being sought from him.

ADV MASUKU: Yes, thank you, Commissioner Baloyi, for those questions. The first one, I respectfully disagree with your view that there is no legal basis that I have raised to ask this Commission to defer to the courts. I did say that the courts have got the final authority on matters that are before them.

And if there is a dispute that is standing before the courts that could implicate the work of the Commission, the courts must be accorded, as a matter of constitutional committee, must be accorded the respect by the Commission to decide those questions and ...[intervenes].

ADV BALOYI SC: I think I misunderstood you. Forgive me for interrupting you. I misunderstood you. I thought you accept that the fact alone of filing an application does not preclude us from proceeding ...[intervenes].

ADV MASUKU: No, no, but ...[intervenes].

ADV BALOYI SC: Are you ...[intervenes].

ADV MASUKU: No, no, but Commissioner Baloyi, I think I will try again and be a bit more clearer than I think I have. I submitted when you asked me this question, and I made reference to constitutional requirement of committee between urgencies such as this ...[indistinct] urgency, really in a broad term, not to suggest that it is a self-sustaining urgency.

But when a President appoints a Commission of Inquiry, he does not expect the Commission of Inquiry to compete with the powers of the court. There is a general constitutional requirement to respect court processes where they are dealing with matters that may ultimately implicate the functioning of a Commission.

I put it no higher than that and I do not agree that that is not a constitutionally sound principle on which to say, however you call it, deference, postponement, that as a Commission that is bound by the Constitution, there are matters that are now in court which implicate what we are about to do. So we will defer to the courts to the extent that there is – we are respondents anyway in that particular application.

But the second question regarding the sifting through of the notice, I appreciate that question. I think

there is merit in what you are saying, Commissioner Baloyi, I accept that. Perhaps that is a job that should be done, but here is the problem. For now, it will be difficult to do that process in the model that Mr Chaskalson suggests ...[intervenes].

ADV BALOYI SC: No, for my purposes, my engagement with you, do not be concerned about the model that he is suggesting.

ADV MASUKU: Yes.

ADV BALOYI SC: In fact, I think the Commission stands to benefit better if Mr Sindane is sitting there and speaking to the – I happen to agree with you, he should be sitting there to answer to these WhatsApp messages, and I think it serves the Commission better. So do not worry about that proposal for now. For my purposes, it is about the balance of convenience issue that I am raising.

ADV MASUKU: Yes.

ADV BALOYI SC: The horse is bolted in a way, right? In his papers, Mr Sindane should have explained why it is he does not discriminate the different questions that are raised here, as some being answerable, others not being answerable, because I am challenging, I am taking the challenge up in court, or because they are implicated in the criminal matter that I am facing.

He should have done that in his papers. He did not

do that, and where we sit now, we are sitting with absence of a statement on issues that on the face of it could have and should have been answered because on the face of it, they do not appear to be implicated in the criminal trial, and in the constitutional concerns and arguments that he is raising in his application. We do not have now as matters stand.

ADV MASUKU: No, I appreciate that question and that concern, Commissioner Baloyi. And perhaps the other directive that could be given is really to direct that on those questions that can be excised from the constitutional claims he makes, there should be a statement, but that would mean that we were given a bit of time to look at that aspect.

I apologise to keep asking for time. I understand that that must sound quite a hollow request, but I do seriously ask that if in the order that you issue, you could say on the aspects that could implicate his right to trial or his constitutional rights, however he frames them, we are happy to oblige him, but we would like him to answer specific questions that are not covered by that claim, and to direct him to give a statement at a particular time, and if I am responsible for it, you will get that statement at that time. One time.

CHAIRPERSON: The Chairperson heard you. Thank you.

ADV MASUKU: Thank you. Thank you, Chair.

ADV KHUMALO SC: I am glad you made that concession, Mr Masuku, because that is one of the issues I would have raised. Please confer with your colleague.

ADV MASUKU: Thanks. Chair, my colleague raises an issue that may be working backwards, in the sense that it may be too much detail, but it may be necessary for the Commission to base emphasis. Why is he not here? Which is what the Commissioner Baloyi asked the question. In his medical, the nature of illness that is described in the medical report, it says uncontrolled hypertension.

I am not a doctor, and honestly I would not want to venture into explaining what that actually means. Uncontrolled hypertension could mean madness to me. It could mean uncontrollable something, but I would rather the Commission did not have to be exposed to an embarrassing moment where a person with a medical condition actually suffers that medical condition while they are here. So I would say the medical condition that is disclosed may well be. I do not know if I should have disclosed it, but here you go. It is what is written in the medical report.

CHAIRPERSON: Now that you have disclosed that, we may say there is a second condition. Is it severe sinusitis and flu something?

ADV MASUKU: Ja, no, trying to read the doctor's note is ...[intervenes].

CHAIRPERSON: Flu-like ...[intervenes].

ADV MASUKU: [Indistinct]... is what magnifies it.

CHAIRPERSON: Ja, severe sinusitis and flu-like illness. That is the second condition.

ADV MASUKU: Ja, I will neither confirm nor confirm your reading of it, because it does not look – I would have written it more clearly in the sense that you could read it, but this is quite ...[intervenes].

CHAIRPERSON: Thank you. Thank you.

ADV KHUMALO SC: Mr Masuku, when you were addressing the Chair, you talked about people preaching and sermons where the Commission is mentioned. I can confirm that at the funeral of our dear colleague, you did preach about the Commission.

ADV MASUKU: I did, yes, I did.

ADV KHUMALO SC: I heard your preaching, so that part you were not making it up.

ADV MASUKU: Yes, no, I was not making it up.

ADV KHUMALO SC: And it was the first time I heard your preaching, by the way, but let us leave it there. I was concerned with paragraph 63 of the affidavit on page 24, but you have clarified it, I think, with reference to 95.1, and my concern stems from how paragraph 63 is framed because it suggested that you wanted the staying of Mr Sindane's evidence pending the finalisation of the Part B

application, because that is the review application.

And the way the heading and this paragraph are framed, that is the impression they create, that the proceedings that are the subject of the review should be stayed pending the finalisation of the review proceedings, which is the Part B.

So you have clarified in your response to Commissioner Baloyi that in fact what you are seeking is what is in 95.1, that his scheduled appearance today be postponed pending the finalisation of the Part A, not the Part B.

