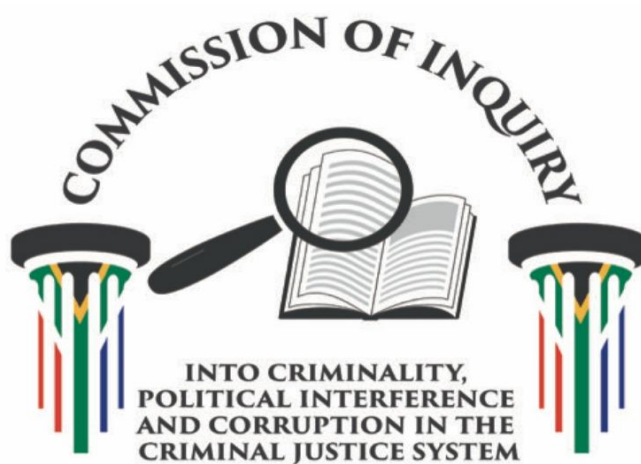


**JUDICIAL COMMISSION OF INQUIRY INTO CRIMINALITY,
POLITICAL INTERFERENCE AND CORRUPTION IN THE
CRIMINAL JUSTICE SYSTEM**

HELD AT
BRIGITTE MABANDLA JUSTICE COLLEGE

21 OCTOBER 2026

DAY 185



PROCEEDINGS HELD ON 21 OCTOBER 2026

CHAIRPERSON: Good morning, Mr Chaskalson. Good morning, Mr Winks.

ADV CHASKALSON SC: Morning, Chair. Morning, Commissioners.

ADV WINKS: Good morning, Chair and Commissioners.

CHAIRPERSON: Yes. Perhaps for the record, let me just say before we walked in, I called counsel outside and I indicated to them what our inclination is. They did not have enough time before us coming in to consider that because it was just seconds before we came in. For the record, I will ask Mr Chaskalson, in fact perhaps for the public, to state fully what the application is about.

And I think I will then share in writing what I told counsel outside. I will send it to Mr Chaskalson's phone and he will then share it with his colleagues and we will take an adjournment and we will come back and counsel will indicate to us whether they can meet each other or whether there will still be full-blown argument.

For a start, if you could just state for the record what the application is about, Mr Chaskalson.

ADV CHASKALSON ADDRESSES THE COMMISSION:

Thank you, Chair. The application is for an *in camera* ruling in respect of the evidence of Dr Sifolo, who is the coordinator of the National Intelligence Coordination

Committee. The evidence leaders have brought this application because the bulk of the evidence of Dr Sifolo relates to documents which have been partially declassified. They have been declassified for the use of the Commission and the consideration of the Commissioners and evidence leaders and, subject to correction, the Commissioners. Well, certainly the evidence leaders and Commissioners, there are other parties who are mentioned in the declassification order.

They have expressly not been declassified for the purposes of public dissemination. What that means is that, as things stand, the Commission can only hear the evidence of Dr Sifolo on those documents if that evidence is *in camera*. If the evidence is not *in camera*, then the declassification order, as it stands, precludes the Commission from hearing the evidence. So that is the basis of this *in camera* application. There is a central dispute between the evidence leaders and the representatives of the media on whether the Commission has the power to vary the declassification order, essentially to override the declassification order of Dr Sifolo.

Our understanding of the law is that the Commission does not have that power. The media respondents say the Commission does have that power. I think that is as much as I can say at this stage. We heard a

suggestion from the Commission that may afford a means of settling this dispute, but we have not had an opportunity to consider it or to discuss it with the media respondents. So in the interest of exploring the possibility of a settlement, I would ask that the matter stands down probably for half an hour. And in that time, we will both look at it properly and see if we can reach agreement around those lines.

CHAIRPERSON: Thank you, Mr Chaskalson. Is there anything you wish to say, Mr Winks?

ADV WINKS: Nothing to add to Mr Chaskalson. I think 30 minutes should be sufficient, if the Committee is willing to indulge us, the Commission.

CHAIRPERSON: All right. Thank you very much. You will wait for about a minute or so, because I have to edit this. It was written for the consumption of my co-Commissioners, so I have to get rid of some stuff. But within two minutes, you should get it.

ADV CHASKALSON SC: Thank you, Chair.

CHAIRPERSON: I will not indicate a time for coming back. You will indicate when we are ready. Let us adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes, Mr Chaskalson.

ADV CHASKALSON SC: Thank you, Chair. The evidence leader's seek a ruling directing that the evidence of Dr

Sifolo be heard *in camera*. Dr Sifolo is the acting coordinator of the National Intelligence Coordinating Committee and the bulk of the questioning of Dr Sifolo will relate to several hundred pages of classified documents comprising four National Intelligence Estimates, which were issued over the years 2022 to 2025, and 11 National Intelligence Coordinating Committee intelligence briefs and a special report, which were issued in 2025.

And then, late in the day, there were three additional documents that we obtained from NICOC, which are minutes and reports of NICOC meetings in 2025. The documents in question deal with issues relating to the central topic of this Commission's investigation, the infiltration of the criminal justice system by organised crime syndicates. They have been declassified for the limited purpose of their use by the Commission. The declassification order expressly makes clear that they have not been declassified for public dissemination and the distinction is material.

The declassification permits the Commission to receive and consider these documents for the purposes of discharging its mandate. It does not authorise the Commission to make the documents or their contents available to the public at large. Now, the respondents highlight the likely public interest in disclosure of the

documents in question. And they contend that the mere classification of information cannot, without more, justify a departure from the principle of open justice.

However, the respondents' contentions proceed from an incorrect premise, and this is the central issue in this application. The Commission is not a High Court. It has no power to set aside a decision to classify information or to override a decision on the terms on which classified information is declassified. The Commission just does not have that power. And if we are correct in our submissions that the Commission does not have that power, the Commission is left in the present situation with three choices.