ADV MASUKU: Yes.

ADV KHUMALO SC: So we can leave that for now.

ADV MASUKU: Yes.

ADV KHUMALO SC: And then my concern with the timeline is, if he wanted to and it was open to him, and we all know how the courts in the Gauteng Division work. He was served with a subpoena on the 8th of September. He had the week of the 15th to seek the urgent relief and he also had the week commencing yesterday. He could have sought relief so that the fog cleared before we came here today, and he elected not to do so, and there is no proper explanation why.

It is not clear why he picked the date of the 6th of October. Why did he not go to Urgent Court on the 15th, or

even yesterday on the 22nd? And in extremely urgent matters, you know in Gauteng, courts can even hear urgent applications on Sunday evenings.

ADV MASUKU: Ja.

ADV KHUMALO SC: So there is really no explanation why he chose a day, 13 days from now, basically, for the hearing of the relief that he could have obtained a week ago or even yesterday.

ADV MASUKU: Yes. Commissioner Khumalo, I understand and appreciate that question. I think what I would submit in response to that question is that often litigation starts this way. And who knows, the Commission files an answer that changes the price of the case and then there is ultimately an agreement on the further conduct of the matter.

They start off urgent, but cases can evolve in the course of time. To have gone to court on an urgent basis, as you would suggest, may well be risky. Because as I said, the Commission's work sits at the core of the stability of our constitutional system. To try and go and stop it in respect of one witness is highly risky.

I think even if you were sitting as a Judge, you would not appreciate a person coming to court on an urgent basis and asking for urgent relief against a Commission that has not spoken or that has not filed any papers. You want to give the court process a certain level of reverence so

that there is serious engagement with the issues that are raised, both by the Commission and the applicant. That is a number of benefits.

When the case finally runs in court, it is not just Mr Sindane who is interested in how the court deals with it. I mean, a number of people, witnesses, who are likely to be called to this Commission will be watching and trying to get notes on what other ways they can adopt in order to assert their rights or whatever.

So there is a public benefit in having a timeline that allows the Commission to engage with the issues in an uncertain affidavit. Bringing it on an urgent basis may well be risky, I accept that, and I think on the 6th that is a major question that we will have to deal with. But I would urge Commissioner Baloyi – sorry, Commissioner Khumalo, my apologies, Commissioner Khumalo that perhaps that bridge of whether the matter is urgent or not is raised on the 6th.

If the matter is struck off the roll for lack of urgency, so be it. Then we would not had met the case. And I say if it is struck off on the lack of urgency, then this will back in the Commission and the Commission can then case manage it however it does. Issue directives as to what to be done and what not to be done. So I accept entirely the litigation risks that are associated with the application.

I did say that I do not want to present my argument as though I am arguing on a perfect record of conduct. So I accept that this could be done yesterday, day before yesterday, or any other time. We have chosen this time, but the advantage of this time is that it gives the Commission the opportunity to respond to that application if it decides to do so.

ADV KHUMALO SC: And my colleagues have dealt with some of the issues I wanted to deal with. I must just say to you that I personally do not want to wait until the 6th to give a direction. The suggestion or invitation you made earlier was more attractive, that a statement be filed. If your client wants to assert privilege or other constitutional rights in relation to some of the questions, he can do so in the statement, as Mr Sibanyoni has done, but he must file a statement.

The statement is already more than a month late. He was supposed to have filed it on the 17th of August, and there is really no explanation why he has not. Where he is asked questions about his relationship with TMPD members, whether he has a relationship with the TMPD, where he is asked questions about his relationship with Sergeant Nkosi, those fall within our terms of reference as the Commission and there is absolutely no reason why he should not have provided a statement on those issues.

I accept that where he does not want to incriminate himself, or where he raises issues with the DPCI subpoena and the Kwaggafontein case, there he can assert whatever right he wants to assert, without me accepting that there is a legal basis for it, but he can assert those rights in a statement. But he must file a statement before the Commission.

ADV MASUKU: Yes.

ADV KHUMALO SC: He cannot say because I have got other issues with some of the questions, I refuse to file a statement in relation to issues where I should be answering questions, and those fall within the Commission's terms of reference. So your invitation that such a ruling be given, I prefer that it be done now, not after the 6th.

ADV MASUKU: Yes, and I would advise Mr Sindane to comply with that directive if it is issued. And as I say, if I am still involved in the matter, that directive would be complied with. The only issue I would ask is that I am new in the case, and I am given a bit of time to engage with him. At the moment he is indisposed and trying to fix a consultation with him may be a fairly difficult process.

That is for our benefit as a legal team, that if that directive is given, we are given time to when that statement can be prepared and submitted to the Commission, and my undertaking as counsel is that that will be done. Even if it

is to say we have not finished the statement, but here is what we provisionally can give.

ADV KHUMALO SC: And I qualified it by saying if you are still on brief.

ADV MASUKU: No, no, no.

ADV KHUMALO SC: I do not know how much weight you are undertaking.

ADV MASUKU: No, as you know, Commissioner Khumalo,. these matters resides entirely within the power of our instructing attorneys and the client. But if I am on the brief, that undertaking will be honoured and maybe you can hold me to account if that is not honoured.

CHAIRPERSON: Thank you, Mr Masuku. Mr Chaskalson?

ADV CHASKALSON SC: Thank you.

CHAIRPERSON: 45 minutes for you as well.

ADV CHASKALSON SC: Thank you, Chair, I will do my best. Chair, at the outset, I just want to correct an error in the date of Monday. Initially, I said we would be asking for a postponement to the 29th. Monday is in fact the 28th, so we still stand by that. There are really six issues I would like to address.

The first is why we have to look at this postponement application, not only in relation to Mr Sindane's exchanges with the Commission, but also in relation to broader issues concerning the Commission's

programme. What I mean in that regard will become clearer when I address it.

The second concerns the court proceedings. And my submission is that Mr Sindane's delays in relation to the court proceedings disqualify him from invoking them now as a reason to postpone. The third is his complaint that if we proceed today to canvas this material, he will be subjected to a one-sided display.

That leads to the fourth, which is an issue that runs right through his exchanges about the alleged unfairness of the Regulation 10.6 procedure. Finally, I want to address briefly his complaints about the WhatsApp chats and the manner in which we procured them, and the complaint that because no witness has yet implicated him in testimony before the Commission, that is a reason that we should indulge him.

But the first point is a very important point, which is, on its face, there is a superficial appeal to the idea that, well, all he is asking for is a short postponement to the 6th of October, till after the 6th of October. It is no skin off the nose of the Commission, but that actually ignores the constraints of this Commission's programme. This Commission has had its deadline extended repeatedly, but we now have to finish, and we have a packed programme.

And if we have a postponement, we will lose today.

We will also lose Monday, because Mr Sindane is a witness whose testimony was going to take two days, and we are not going to find another witness to slot in on Monday. So what then happens is a witness who was supposed to take two days, assuming everything else falls into place and Mr Sindane, or my learned friend Mr Masuku is able to prevail on Mr Sindane to take a responsible and cooperative attitude to this Commission if he loses in court.

On a best-case scenario, we will have a witness who should have taken two days, who now takes four days. In other words, this witness takes twice as much time as the Commission programme has allocated to him. This witness is not unique. We are at the business end of this Commission, where with very few exceptions, every single witness who comes has reasons to want to avoid these proceedings.

And if we establish, or if we find ourselves in a position where our programme time for witnesses turns out to be 50% of the time that they actually take, we just will not finish and we will end up, when we have to close evidence either at the end of November or early December for a report which now has to be filed on the 25th of January, we will end up just not having touched certain topics and certain witnesses who should really have been here.

So, there is a broader principle at play here. Witnesses who do not want to come to this Commission, who have reason to be anxious about what might happen if they testify before this Commission, will want to take points to string out the process before which they are ultimately forced to appear before the Commission and will hope to avoid that ultimate day.

And we cannot proceed in circumstances where there is not really a good ground for a postponement that would not have been avoided if Mr Sindane had acted responsibly, and to indulge Mr Sindane by giving that postponement, because we are going to face this situation again and again and again, and our programme is tight. It is not just that we cannot give double the time to witnesses who do not want to be here.

We cannot give 50% more time to those witnesses. We will not finish, and we do need to finish. So there is a broader issue here in relation to the Commission's programme, but that brings me to the second issue, which is the court proceedings, and it is an issue that we address in our answering affidavit at page 267.

It is an issue which the Chair canvassed with Mr Masuku, which is that this whole application is now pinned on the court proceedings on the 6th of October, but those court proceedings would have been done and dusted long

ago if Mr Sindane had behaved with a modicum of responsibility as a litigant.

The delay is entirely his fault. He had already decided to bring those proceedings on the 18th of August. That is when he approached the Chief Justice for permission. He had already got permission from the Chief Justice, which the Constitutional Court has now said was not even necessary, by 25 August. So on 25 August, he was ready to go.

One does not approach the Chief Justice for permission before one has worked out that one wants to go and that one has a case that one would like to ventilate. That was the 18th of August where those decisions had been taken, and the 25th of August was any procedural obstacle had been removed, and yet he delayed for more than four weeks.

If he had not delayed for more than four weeks, we would not be having this debate here. We would have had the matter heard in the Urgent Court. There would be either an interdict which would have stopped us calling, or the application would have failed. So we are only sitting here having a debate about a postponement because Mr Sindane has delayed egregiously, and that egregious delay has huge implications for what is going to happen on the 6th of October. I will get to those in a minute.

But before I do that, I want to address the belated suggestion that has now been made. Well, actually it was not 18 August when the decision was taken because the decision really was only triggered by the subpoena. That, with respect, is just an unacceptable suggestion. The very first communication to Mr Sindane from this Commission after the regulation, the very first communication in the correspondence after the regulation 10.6 made clear that he was going to be called.

If I can take the Commission to page 58, paragraph 3. It is in the Commission's letter of 10 August where the Commission says, paragraph 3:

> "The notice served on your client is not served as a result of any other witness before the Commission implicating your client as a person of interest. Nevertheless, the Commission intends to call your client to give evidence publicly before it on the issues traversed in the Regulation 10.6 notice and will in due course subpoena your client accordingly."

ADV KHUMALO SC: Because 10.6 says any person. It does not say somebody implicated.

ADV CHASKALSON SC: Indeed. Indeed. And in fact we regularly gather information under 10.6 from people who we

do not intend to call and who we do not regard as implicated persons or even persons who may be implicated in the future. But it has been clear from 10 August that Mr Sindane is going to be called and, in fact, in that same letter, paragraph 11 on page 79 – page 60, not page 70, the attorney said:

> "In terms of the programme of the Commission, the evidence of your client will have to be heard before the Commission breaks on 2 September."

So at that stage, Mr Sindane was facing a situation before the term of the Commission had been extended when he was being told explicitly we are going to call you before 2 September. So he has known since 10 August that he was going to be called, probably at that stage, in the month of August. There was then an extension which enabled us to call him only to appear today.

But what that means is that all of the alleged violations of his rights that he wants to ventilate in front of the Urgent Court on the 6th of October have been known to him full well since 10 August, and so he has delayed extraordinarily before bringing his urgent application. And that has obvious implications for what is going to happen on the 6th of October because urgency. And it is not a contrived point. It is not a procedurally technical point

either, because what is being asked for as interim relief will effectively be final relief, because there is no way that Part B of this application is ever going to be heard before the Commission stops hearing evidence.

So all of the interim relief sought in Part A is actually going to be final relief, and it is manifestly undesirable for final relief to be granted in a hearing which is not ideal, an Urgent Court hearing where the respondent, in this case the Commission, has been given four days to file answering papers, where the court is going to have to squeeze a way of hearing the matter into the exigencies of an urgent roll, where it is not going to get proper time to be ventilated in all likelihood, and where all of this would have been avoided if the applicant had not delayed for over a month before launching the application.

So there is a very real risk that if we delay in the hope that we will get clarity on the 6th of October, we are not going to get clarity on the 6th of October. What we are going to get is a matter that gets struck from the roll. Before we leave the court proceedings, it is worth focussing on what the relief sought in the court proceedings is, because we hear Mr Masuku making responsible submissions about what a responsible litigant should do in relation to this Commission.

But if we look at the notice of motion, it is quite an

extraordinary notice of motion, bearing in mind, first of all, that it is final relief, not interim relief as a matter of practical reality. 2.1, sorry, page 119, it is an:

> "Interdict to prevent the Commission from enforcing, implementing, or giving effect in any manner to the Regulation 10.6 notice, including compelling the applicant to provide a sworn statement, attend any hearing, or provide any documents or material pursuant to their duties."