The first choice is that it could apply urgently to the High Court to review and set aside the decisions to declassify the documents on terms which prevent those documents and, indirectly, any questioning in relation to those documents from being heard publicly. It could go to the High Court, which does have the power, and ask the High Court to exercise that power. That is the first option. The second option is that it could refuse to hear the evidence of Dr Sifolo *in camera*. It could just say, we are not going to hear your evidence *in camera*.

But the practical result of that is that the Commission would not be able to question him on any of the

documents in the exhibits bundle. So the documents would remain before the Commission, they have been submitted to the Commission, but the Commission would not be able to question Dr Sifolo or, indeed, other witnesses who the evidence leaders may want to question in relation to those documents.

The third option is what we submit the best of the three options, which is to hear the evidence of Dr Sifolo *in camera*, maintaining a complete record of the questioning of Dr Sifolo and the documents to which it relates, and to leave it to the media respondents to approach the High Court for access to that record or parts thereof on terms that the High Court determines to be appropriate. Let us go through these three options to indicate why the evidence leaders submit that the third is the most desirable.

The first option, which would be for the Commission itself to go to the High Court on an urgent basis, is undesirable for various reasons. First, it will divert the time and focus of the Commissioners and the evidence leaders away from their core task and into a collateral dispute over the terms of declassification of documents on which it needs to question Dr Sifolo and other witnesses. The Commission has already had to deal with three urgent applications brought by witnesses seeking to avoid testifying or furnishing documents to the Commission.

These urgent applications have been extremely disruptive to the work of the Commission and they have diverted significant resources of the Commission from the central inquiry that the Commission is established to conduct and not what the Commission should be spending its time on. Second, there is no guarantee that an application will succeed.

Third, even if an application were to succeed, having regard to the nature of the documents, it is likely that much of the evidence of Dr Sifolo will still have to be given *in camera* in that it is extremely unlikely that an application to the High Court would have the result that everything in the bundle of Dr Sifolo is declassified for public dissemination.

And finally, an application will interfere with the timetable of the Commission and will disrupt the proposed evidence schedule not only of Dr Sifolo but also of the other evidence who are to be called to deal with issues arising out of the evidence of Dr Sifolo and the documents in his exhibit bundle because there are other witnesses who will have to be called. It will almost inevitably require that those witnesses will have to be called after 9 November when the Commission resumes calling witnesses in public.

And given the tight constraints on the Commission's evidence time, this is likely to require the displacement of

other witnesses and interfere with the ability of the Commission to finish hearing evidence in December. So that is the first option, go to the High Court proactively. The second option is self-defeating. If the Commission were to refuse to hear the evidence of Dr Sifolo *in camera*, it would just deprive itself of the opportunity to question Dr Sifolo.

That leaves the third option as the only desirable option available to the Commission, namely to proceed with the questioning of Dr Sifolo *in camera* and to leave it to the media respondents, if they so choose, to approach the High Court for access in whole or in part to the record of that questioning and the documents relevant to that record. Why this option is desirable is firstly it allows the evidence of Dr Sifolo to be heard and to be heard without disrupting the programme of the Commission and diverting evidence leaders and Commissioners from their primary task.

It similarly allows the Commission to hear the evidence of other witnesses who are to be called to deal with issues arising out of the evidence of Dr Sifolo and the documents in his bundle. It will enable the Commission to preserve a full record of this evidence and the documents so if the respondents or anyone else wants to have access or wants to approach the High Court to have access to the relevant documents, they can and the High Court has the

power to give them access in appropriate circumstances, they will have to make out a case that there are appropriate circumstances.

It has a further advantage which is apart from the fact that the High Court has the necessary powers to regulate access to the documents and evidence. If it does so after the relevant evidence has been led, it will be performing the exercise retrospectively with reference to a fixed record of evidence and documents. This is a much more desirable approach than attempting prospectively to regulate the national security and intelligence consequences of potential questioning in relation to the documents in question.

The High Court will know exactly what it has to be able to disclose or not. Not guessing at where the questioning will go and what may or may not be allowed. So in this way, if the respondents feel sufficiently strongly about the issue, they will be able to secure access for themselves and the public to all of the evidence and documents of Dr Sifolo to which they are constitutionally entitled to have access.

Now, the respondents say that the evidence leaders have got it wrong and that the Commission in fact does have the power to override a declassification order.

CHAIRPERSON: Sorry, sorry, Mr Chaskalson. After the

evidence has been led *in camera*, you say the record will be there. How do you say access may be gained to it by those who are interested?

ADV CHASKALSON SC: Well, through an application to the High Court.

CHAIRPERSON: Or you go to Court first and you say there is a record there.

ADV CHASKALSON SC: To go to Court to obtain access or to review our decision, well, I do not think a decision, an application to review a decision of the Commission, either to review the decision to declassify on terms that prevent public access and as ancillary relief to ask the High Court to grant the media respondents access to an appropriately redacted copy of the record, either agreed upon by the respondent in that case, which will be Dr Sifolo or NICOC, or under some sort of High Court supervision to perform the appropriate redactions.

Or to apply to the High Court for, to apply to the Commission for access to information to the record when retrospectively, if there is anything that is not classified, the Commission could give, and not subject to classification, or subject to a release from Dr Sifolo, the Commission could give access. Or if the Commission could not give access, it would depend on a decision, it would probably, if Dr Sifolo does not ultimately agree to the declassification of some of

the information, if the media respondents wanted access for that, they would have to apply to Court to review and set aside that decision and for ancillary relief.

CHAIRPERSON: I get your submission and its essence fully, but then there is the antecedent right which the respondents are asserting, which is open justice. So the relief, or possible relief that you are pointing to, effectively means that that right will no longer be exercisable as that right.

ADV CHASKALSON SC: Well, I do not want to accept that it will not be exercisable as that right.

CHAIRPERSON: The hearing of the evidence...

ADV CHASKALSON SC: The hearing will not be public.