So Mr Sindane does not want to attend any hearing, to provide a sworn statement, or to produce any documents or material. He wants the court to say that we cannot make him do that. 2.2:

> "The court must also prevent us from implementing or giving effect to the subpoena, calling on him to give oral evidence."

So he does not want a subpoena to give, to be forced to give oral evidence. 2.3, it is not just that subpoena, it is any other subpoena. So 2.3 is an interdict to prevent the court from, to:

> "Prevent this Commission from issuing any further subpoena, summons, notice, directive, or instruction against the

> applicant, arising from or in connection with the applicant's Regulation 10.6 notice, or the applicant's subpoena, or any matter related thereto."

So he does not want to furnish a statement. He wants the court to say he does not have to furnish a statement in the future. He does not have to appear because we cannot compel him to do. 2.4, just out of an abundance of caution, the court must also:

> "Interdict the Commission from compelling or requiring the applicant to appear before the Commission, give oral evidence, provide a sworn statement, provide documents or other material, or otherwise comply with any notice, subpoena, or directive arising from or in connection with the Regulation 10.6 notice."

And on and on it goes. Basically, this interdict is saying Mr Sindane wants to be immune from the process of this Commission. That is what the interim relief is seeking and that interim relief is going to be final relief and that interim relief is being sought in Urgent Court on radically abridged timetables after Mr Sindane has delayed for a month since he has known everything he needed to know about this case

and he has been given consent by the Chief Justice to launch it.

So we hear one thing from Mr Masuku about how he would like Mr Sindane to conduct himself in relation to this Commission, but we see in the notice of motion something completely different. That raises the issue of what to do with today. We have put forward the proposition that we should flight the evidence that we want to flight and Mr Sindane, if he decides to depart from his position in his interdict application, can then come back and answer it.

The complaint about that is that it is a one-sided display and Mr Sindane will be prejudiced because we will put up documents that he might be able to explain, but we will draw inferences that may be the wrong inferences because we do not have him here. But that situation is entirely of Mr Sindane's own making.

If he had furnished us with his Regulation 10.6 statement, which is now over a month late, it would not be a one-sided display. We would have his version and we would be able to say, Mr Sindane explains these documents this way, but he has chosen to defy us for over a month and now he says, because I have defied you and I have not given you my version, if you put up what the documents say and draw the inferences that are the most obvious inferences to draw from them or flag the questions that you

would like resolved in relation to them, that is unfair to me. Well, that unfairness is entirely of his own making. He could have avoided it if he had complied with his obligations.

There is a broader objection to the Regulation 10.6 process that has been advanced by Mr Sindane and his legal team right through this process. They have said it is unfair for you to ask me to answer these questions without providing me with all of the documents that you have at your disposal that are relevant or potentially relevant.

That argument may sound superficially attractive, but with respect, it breaks down on closer inspection. The process of this Commission is inquisitorial. It is not adversarial. So the Commission has to enquire and gather information, gather information both from willing providers of information and also from unwilling providers of information.

When it encounters people who may not want to be completely frank with it, it is entitled to adopt a procedure which encourages those witnesses to make as much information available to the Commission as possible as opposed to tailoring what they choose to disclose to the Commission in the light of what they know the Commission already knows.

It uses Regulation 10.6 for that purpose. So it

does not give witnesses details of what it already knows before it asks witnesses to disclose under Regulation 10.6. If it did that, it would invariably get back from the witnesses a version that tells it very little beyond that which it is already known. That is not unfair, and I want to emphasise why it is not unfair.

First of all, there is no risk that a witness may subject itself to any self-incriminatory consequences by responding to a Regulation 10.6 notice. So issues of self-incrimination and fairness in that regard go out the window. Regulation 8.2 makes that clear. It says that nothing self-incriminatory in a statement furnished to the Commission is admissible in criminal proceedings.

So what the witness says in response to a Regulation 10.6 notice is protected from use in criminal proceedings. So criminal trial fairness is irrelevant here. What unfairness remains? The potential unfairness or potential prejudice is reputational prejudice if that Regulation 10.6 notice becomes public, but the Regulation 10.6 notice cannot become public unless the witness is called to testify.

That flows from regulation 11.3, which says we have to keep all of these materials secret. So the only circumstances in which that notice becomes public is if the witness is called to testify. And long before the witness is

called to testify, the witness is provided with all of the documents potentially relevant to the witness' statement, or to the witness' evidence, or certainly all of the documents on which the Commission is going to question the witness.

And if there has been a *bona fide* error in the Regulation 10.6 statement that the witness wakes up to when they get the document bundle, then they can correct it. We have seen it a lot of times. That is how the process starts. Here is your Regulation 10.6 notice statement, is there anything you want to correct? And the witness then corrects. And if it is a *bona fide* error, well, then no prejudice flows from it. If it is a *mala fide* error, well, then that is not the sort of prejudice that one needs to concern oneself with in relation to questions of fairness.

So before Mr Sindane comes to testify, he was always going to get access to all of the documents on which we would question him. And in fact, he has had those documents for more than 10 days now. He has had the bundle since, I think, the 11th of September. So his complaint in relation to the Regulation 10.6 notice, it was unfair to ask me to file a statement before you showed me what evidence you had on me, was, one, legally incorrect and is now practically irrelevant because he has got the bundle. He has had it since the 11th of September.

If he does ultimately come and testify and if he

wants to correct anything in a statement that he does give us, it is the first thing I will ask him. But we are really talking about an academic exercise now because he has had the bundle for 11 days. If he wanted to respond to the Regulation 10.6 notice in the light of our documents, he has had 11 days to do so.

So this one-sided flighting complaint is, like most of Mr Sindane's complaints, a direct product of his own default. If he wanted to avoid a one-sided flighting situation, he could and should have given us his Regulation 10.6 notice. And in his case, unlike all other witnesses, his 10.6 notice could have taken account of the entire bundle because he has had it for over 10 days.

That takes us to his broader issues in relation to his complaints about the WhatsApps, and that is an issue that we address at page 268 of the papers when we deal with the WhatsApp chats, and we maintain that the Commission is lawfully in possession of the WhatsApp chats. It is paragraph 15, page 268.