CHAIRPERSON: Yes. And that is exactly what, in my understanding, open justice relates to. It relates to the actual hearing being in the open. So to have a record that may, perhaps through a Court process, be accessible, the horse will have bolted with regard to the open hearing itself, which is what open justice is about.

ADV CHASKALSON SC: Well, open justice, to an extent, I would concede, open justice will definitely be limited. There will not be an open hearing. That happens whenever we hear evidence *in cameras*. The extent of that limitation will be contained by the High Court. If the High Court, on an inspection of the record, concludes that there is material

there to which the public, having regard inter alia to the principle of open justice, should have access to, the public will get access to. So the only issue is that the access will not be live. The legitimate access will not be live.

But this entire debate turns on the central issue of whether this Commission has the power to vary a declassification order. And our submission is it does not. Because if the Commission does not, then that really should be the end of the matter.

CHAIRPERSON: Not necessarily. I get the submission, and subject to what Mr Winks will say, I think I am with you with regard to the Commission's lack of a power to itself declassify fully insofar as the qualified declassification is concerned. I believe, as you do, that the Commission lacks that power. But in my view, the matter does not necessarily end there because we want to see a clearer or a fuller picture with regard to what may or may not be delineated with regard to either having or not having a public hearing at all.

So there is a distinction there. And that is what the inclination I shared with counsel before we came in related to. So I do not think it ends with the fact that there is a qualified declassification and that is the end of the matter. I do not believe so.

ADV CHASKALSON SC: Well, let me first address the

issue of whether there is the power because I must concede that if there is the power, then the media respondents have, their case must [indistinct] ...[intervenes]

CHAIRPERSON: As I said right at the beginning, I think I share your view that we do not, that we lack the power. But if you want to address it fully as a question of law, I will...

ADV CHASKALSON SC: Unless the other Commissioners want me to address it, I will save it for reply if needs be.

ADV BALOYI SC: Can I just ask my question on this? If you say, if the position is that the Commission does not have the power to override, and I use the word override loosely, the limited declassification, does that not necessarily therefore concede that the Commission can never inquire into the validity of the limited, the reasons, in fact, for the declassification, the limited declassification?

And if you say, and it sounds to me like if we do not have the power to override, it must mean that we must just accept the say-so of the witness and we cannot inquire into is that position taken justifiable in the circumstances, the reasons given for it. And on what basis do we say we cannot inquire into that?

ADV CHASKALSON SC: Well, the question is where would the inquiry go?

ADV BALOYI SC: Before you get there, I am just trying to establish first principle. We, for example, witnesses can

raise the defence of privilege, for example, or fear of self-incrimination. The Commission can inquire into that, and we have put witnesses through that to justify it is not for the taking. But the position that you seem to be advocating for now is that, well, it is for the taking when it comes to classification. They need only say, this is classified, we are not giving it to you. Never mind limited declassification, but complete refusal to provide on the basis that it is classified. And your submission suggests that the Commission can never inquire into that. And on what basis do you say that?

ADV CHASKALSON SC: Because the status of classification is, classification is a fact which is determined by the act of classification, in this case by Dr Sifolo. So the fact that Dr Sifolo ...[intervenes]

ADV BALOYI SC: And Dr Sifolo has the power to declassify. He does, it is a matter of law. He does have the power to declassify, and there must be principles that apply to how does he make that decision. At least from where I am sitting, it is not a simple case of he can arbitrarily exercise that power to declassify or not to declassify. It must be a justifiable decision. Can we inquire into that?

ADV CHASKALSON SC: We do not have the power to vary the declassification. We do not have the power to override it. That being the case, it is not the Commission's function

to inquire into the reasons. He cannot do so arbitrarily. If he does so arbitrarily, the High Court can strike it down. But we cannot. We are stuck with section 26 of the Intelligence Services Act, which says if you are not a member of the Intelligence Services and you disclose classified information without the permission of the Director General, you commit an offence.

ADV BALOYI SC: Yes. We have had declassification of information held by the NPA. We have had declassification of information held by the SAPS. So there is a power that is given to declassify, to make the decision to declassify. My inquiry is your submission, or I have a difficulty with your submission, insofar as it suggests that he could easily have said to us, I refuse to declassify, not give us a reason, and we would be here now. We would have to make a decision. Are we going to Court? Do we sit it out?

As you say, the second option is to simply forego that testimony. In fact, I am not even going to option three. I am dealing with one, two. He says to us, I do not want to declassify. He does not need to give us a reason. As I understand it, the consequence of your submission, it does not have to provide a reason, and that would be the end of it. If we want recourse, you say our recourse would be to go to Court. Is that what you are suggesting?

ADV CHASKALSON SC: If we want recourse. It is really

an issue, I mean, let us take an extreme example. Dr Sifolo says, I am not going to vary my declassification order, and I am not going to give you reasons. Now, we might be entitled to compel reasons from Dr Sifolo, but we would not be entitled to override the declassification decision. The Commission does not have that power. And the ...[intervenes]

ADV BALOYI SC: Well, Mr Chaskalson, maybe let me interrupt you. Sorry for that. Please do not lose your thought process. What would be, if we do not have the power to compel that that information be submitted to us, that we exercise the power to determine whether it goes *in camera* or not, what would be the point of a power to compel reasons for refusing to declassify and to provide that information if in any event we cannot do anything about it?

ADV CHASKALSON SC: At best, what we could do is ...[intervenes]

ADV BALOYI SC: But maybe before you even answer, maybe also consider the provisions of section 3(1), where it says, and to call for the production of books, documents, and objects. What does that, in fact, mean if Dr Sifolo can say, I am not giving you this document because it is classified? What does it mean?

ADV CHASKALSON SC: He cannot say, I am not giving

you this document. But he can say, because we have the right to the document under 3(1). What he can say is you can have the document, and you can use it for your purposes, but you cannot disseminate it publicly. 3(1) is not – and that is why it may be important for me to make the argument as to why the Commission does not have the power.

ADV BALOYI SC: Maybe do.

ADV CHASKALSON SC: Because it is a very important distinction that feeds into the question of where an alternative regime goes. So let me get back to the media respondent's argument on the power. They say that this power flows from section 3(1) of the Commissions Act, the provision that Commissioner Baloyi just quoted to me. Now that provision says:

“For the purpose of ascertaining any matter relevant to the subject of its investigations, a Commission shall have the powers which a provincial division of the High Court has to summon witnesses, to cause an oath or affirmation to be administered, to examine them, and to call for the production of books, documents, and objects.”

So it is essentially, as we read it, the subpoena power of

the High Court.

They, the media respondents then invoke the judgment of the Constitutional Court in Masetla that says in paragraph 53 that:

“A Court has an inherent power to override the classification of a document and to determine that the public should be given access to that document if the principle of open justice requires.”

And they then contend that if you read 3(1) in Masetla together, it means a Commission must have the same power. But the argument is wrong and what it misses is that the reasoning in Masetla is based on the inherent power of a Court under section 173 of the Constitution. And that is very clear from Masetla. So in paragraph 53 in Masetla, the Court says:

“Where the request to disclose intelligence documents occurs in any...”

Oh, sorry.

“When the documents have been placed before a Court by a party to the proceedings and form part of the court record, in that event, a Court will always have the power to regulate the proceedings before it because it is closed

by section 173 of the Constitution with an inherent power to regulate its own process, taking into account what is in the interests of justice.”

And then again in paragraph 57, it makes clear that this is all about section 173 of the Constitution.

“Where a government official objects to disclosure of a part of the record before a Court on grounds of national security, the Court is properly seized with the matter and is obliged to consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret and away from any other parties, the media or the public. This forms part of a Court's inherent power to regulate its own process that flows from section 173.”

So it is all about section 173. The power to get the documents before Court is the power of subpoena. The power to decide who has access to the documents once they are before Court flows from section 173 and is part of the inherent jurisdiction of the High Court. Now, this Commission does not have the powers under section 173.

ADV BALOYI SC: What is the power of the Commission, of

the Chairperson in particular, to determine whether a matter must be heard publicly or *in camera*? What does that power entail? Is that not a power to regulate how testimony or evidence and documents of witnesses will be handled? So is there not, therefore, not an inherent power, but is it not a statutory power insofar as it is founded?

ADV CHASKALSON SC: It is a statutory power.

ADV BALOYI SC: And what do you say are its parameters in a case like this?

ADV CHASKALSON SC: It is a statutory power that can only be exercised in accordance with the law.

ADV BALOYI SC: Yes.

ADV CHASKALSON SC: And if there is a law which says when Dr Sifolo has declassified a document for use only by the Commission, no one may publicly disseminate that document without committing an offence, then the power to regulate the proceedings, the power to determine what is open and what is not open, cannot be exercised in a manner that would contravene section 26 of the ISA.

ADV BALOYI SC: So in effect that power lies with Dr Sifolo in these circumstances. He is the one that determines, not the Commission. The Chairperson cannot exercise that power. It is Sifolo who exercises the power whether his testimony will be heard *in camera* or publicly. Is that not effectively what it becomes?

ADV CHASKALSON SC: Well, in the very limited situation covered by classified documents, that is the practical outcome of that. Dr Sifolo cannot refuse to furnish documents because under 3(1) Dr Sifolo has to furnish documents. But if the documents are furnished subject to a declassification order that says you may see them, you may have regard to them for the purposes of your inquiry, but the public may not, then the Commission does not have the power to override it. The High Court may well, or does, not may well, does, but the Commission does not have that power.

ADV BALOYI SC: But then if that is correct, if that position that you are putting is correct, then is not the burden on the Commission in the exercise or discharging of its functions and mandate to then approach the Court instead of sitting back? Because effectively, if you are correct, or if Dr Sifolo is correct, then effectively it means the Commission cannot discharge its mandate.

For example, if he had taken a position that, well, I am obliged under 3(1) on your argument. If he had taken the position, I am obliged under 3(1) to give you these documents, but you may do nothing about them. I do not give you permission to treat them. It negates 3(1), that subpoena power. And on what you are saying, we cannot interrogate his reasons for it, we must accept he is made a

decision how we are going to handle these documents.

So if he were to take that position, you are saying, well, it would be for the media respondents to go to Court, but the consequence of it, and it seems untenable to me, that the consequence of it would be that the Commission will not go to Court because it would expend its resources when, in fact, I want to suggest in that case, the Commission would have a positive obligation to go to Court because it does have a mandate to discharge, it must investigate these matters, so we would be burdened with going to Court. We cannot just leave it.

ADV CHASKALSON SC: To vary your example, if Dr Sifolo refused to give us the documents, then we would, if we considered the documents to be of sufficient importance, or the inquiry in relation to the documents, because we may not know what they were, to be of sufficient importance, then we would go to Court. But it is a question that has to be answered with reference to the importance of the issues that you want the Court to resolve relative to the central function of the Commission.

Now, in this case, the Commission is not obliged to go to Court. If the Commission were to go to Court, the marginal benefit for the Commission is really only to have this part of its proceedings held in public. In terms of the inquiry that the Commission is conducting, there is no

benefit to go to Court or not to go to Court for the Commission. So long as it has access to the documents and can question any witnesses it wants to question on the documents, albeit not in open session, the Commission can perform its central function.

If it were to go to Court, it would have all of the adverse consequences that I have already gone through. And I do not want to belittle them as the chief evidence leader who has been responsible for dealing with the last three urgent applications. They consume a very substantial amount of time and resources. They divert evidence leaders and investigators away from what should be their central function. And in this case, there is no guarantee that the application would succeed.