We obtained those WhatsApp chats under notice which we issued to the SAPS, to the DPCI who had themselves obtained the images, had imaged the phone of Mr Sindane. He says, well, SAPS imaged the phone for one purpose. You cannot get from SAPS the contents of the phone for another purpose. So that, with respect, is an

argument that breaks down on even superficial inspection.

And we make the point that the absurdity of the argument can be illustrated by postulating how he would have responded if his phone was still in his possession, not in the DPCI's possession, and the Commission had called, had served a notice on him, calling him to produce the relevant WhatsApp chats.

Unless he were to have acted illegally by deleting those chats or denying their existence, he would have had to have given them to us. That is what Regulation 10.6, that is the power that Regulation 10.6 gives us, and he would have to have subjected himself to the difficulties of being questioned on them. He cannot now say, well, because they were not in my possession, but they were in the DPCI's possession, you cannot get from the DPCI that which you could have got from me. It just does not make sense.

But in any event, the issue of his WhatsApp chats does not justify an entire postponement of Mr Sindane's appearance. At best, it might found an objection to particular questions which were based on those chats, or in the absence of Mr Sindane, a particular set of chats which we seek to flight to which there is a legitimate objection.

Now, we hear again that the legal team is not in a position to make those objections because they have no

context to understand how to, you know, what they should object to and what not to. But if that is the case, that is entirely Mr Sindane's doing. He has had the chats for over 10 days. If he chose not to consult with his legal team and explain to them what his legitimate concerns in relation to the chats were, that is his problem. It is not our problem.

And the legal team cannot say to this Commission, well, Mr Sindane has not explained, we have had the chats for 11 days now. Mr Sindane has not taken the trouble to explain to us what his concerns in relation to those chats are, so our right to object is a nugatory right. If it is a nugatory right, it is because Mr Sindane has not taken this process seriously.

If he was concerned, he should have consulted with his attorneys when we gave them the bundle on the 11th of September and he could have explained these chats over here, they are legally privileged. You may not realise it, they are. Those chats over there, I have this objection to disclosing them. You should be able to advance that objection. He apparently has chosen not to. This Commission cannot be hamstrung by that sort of choice.

There was also an issue raised that because no other witness has testified before this Commission and implicated Mr Sindane, we should somehow back off. That, with respect, is no reason not to proceed. If we have

documentary evidence and we have reason to believe that there are questions that we want Mr Sindane to answer and/or documents in relation to Mr Sindane that we want to put into the record, we are entitled to do so. We do not need another witness to come and implicate Mr Sindane in that regard.

And when we actually get to the documents, including those documents in the Kwaggafontein docket, we will see that some of those documents are affidavits by complainants which implicate Mr Sindane in very specific ways. We could have gone to the same complainant and got a confirmatory affidavit saying, I gave this affidavit to the DPCI on such and such a date, I confirm the correctness of it. But why do that? I mean, there is an affidavit sworn before Commissioner of Oaths. We are entitled to rely upon it.

So, in conclusion, this postponement application before this morning I would have submitted had no merit at all, because Mr Sindane is ill and I do not take issue with his medical note and I accept that he is not fit to appear today, we would concede to a postponement of his appearance to the 28th, Monday the 28th.

But we would seek to ventilate the documentary evidence today and we ask that partly so today is not wasted, but also because if Mr Sindane's notice of motion is

to be believed, we have little confidence that Mr Sindane is suddenly going to turn into a cooperative witness.

That notice of motion is saying immunise me from the entire process of this Commission forever. That is what it is saying. And in those circumstances, we should approach this matter on the basis that if there is evidence relevant to Mr Sindane, it should go in and it should not be deferred until such stage as Mr Sindane decides or does not decide that he is going to cooperate with the Commission.

So, we would ask the Commission to postpone to Monday and to use what remains of this day to flight the documentary evidence in relation to Mr Sindane with the understanding that if Mr Sindane is not recovered by Monday, we will complete flighting whatever documentary evidence remains to be flighted and then he will have to be recalled at a later stage. Thank you, Chair.

CHAIRPERSON: Thank you. Thank you, Mr Chaskalson. Mr Chaskalson, regarding, I know this has been the Commission's practice throughout, that is, furnishing a witness with a bundle of documents after submission of a statement. Last night, I just thought, is that – I know the situations are not on all fours, but last night I just thought of my judgment at the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission*.

And, of course, I do know that that judgment, if I

recall correctly, concerned Rule 53, yes. So, again, I repeat, the situations are not necessarily on all fours. But if you look at the substance of what I said in that judgment, is there not, or can an argument not be made that available documentation should be afforded a witness prior to their submission, the submission of their statement?

ADV CHASKALSON SC: Chair, I think the crucial distinction here is that this Commission follows an inquisitorial process. So, it is trying to find information out from witnesses, which witnesses may not want to give it. And in that process, it is entitled to design a modus operandi that is calculated to get as much evidence out of a witness without in any way unfairly prejudicing a witness.

And in that respect, my submission is that following the process that we do follow, which is Regulation 10.6 notice, the base statement from the witness, then the bundle, and then hearing, does protect a witness against any unfairness for the reasons I addressed earlier. The first is, nothing in that 10.6 statement can ever be held against the witness in criminal proceedings. So, that concern of inadvertently saying something that might incriminate you without full knowledge of what the Commissioner has at its disposal can be put to one side.

And so, what then remains? It is the issue of reputational prejudice, of being confronted with what you

said in your 10.6 statement and other evidence that shows that that may not be correct. Now, if you made a *bona fide* error in your 10.6 statement, then you can explain that. And we frequently do that, because by the time you come to testify, which is the first time that statement goes public, you will have seen the whole bundle and you will have identified, I made a mistake here, I need to clarify that, and you will be given the opportunity by this Commission.

So, when your statement goes public, it goes public with your opportunity to clarify anything or to correct anything. And Chair and Commissioners will know that the first question we ask the witness is, first question is, in fact, even before we get to is this your signature, we say is there anything in the statement you would want to correct or amplify or qualify? And then the witness says, well, actually, there, that is a mistake, and I should read this way.

Witnesses get the chance to correct *bona fide* errors. There is no principle of fairness that says a witness should be allowed the opportunity to make a *mala fide* error and not be embarrassed by making a *mala fide* error. And so, my submission is that having regard to the inquisitorial nature of this Commission, the principles of your judgment in *Helen Suzman Foundation* are not at odds with this Commission.