It may, it may not. It may succeed partially. It would be a very extensive allocation of Commission resources for a purpose that does not centrally affect the Commission's primary investigation with the prospect of marginal gains. And in the process, it would put the whole of the Commission's calendar in relation to *in camera* witnesses dealing with these documents into limbo until the Court case was determined. We could not decide whether to schedule these witnesses in the *in camera* window.

So they would definitely have to come after 9 November. That would then displace other people who have

been scheduled there. It would have serious knock-on effects. My submission is that the Commission can defend a decision not to go to Court prospectively to sort this out. And the marginal cost to the respondents is minimal. If they want to go to Court retrospectively to sort it out and to get access to that to which they are entitled, they can. And then the Commission stays focused on the Commission's primary focus.

And the respondents, or indeed any other members of the public who want access to the relevant documents can go to a Court, and a Court can decide. The Commission's primary function is to conduct its inquiry. It is not to provide public access to everything that it does.

ADV BALOYI SC: I accept that, Mr Chaskalson, and I hear your convenience argument. It is a real issue that the Commission has had to deal with since we started, and we have to deal with it every day. The difficulty, or some of the problems that I have, is the Commission conducting its inquiry as it must, but doing so on the dictates of a witness. And I want to suggest to, put this to you and hear your comment lastly.

What if, assuming that on what is the documents placed before us, we are of the view that this is information that should be heard publicly? Because it is not just one scenario that all his testimony obviously belongs *in camera*.

What if the view of the Commission is that having once we have been presented with documents, and we form the view that, well, this testimony in fact should be heard publicly for considered reasons. We do not make that determination arbitrarily, but for considered reasons.

You seem to be, I understand your submission to be, well, it is not for the Commission to make that determination that this is matter that must be heard publicly. I understand you to be saying, well, notwithstanding the Commission's view, we still must do what the witness says, which is it has to be heard *in camera*, notwithstanding the view that the Commission holds. I struggle with a suggestion like that because it is in fact the witness who dictates how we are going to hear his testimony.

No different from other witnesses who have asked to testify *in camera*, because they come to us with a dictate that says your testimony, my testimony must be heard *in camera*, not in public, and we have said no, it does not work that way. So I am putting to you that problem. What if we are of the view, having reviewed the documents and the nature of the evidence, that this is matter that must be heard publicly? You are saying we do not have the power to make that determination. That is pretty much the bottom line.

ADV CHASKALSON SC: We do not have that power. If the Commission, having inspected the documents, having even questioned Dr Sifolo, is of the view that this is of such public importance that the public should know, then the Commission could itself proactively go to the High Court for an order to that effect. But it is the High Court that has the power, not the Commission. And the Commission is faced with a choice now.

Does it consider this sufficiently important, preemptively, to go to the High Court? If it does, then, if that is the view of the Commissioners, then that is what the Commission should do. But until the Commissioners take that decision, unless the Commissioners take that decision, my submission is the Commission does not have a power to order Dr Sifolo to vary the terms of his declassification. That is a High Court power. And the consequence is that unless the Commission takes that decision, the evidence must be heard *in camera*.

ADV BALOYI SC: Thank you.

ADV CHASKALSON SC: What I do want to say is that the suggestion that has been put to us is possibly an alternative scheme in terms of which we return to Dr Sifolo, we ask him to separate his affidavit into two affidavits, one that addresses material that he says must be kept *in camera* and one that may be held in public, and to particularise why the

second half of the affidavit has to be addressed *in camera*.

My concern with that proposal is that if the Commission does not have the – I mean, assume Dr Sifolo says the second half must be heard *in camera* because I say so. The Commission still does not have the power to do anything about that. It does not have a power to vary a declassification order. And so that model ...[intervenes]

CHAIRPERSON: Let me, because I crafted that, let me explain why I have that. I actually did think about it and I actually also reached exactly the same point you make, which is, but where is this taking us? Because I do not think we have the power, contrary to what my colleague Commissioner Baloyi, at least of course I know she is just engaging you and this is not indicating a definitive view, but the engagement questions, the question of the Commission not having the power. So I engage with that point from the basis that the Commission does not have the power.

But I still have had that or included that on the basis that I think as a Commission we should at the very least have the full, full picture of what is going on, especially, okay fine, we have the one statement that Dr Sifolo will be saying, evidence on this can be given publicly, but not evidence of the rest. I just want to have a full, full picture of what is going on, what is in his mind, even if we may not necessarily be in a position to undo the qualified

classification. I see no harm at all in him giving an explanation in that regard.

ADV CHASKALSON SC: I hear what you are putting to me, Chair, but if ultimately the Commission does not have the power, it is really just a request to Dr Sifolo to think carefully again about what needs to be declassified and what does not need to be declassified. And then we should be writing a letter to him.

CHAIRPERSON: Who knows, that just might produce positive results.

ADV CHASKALSON SC: But there is a distinction, because it seems to me that if we want Dr Sifolo to think again, we should ask him to think again.

CHAIRPERSON: But truth be told, that part of what I propose to counsel is really ancillary. The most important part is delineating what he can testify to publicly and what he cannot. And the result of that, if that is indeed the ruling that comes out of this Commission, will be that we will then have two statements from him. And it is on that basis that I say this part that we are debating now is ancillary. I could easily get rid of that part if it becomes an issue. So from where I am sitting, it is quite ancillary. It does not really affect the substance of what I proposed to counsel.

ADV CHASKALSON SC: I hear you, Chair. I would, well, firstly, if we are going to go down that route, in fairness to

Dr Sifolo, he is not here. He did not bring this application, we did.

CHAIRPERSON: Yes, yes.

ADV CHASKALSON SC: So it should be an obligation of the evidence leaders to approach Dr Sifolo to do that. I do not think we can make any order against or ruling binding Dr Sifolo. I do not know what he would or would not want to say in that regard, and I am not his representative. But if the Commission wants the evidence leaders ...[intervenes]

CHAIRPERSON: Would it, in the light of what you have just said, would it be practical then, and I assume it should be because the evidence leaders have engaged with the documentation, would it be practical for an order to then say the evidence leaders must do what I proposed should be done, which is the production of what? A statement has to be by the witness?

I think in terms of the inherent power that the Chairperson of the Commission has, which Commissioner Baloyi referred to, even if Dr Sifolo is not here, surely in terms of that power I should have the power to direct what sort of statement or statements he should file. I do not see what possible legal impediments there may be.

ADV CHASKALSON SC: You may have that power, Chair, but in terms of principles of fairness, you cannot exercise that power, at least without hearing Dr Sifolo. I am just, I

am acutely aware that I am...

CHAIRPERSON: I could tweak the ruling and introduce it by saying to the extent that he may want to, he must show cause why he should not file those two statements, and failing showing such cause, then he must file those two statements. I know it is pushing it further and further down the line, but I am trying to avoid having hurdles in front of us, procedural hurdles standing in front of us, and possibly making it impossible for me to make the ruling that I am minded to make. So if your preference would be the showing of cause, I can go down...

ADV CHASKALSON SC: The showing of cause I appreciate. I just do need to emphasise my position. I did not...

CHAIRPERSON: Yes, yes.

ADV CHASKALSON SC: I have not consulted with Dr Sifolo on these issues. I am not Dr Sifolo's representative. I am still less than representative of NICOC.

CHAIRPERSON: I think in fairness, I think in fairness I should say I take your point with regard to fairness to Dr Sifolo in this regard.

ADV CHASKALSON SC: But again, if that is the inclination of the Chair, of the Commission, I mean Dr Sifolo's declassification decision says that if you want to disseminate further, you must ask him, you must get his

permission. And I do not like the idea of rulings on a party who has cooperated completely with the Commission, who has his policy reasons for doing that which he has done. I would prefer a situation where if the Commission wants further declassification, it requests that from Dr Sifolo rather than make a ruling in his absence.

And the evidence leaders and the chief investigator will engage Dr Sifolo as a matter of urgency and this application can be held, we are not going to hear him *in camera* until that is resolved. But I do see a problem of fairness in making rulings relating to him in circumstances where he is never once been...

CHAIRPERSON: Difficult.

ADV CHASKALSON SC: Well, it is that not the Commission has ever asked him to do anything other than that which he has done thus far. And where the end point of that process.

CHAIRPERSON: I must say, I have not seen his qualified declassification. Maybe it is a failure on my part to pick it up in what we have.

ADV CHASKALSON SC: It is one of the early documents in the bundle.

CHAIRPERSON: Oh, okay.

ADV CHASKALSON SC: I will give you a page reference.

CHAIRPERSON: Okay, all right. But as you say, Mr

Chaskalson, if it may mean... Oh, let me ask this first. Are you hopeful, though, because I assume you have been engaging with him quite extensively? Are you hopeful that it would be worthwhile to attempt to see if he would be willing to relax the qualified declassification?

ADV CHASKALSON SC: I cannot speak for him. Let me say, for instance, his CV. I do not think anyone – his description of himself and his CV in his statement, I do not think that would be an issue. I may be wrong, there may be reasons for it. There are limited parts of his statement which I could contemplate that he might agree to be disseminated publicly. I cannot speak – I am not an Intelligence Services person. I do not actually appreciate the policy implications of disclosure of any of the substantive intelligence documents.

CHAIRPERSON: I understand.

ADV CHASKALSON SC: I cannot speak for Dr Sifolo on that.

CHAIRPERSON: I understand.

ADV KHUMALO SC: Mr Chaskalson, very quickly, can you just tell us why 34 of the media parties' submissions is not workable? As I understand the media parties, they appear to concede that there may be some material which is not for public consumption. But they are saying not everything falls in that category. And they do not see a reason why Dr

Sifolo cannot, in public, say what the intelligence community knew, what the failures were, and why there were those failures.

And Dr Sifolo can, in public, deal with that part of his statement and that part of the evidence. And then documents which cannot be disclosed for the reasons that you have mentioned can then be the subject matter of a directive. Because I do not understand the media houses to say, we want to see the documents themselves. Or we want the documents themselves to be displayed or ventilated in public. They are prepared to accept that there may be national security issues, but they are saying not everything.

And they say there is public interest in the public hearing what the intelligence community knew and why nothing was done. And that part can be dealt with in public. And whatever that is sensitive should then be left to be dealt with, I assume, in private or...

ADV CHASKALSON SC: Again, it is a request we can make to Dr Sifolo. If the Commission does not have the power to vary the declassification order, then ultimately the commission, the purpose of all of this would be to direct Dr Sifolo, essentially to provide reasons for the extent of the classification and to disclose information with a view to varying the declassification.

If the Commission does not have that power, it is

an inquiry that should not be directed by this Commission. It is an inquiry that belongs elsewhere. I do not, even assuming, for present purposes, that there is an overriding public interest in knowing what the intelligence community knew, to whom the intelligence community reported what they knew, when they reported what they did, it is not something that this Commission controls. It is something that the High Court controls.

ADV KHUMALO SC: Is the short answer that all those answers are to be found in the classified documents?

ADV CHASKALSON SC: Well, my understanding at the moment is that all of those answers are to be found in the classified documents. Certainly the issues of what the intelligence community knew, to whom they reported, when they reported, if they reported. As I understand it, that is what sits in the classified documents. And to order a disclosure of that nature in the face of the classification, I think, is something that the Commission does not have the power to do.

ADV KHUMALO SC: Thank you.

CHAIRPERSON: Please continue, Mr Chaskalson.

ADV CHASKALSON SC: Chair, I do not have more to add. But I do want to emphasise that this is, and I do not speak for Dr Sifolo here now, I am acutely aware that he may have lots of things that he would want to say before varying the

terms of his declassification order or choosing not to. And I would urge the Commission not to make an order against him in his absence. There may be issues that he needs to bring before the Commission.