The 10.6 statement does not go public, it does not cause any prejudice that until the point at which the witness has seen the entire bundle and can explain anything that needs to be explained if the witness is acting *bona fide*.

CHAIRPERSON: Thank you, Mr Chaskalson.

ADV BALOYI SC: Mr Chaskalson, can you just, your proposed postponement that he appears on Monday and yet we proceed today, you seem to be saying just for practical reasons, but it is not clear to me that if a postponement is granted on the grounds that are sought, in this case, the medical certificate, if we grant a postponement that the basis for proceeding today, is it not rather that the postponement be refused and then you proceed to present and he is called upon to appear on Monday? Because he is not here today, as a matter of fact, and then he is ordered to appear on Monday and Monday becomes what it is. Is that not the better formulation?

ADV CHASKALSON SC: Commissioner Baloyi, it may be. What I do not want to suggest is pre-empting a decision that his non-appearance today was wilful or, you know, merits some sort of sanction. If he is ill, he is ill and he cannot be here today. So, however, the practical outcome that I would like to achieve is that we use the time today to flight what we can flight and that if Mr Sindane and that Mr Sindane is ordered to appear again on Monday, but if he has not

recovered by Monday and he is not there, well then we can continue to flight whatever we have to flight. But I am wary of asking for an order which in some ways might suggest that we do not accept the *bona fides* of the medical reason for absence today. That was my only concern.

ADV BALOYI SC: Ja, all right. No, I also have the opposite concern which is upholding the application for a postponement and then proceeding anyway, but that is something that we can deal with in discussions with the Chair. Thank you.

ADV KHUMALO SC: Mr Chaskalson, when Chair directed that a substantive application be filed within a day, I think this is 38 pages long, are you violently opposed to the idea of the Commission directing that a statement be filed on Friday and that you lead the evidence? If he is here on Monday, he can obviously read his statement. But if he is not here on Monday, then you can present the evidence as you wish.

Here is my thinking, Mr Masuku having just landed in Pretoria, Johannesburg and then Pretoria this morning, would not have had the opportunity to consult with his client about which chats they have an objection to if you were to flight them. So is it not beneficial to give them at least that opportunity? They have the bundle, so they can consult with their client and say, if they are flighted in your

absence, which ones do you want us to object to? So the benefit of starting on Monday is to allow them that opportunity. I just want your comment on that.

ADV CHASKALSON SC: Commissioner Khumalo, I was about to be persuaded, but there was something that you suggested at the end that was concerning, because if we are going to get a statement on Friday, then that would merit standing – that would justify proceeding along those lines. We are losing half a day at the moment. It is not ...[intervenes].

ADV KHUMALO SC: If a founding affidavit and a reply could be produced in two days, I mean, these are 280-page papers. Chair made a ruling, I think, on Monday, and by yesterday we had the papers. So I am sure a statement answering the 10.6, it is not a very long 10.6. I mean, do you know this person? What is your relationship? I cannot think of any reason why, if we direct that a statement be here by Friday end of business at the latest, that that cannot be done.

I mean, I am mindful of the nature of the illness, and Chair has said to me maybe the nature of the illness is such that even the statement cannot be produced, but I am sure they can take instructions, as they did this morning, because we stood down for 30 minutes to allow for consultation. So I am sure a meaningful consultation can

take place.

The reason why I was raising the issue you have a concern with was what happens if there is a statement, but Mr Sindane is not here on Monday, what do we do? We cannot waste the Monday, or we cannot lose it, and I am assuming that if they use the time from now to Monday to consult with him, they will be able to ask him, which of the chats in the bundle do you want us to object to and what is the legal basis for that objection? So that when they are flighted, the prejudice they are raising is not there.

Because sitting here today, they will say, well, if you flight a chat, we will not know whether to even object or not, because we do not have instructions from our client. So I was raising it in that context, the part that you have a concern with. So maybe I can hear your comment.

ADV CHASKALSON SC: Commissioner Khumalo, my point of principle on that score is that is something that should really have been done in the last 11 days because the documents have been there, and they ...[intervenes].

ADV KHUMALO SC: Assume I agree with you ...[intervenes].

ADV CHASKALSON SC: But we sit where we are today. At the level of practicality, we have now spent most of the day anyway in this process. We are not going to gain much time by proceeding to spend, we will probably have maybe

an hour and a half at best to use. And if we stand the prospect of getting a statement and an informed position for the legal team to adopt come Monday, if Mr Sindane has not recovered, I cannot really object to that. So I grudgingly, grudgingly do not object.

My fundamental concern here is that we are dealing with a stage in the Commission's programme where the vast majority of witnesses are not happy to be here. And frankly, I have a lot of sympathy for the witnesses. It is an unpleasant experience, but there are some witnesses who are taking their unhappiness and are not behaving as responsible litigants in relation to the Commission. And I do not want us to set a precedent where people get accommodated for simply not engaging with the Commission's processes because those processes are potentially unpleasant for them. So in the situation in which we find ourselves right now, I cannot say that that would be an – I have to accept it would be a sensible way forward, but I do so grudgingly.

CHAIRPERSON: Thank you, Mr Chaskalson. Mr Masuku, is five minutes enough?

ADV MASUKU: It is enough, if you would allow ...[intervenes].

CHAIRPERSON: Anyway, I can give you 10 minutes, that will take us to lunch. 10 minutes? 12, in fact.

ADV MASUKU: Chair and Commissioners, can I ask that my colleague, Qofa, takes the reply? We are just with colleagues, and this is how we thought we could best present the case. So if you do not mind, I will give over the reins to her.

CHAIRPERSON: You and I and Mr Chaskalson and my colleagues' experience, we all know what the disadvantage of that is. Counsel who did not present the main argument, if they have to reply, there is the tendency of re-arguing the entire case.

ADV MASUKU: Okay ...[intervenes].

CHAIRPERSON: No, no, no, no, no, no, no, I am not saying that to refuse your request, but I guess I just want to work on Ms Qofa's conscience. Yes, yes.