CHAIRPERSON: So with regard to that point, you would be happy with an order that, before anything else, that initially says he must show cause by X date why the proposed order should not be made?

ADV CHASKALSON SC: Well, I would prefer a direction on the evidence leaders to take up the terms of the declassification order to say if you want me to vary this classification, well, if you want to disclose beyond the evidence leaders and the Commissioners and the secretary, seek my permission.

CHAIRPERSON: All right. No, that is in order, that is in order. Are those...?

ADV CHASKALSON SC: Those are my submissions.

CHAIRPERSON: Thank you, thank you, Mr Chaskalson Wilson. Yes, Mr Winks?

ADV WINKS ADDRESSES THE COMMISSION: Thank you, Chair and Commissioners. Just to put myself on record with my team, it is Ben Winks appearing for amaBhungane, Daily Maverick and Media24, the so-called media respondents. I am joined by Dr Dario Milo, my instructing attorney from Webber Wentzel, and Mr Lisetti Ngubeni behind me. We

have a significant difficulty with the evidence leaders' point of departure. The question being posed to the Commission by the evidence leaders is whether the Commission or the Chairperson has the power to override a classification decision or a declassification decision. That, we submit, is not the inquiry.

The inquiry is what, in light of the regulatory scheme that governs the Commission, is the Commission empowered to do. The Commission's Act, the regulations, the proclamation and the rules and I will take the Commission through what I submit is relevant in those documents shortly. But we want to just explain that the way we see the application and why giving Dr Sifolo another opportunity might not, or we submit will not, bear any fruit, is because what has been relayed to the Commission through the evidence leaders by Dr Sifolo is not an application for *in camera*. It is an ultimatum.

He is saying, either you hear my evidence and look at my documents in total secrecy, or I will not give you those documents, and I will not be able to say anything meaningful.

CHAIRPERSON: But that may be so, perhaps... I am not sure that the affidavits in the application itself, yes, the affidavit by Mr Popkas [?], I am not sure that it goes so far as to make the point I am about to draw to your attention,

which is quite important. He says that permission, I am looking at, I do not know if you have this bundle.

ADV WINKS: We do, Chair.

CHAIRPERSON: That is why I preface my comment by saying I do not think Mr Popkas' affidavit touches on this. It is a, is there, ja, okay. After declassifying for purposes of use by the Commission, Dr Sifolo then says:

“With permission for any further dissemination of the documents outside, the Commissioners, the secretary, and evidence leaders should be kindly requested from NICOC as the author of the documents in line with Chapter 4, section 2 of the MISS.”

So what you refer as an ultimatum may not be accurate, but of course I understand where you are coming from because you are not aware of this. I am saying this on my recollection of what Mr Popkas says in his affidavit. I do not recall that it does touch on this, but if it does not, then I understand where you are coming from. But I think it is only fair that I should draw this to your attention, and I think it does temper what you say with regard to this being an ultimatum.

ADV WINKS: Yes, thank you, Chair. That certainly, we are grateful for that information which we did not have. The

affidavit which was presented to us as the media was one in which Mr Popkas indicated that if it is not heard *in camera*, then the Commission cannot hear anything from Dr Sifolo. That was paragraph 11 of his initial affidavit. It was, if I recall correctly, put even more firmly in the replying affidavit in which Mr Popkas says, where he frames it in paragraph 6 of his replying affidavit, which is at page 53 of the bundle that the evidence leaders provided us with, is this framing of overriding the classification. That is paragraph 6. It says:

“It concerns the limitation attaching to the declassification of the information and documentation which is required to place before the Commission and the Commission's inability to vary or override those limitations.”

There is a further suggestion in the remainder of that affidavit, if you will bear with me for one second. Yes, it is the three choices proposition that was put by Mr Chaskalson. It is found in paragraph 17 of Mr Popkas' replying affidavit. It says first, the Commission can apply urgently to the High Court to set aside the declassification decisions because the Commission does not have the power to override or vary those decisions. That is the first option that is put to the Commission. The second is to refuse to

hear the evidence of Dr Sifolo *in camera* with the practical result that it will not be able to question him on any of the documents in the exhibits bundle.

This is more accurately what I was alluding to as an ultimatum, is to say through the evidence leaders, Dr Sifolo saying, you cannot question me on those documents if it is not closed or occluded from the public view. Now the difficulty we have with that is that it is found nowhere in the Commission's Act, in the proclamation, in the regulations by which this Commission derives its entire purpose and operation.

That, it is not a question of whether the Commission has the same power as a High Court. Rather the question is whether there is an exemption in that regulatory scheme for classified documents. Now what the scheme says is that the Commission is open, the witness must come, the witness must take the oath, the witness must answer questions. And there is an exception provided for that, which is in section 3(4) of the Act. And this of course is what Commissioner Baloyi was alluding to, is that section 3(4) says:

“Any person who has been summoned to
attend...”

As Dr Sifolo has, and I skipped a bit about witness fees,

“...the law relating to privilege as

applicable to a witness giving evidence or summoned to produce a book or document in such a Court, being a Superior Court, shall apply.”

The regulations of this Commission then, at Regulation 8.1...

CHAIRPERSON: Sorry, can you just paraphrase the point without necessarily reading the section, because with the excision you just made I could not quite get the point you are making.

ADV WINKS: Yes, the relevant provision is in fact 8.1 of the regulations.

CHAIRPERSON: I am talking about the section first before you get to the regulations.

ADV WINKS: Yes, the point is that a witness can only invoke privilege not to answer a question. And the regulations of this Commission at Regulation 8.1 says:

“No person appearing before the Commission may refuse to answer any question on any grounds other than those contemplated in section 3(4) of the Commission's Act.”

And if I read section 3(4) correctly, it only provides for privilege and then there is provision in Regulation 8.2 for self-incriminating answers and the like. But Regulation 8.1

says the only ground on which you can refuse to answer a question, is in section 3(4) of the Commission's Act, which is privilege.