ADV QOFA: Indeed, Chair. Thank you very much, Chair and Commissioners. Good morning and good morning to the Evidence Leaders. Chair, I think looking at the questions that the Chair and Commissioners have raised, starting with Commissioner Khumalo who has looked at the proposal which he is suggesting Mr Chaskalson should not be so violently opposed against, Mr Masuku had indicated in his original opening that if there is a mechanism within which we can exercise those aspects of the Regulation 10 notice which are in dispute and which form the basis, the critical basis of the application before the High Court, that

would be something we would be able to consult with Mr Sindane and get instructions.

Indeed, we did say we have limited access to Mr Sindane and we have done everything we could. In fact, Chair and Commissioners will note at one point our attorneys of record had to wait just to be given access to him in the midnight. Otherwise, it would have been impossible. But saying this, Chair ...[intervenes].

CHAIRPERSON: But I think what Commissioner Khumalo said was, you know, we ask a whole lot of questions in testing counsel's argument. That does not in and of itself indicate an inclination. So the short point I am making is that when we see the statement, if that is the route we go, when we see the statement, who knows, we may still get everything that Mr Sindane should respond to. So what Commissioner Khumalo said should not be regarded as saying, please give us something curtailed, not necessarily.

ADV QOFA: Absolutely, Chair. That is indeed taken as it is. I would want, Chair, maybe to go back to Commissioner Baloyi's question and/or concern pitched to the extent that if we then insist on proceeding to flight, does that therefore not mean the postponement itself is being declined?

CHAIRPERSON: I think Mr Chaskalson, even if grudgingly, he now accepts that perhaps because we only have one and a half hour or whatever this afternoon, which is all we are

left with, we are forced by circumstances not to even do that flighting at this stage.

ADV QOFA: Then we are happy, Chair. Then we can proceed from that stance. Chair, I have been having this concern that to some extent Mr Chaskalson seems to argue the issues, the merits or demerits of the application in the High Court and the basis thereof of urgency and so on and so forth.

Mr Masuku has been at pains to indicate to this Commission that allow us, imperfect as the picture might look, we still have that river to cross and it would be only opportune to allow us to address the issues before the court without having tainted the mind of the Judge who would have to hear those issues as they get ventilated before them.

It is only in that regard that we say this Commission ought rightfully to allow Mr Sindane to be able to vindicate the issues. I say this because, as you would have noted, Chair, when the issues before the High Court are ventilated by Mr Chaskalson now, there is no mention of the basis of why we take issue with the Regulation 10.6 notice issue to the DPCI.

CHAIRPERSON: I think Mr Chaskalson's focus was just on the question of urgency. And in a sense, I think what he said in that regard may merely be viewed as an extension of

the very first point, the substantive point I engaged Mr Masuku on, which is before us Mr Sindane has placed himself in the difficult position in which he finds himself because of all the delays. So if this was an urgent before us, one could make the point that Mr Chaskalson is making, that that urgency is self-created. So, ja, ja, ja.

ADV QOFA: Chair, indeed, well, we take the point. But critically, Chair, I must probably continue to state that the concerns that are raised are not only limited to whether or not there is information before the Commission. We raise issue with the fact that the subpoena – forgive me, Chair, the search and seizure that was authorised by the Magistrate under the Cybercrimes Act was meant purely for obtaining this information for purposes of the Kwaggafontein case, and it indeed says so.

Our case law is replete that once a search and seizure has been obtained for a particular purpose, it cannot be extended beyond that purpose. And we simply take issue to indicate that even though this Commission is entitled to obtain information in all the other ways it may, to extend the scope and repurpose the very search and seizure that was given by the Magistrate ...[intervenes].

CHAIRPERSON: And now, if this Commission also wanted that same information that was obtained through the Magistrate's ...[intervenes].

ADV QOFA: Cybercrimes ...[intervenes].

CHAIRPERSON: Yes, yes. How, in practical terms, according to you, would this Commission also access that information? Because now if it were to issue something that seeks that information from Mr Sindane, that would be futile.

ADV QOFA: Chair, that particular search and seizure is not per se, it is normally done *ex parte*, as it was. But what then normally happens after that, as it happened in Mr Sindane's case, you would know that the DPCI would have informed our client, we have obtained this information, the search and seizure would have indicated you will only have access to Mr Sindane during the day to be able to have access to his phone or whatever it is, that access would have been granted. And the search and seizure itself would have indicated, amongst others, that the scope is for this purpose ...[intervenes].

CHAIRPERSON: That is not answering me, Ms Qofa.

ADV QOFA: I am coming there, Chair.

CHAIRPERSON: Please.

ADV QOFA: Now, should the Commission have wanted to obtain that similar information, nothing would have prevented the Commission from obtaining that information, and obtaining a warrant for such, for obtaining that information. The case law in our country is that once you

have obtained a search and seizure, for that purpose, it cannot be ...[intervenes].

CHAIRPERSON: Could the Commission have obtained this information from Mr Sindane using the same instrument it used in sourcing it from the DPCI? Was it proper for the Commission to use that instrument? Could it have used that instrument if the information was still with Mr Sindane?

ADV QOFA: Chair, the Commission was within its rights to obtain the information.

CHAIRPERSON: If it sought it from Mr Sindane.

ADV QOFA: It absolutely was within its rights ...[intervenes].

CHAIRPERSON: But now we know that the information is elsewhere, it is no longer with him. Why can the Commission not use that same instrument to get the information from where it is? What becomes wrong?

ADV QOFA: Chair, with respect, our law does not allow that repurposing. It does not. It simply says that the Magistrate, when exercising her discretion in that *ex parte* application ...[intervenes].

CHAIRPERSON: You see, in that process, they sought it for their own purposes. The Commission is seeking it for its own purposes. So it is not about the party that obtained the information simply repurposing in the air. They have received an instrument, a lawful instrument from the

Commission. The Commission is seeking the information for its own purpose. So tell me in law why they would not have to comply with that instrument ...[intervenes].

ADV QOFA: Chair ...[intervenes].

CHAIRPERSON: It is not repurposing in the air. There is a lawful instrument that says this information is no longer with Mr Sindane, it is with you, give it to us. What is legally wrong or objectionable with that?

ADV QOFA: Chair, our law is very clear. Once a search and seizure has been obtained, for a purpose as it has been attached in Annexure R, that search and seizure can only operate insofar as that purpose is identified ...[intervenes].

CHAIRPERSON: So on your proposition, forever and ever and ever, this Commission will never ever have access to that information?

ADV QOFA: No, absolutely not, Chair. That is not my proposition.

CHAIRPERSON: Then as some people say the law is an arse, if that is what the law is.

ADV QOFA: Indeed, Chair.

CHAIRPERSON: Ass as in donkey, please.

ADV QOFA: Indeed, Chair.

CHAIRPERSON: No, that cannot be. Also, to show me that what you say is legally sound, show me how the law you are referring to is on all fours with our situation here.

Show me that.

ADV QOFA: Chair, the only submission ...[intervenes].

CHAIRPERSON: Not in broad general legal terms or principles.

ADV QOFA: But specifically ...[intervenes].

CHAIRPERSON: Show me how the two, the scenario you are referring to, which you say it lays down the law and says here is what the law is, and then relate that to our scenario and show me how the two are on all fours.

ADV QOFA: Chair, there is nothing that would have prevented this Commission from issuing the same search and seizure against Ms Sindane *ex parte* before a Magistrate to indicate to that Magistrate, because as Chair will know, will remember, once that decision is made by the Magistrate, it says it is squarely limited to the issues that are before that Magistrate. Nothing prevented this Commission. And Chair, I do not want to be seen to be arguing the issues that are the subject of the High Court application ...[intervenes].

CHAIRPERSON: You are repeating your argument and you are not showing me how the two scenarios are on all fours, but continue, continue.

ADV QOFA: Thank you, Chair. But critically, what I would want to emphasise, Chair, is the following. Mr Sindane's engagement with the Commission has always been I have a

concern with this particular information. And all we are saying is, and we believe that the correspondence between the Commission and the lawyers of Mr Sindane ought, in the very least, to elicit some form of a meeting of the minds halfway.

To the extent that, in the very least, the Commission could have simply said, look, deal with those issues that are practical and leave those that you are not going to deal with. That would have not taken anything much away. But if Chair will see the response of the Commission right from the beginning, the response has simply been a hard line, we are not going to argue the law with you.

And in all fairness, and as Mr Sindane has pleaded in his affidavit, he has said, Chair, I am here, I am at your mercy. I respect this Commission. I have raised concerns right from the beginning. The only answer I have got from this Commission was not that of someone who has been requested to participate and assist the Commission, but it has simply been an attitude that says, do what you can.

And we are saying, if there was some form of – I mean, the communication speaks for itself. To the extent that Mr Sindane would have been at least told, I mean, Chair, we take the issue and, Chair, you will note that the Regulation 10.6 notice of Mr Sindane and Mr Sibanyoni

were issued on the same day, containing 90% of exactly similar material.

When the subpoena for Mr Sibanyoni was issued, none was issued for Mr Sindane. Rightfully or wrongly, the assumption of Mr Sindane was, well, the questions are the same, they have been answered, the Commission will not need me. And indeed, the subpoena was not issued, rightfully or wrongfully, Chair. We are simply saying, on that wrong assumption ...[intervenes].

CHAIRPERSON: No, that submission cannot be made seriously, Ms Qofa.

ADV QOFA: Chair, I accept that. But in truth, this is how – to the extent, Chair, that Mr Sindane actually believed, truly, that the Commission would no longer need him because the subpoena was not issued to him. I am truly at pains to express that the fact that he did not file had nothing to do with him not respecting this Commission. It did not.

CHAIRPERSON: Your time is up.

ADV QOFA: Chair, you ...[intervenes].

CHAIRPERSON: Do you want to summarise, perhaps, in two minutes?

ADV QOFA: My final submission, Chair, is that we would just ask that, we do feel that Mr Chaskalson wants some punishment of sorts towards Mr Sindane, which might

include flighting the information. The submissions have been made by my senior, Ms Masuku. And on the truly seductive proposition that the Commissioner has made, which I think is ...[intervenes].

CHAIRPERSON: That is an unfortunate adjective, Ms Qofa.

ADV QOFA: Is it a bad word?

ADV KHUMALO SC: I am not being ...[indistinct] Chair. No, no, no.

ADV QOFA: Attractive, very attractive, which I think, Chair, with you and the Commissioners, we can truly find a better way to address this. But, Chair, this will be our submissions, unless, of course, I defer to my leader in case there is something I have missed. Thank you, Chair.

CHAIRPERSON: Rather whisper to – yes, yes, Mr Masuku.

ADV MASUKU: No, that is what I was going to say, that if there was any addition I needed to make, I would just either write it down or whisper to her.

CHAIRPERSON: Yes, yes.

ADV MASUKU: Just to thank her for the submissions.

CHAIRPERSON: Thank you very much, Mr Masuku. In the light of your response to Commissioner Khumalo, a response you made grudgingly, Mr Chaskalson, may I ask Counsel to see if they cannot draft a ruling over the lunch hour, which should include the possibility of flighting taking

place in Mr Sindane's absence, should he be absent when we next appear. Let us adjourn and resume at quarter past two.

HEARING ADJOURNS

HEARING RESUMES

CHAIRPERSON: Yes, Mr Chaskalson.

ADV CHASKALSON SC: Chair, unfortunately we have not been able to reach agreement between ourselves on a way forward. It may yet be possible to do so, but certainly not in the next hour or so. I think if we could ask for both parties to be given time just to consider their positions and maybe with a deadline for the ruling to come down on, say, Friday morning, which will then focus people's attention but also create the possibility at least of finding a middle ground.

CHAIRPERSON: Thank you, Mr Chaskalson.

ADV MASUKU: Yes, that accurately reflects the status of the discussions.

CHAIRPERSON: Thank you. But as I understand it, we are not going to sit on Friday, so the ruling will be circulated in the usual manner if it comes to that.

ADV CHASKALSON SC: Thank you. I mean, Chair, even if there is an agreement, we would like it to be embodied ...[intervenes].

CHAIRPERSON: There must be a ruling one way or the

other, yes, yes, yes, true, true. In that case, so we adjourn and resume on Monday, whatever will be happening on Monday.

ADV CHASKALSON SC: Indeed, Chair.

CHAIRPERSON: Let us adjourn until 09:30 on Monday, and what has been suggested to us by both Counsel will happen. That is, on Friday there will be a ruling one way or the other. Let us adjourn.

HEARING POSTPONED TO 28 SEPTEMBER 2026

HEARING ADJOURNS

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