CHAIRPERSON: Are you saying any other law that may bear relevance to the giving of testimony becomes irrelevant altogether because of the wording of section 3(4)?

ADV WINKS: It does not become irrelevant, in the sense that if a witness refuses to give an answer, there is a saving clause for the witness. In section 6 of the Commission's Act, it speaks about offences by witnesses. And in 6.1 it says a witness, and I have to paraphrase because it is 15 lines long, it says a witness having been sworn in or who refuses to be sworn in or refuses to attend or having been sworn in, fails to answer fully and satisfactorily any question lawfully put to him is then guilty of an offence.

So there is a provision for a witness to be saved from criminal consequences if the Criminal Court decides that he has answered satisfactorily a question lawfully put to him. But it is not for the laws relating to intelligence to dictate to the Commission, outside the parameters of the Commission's Act, what it may and may not call for from witnesses. If it is relevant to the terms of reference, then the witness must produce it and the witness must answer

questions about it.

The other problem with the declassification decision, limited declassification decision, is that ...[intervenes]

CHAIRPERSON: So are you effectively saying that classification means nothing at all for the Commission? If once the Commission has said produce and then the document has been produced, then the witness is required to divulge the contents of the classified document. Is not the upshot of that that the classification goes out through the window?

ADV WINKS: Certainly not, Chair. It is, we submit a similar line of reasoning as was put in independent newspapers in re Masetla, to which my learned friend referred, that it is not irrelevant, but the party wishing to keep secret a document or part of it, must motivate beyond the decision that they have made to classify or declassify, why that information must be withheld from public view. They must do so based on cogent grounds relating to the information itself, not the decision by some or other person to classify it.

And of course in light of our history, and this of course being a classification decision made under the Minimum Information Security Standards, which is not a law, there is no law on the statute books that provides for

decisions to classify or declassify. It is presumably under the 1982 Protection of Information Act that these standards are implemented by the Intelligence Services. But that decision can be made on any whim.

A member of the Intelligence Services, Dr Sifolo himself, could decide tomorrow, in fact, to withdraw that limited declassification. He could classify documents relating to Crime Intelligence. Any other party or anybody with the power to classify could classify any document and withdraw it from this Commission's scrutiny, not only from public scrutiny, but from the Commission's scrutiny, if a classification was conclusive.

CHAIRPERSON: Why does the Oudekraal principle not apply here? In the sense that there is a decision, and according to the Oudekraal principle, a decision, you may say, this does not fall under the decisions envisaged in Oudekraal, I do not know. But the principle is that for as long as the decision stands, it must be regarded as existing in fact, and cannot be disregarded until and unless it has been set aside by a court of law. That is the Supreme Court of Appeals saying so. And that decision, the Oudekraal principle, has been affirmed by the Constitutional Court in cases like Careland, for example. So why does the Oudekraal principle not apply here?

ADV WINKS: The reason, Chair, is that the, as in Masetla,

the decision to classify is not a decision that has any external effect on other bodies. And this is part of the problem with not having an actual law that provides for classification and declassification. But what we do know is that a High Court is not required to override or set aside a classification decision.

CHAIRPERSON: Is that correct, that there is no law for something with such far-reaching implications to be done without any law whatsoever? I mean, pharmaceuticals, the Constitutional Court judgment in pharmaceuticals would go dead against that. Because pharmaceuticals says no organ of state can act in the absence of a law authorising acting. So pharmaceuticals would cut right across that, and I would be surprised that your submission is correct, at least on this point.

ADV WINKS: The only document that provides for decisions to classify and declassify is the Minimum Information Security Standards, which is a document of the Executive, the Minister of Intelligence. Part of the motivation by the Department of Intelligence or State Security in introducing the Protection of State Information Bill in 2010, was because a review Commissioned by the Minister or the President had previously said we need a framework law to classify documents, we do not have one.

The MISS is not good enough, and that Act has

never been assented to by the President. It is not law. So that is part of the problem, and that problem should not be visited on the Commission or the media. That is a problem of the Intelligence Services and the Executive or Parliament's own making. But again we say it is the wrong inquiry, because the Commission has to follow what is said in the Commission's Act, in the Proclamation and the Regulations and the Rules.

And the Commission's Act says only privilege is a basis for refusing to answer a question, and that is the basis on which the witness has relayed through the evidence.

CHAIRPERSON: Has this legal point been made pertinently in the answering and supplementary affidavits? Because if it has, I am sure it would have exercised my mind and I would have followed up on it. I am not saying that it has not been, but I do not remember picking it up in the answering and supplementary affidavits, because it is quite intriguing.

ADV WINKS: Yes, thank you, Chair. It is not foregrounded in that way. The focus in the papers was essentially the Masetla point, which is on our submission section 3(1) of the Commission's Act says you are clothed with all the powers in relation to witnesses and documents as a High Court. But even if that were not the case, it is now the

submissions that I am making which only flow from the architecture, the legal architecture of the Commission, which were not made pertinently in the affidavits and the heads of argument. I have to concede that. And perhaps I certainly should have brought that also to my learned friend's attention.

CHAIRPERSON: And please do not misunderstand me. I am by no means suggesting that you should not make that point. No. It is a legal point, pure, pure legal point, and if it springs out, as it were, from what is before us, you are perfectly entitled to make a legal submission of that nature. I am just talking about if it had been made, I would have thought about it beforehand and be able to engage with it before now. So I am not suggesting that you cannot make the point, not at all.

ADV WINKS: Thank you, Chair. Thank you, Chair. We are grateful. The reason we submit that, and how it was put by my learned friend, was that if the Commission takes option two and refuses *in camera*, and I wrote down exactly what my learned friend said, which is that the Commission would deprive itself of the opportunity to question Dr Sifolo, which frames this as though these documents and this testimony is a favour or a gift from Dr Sifolo or NICOC or the Intelligence Services.

And it cannot be that any Intelligence Service can

dictate to a Commission post-1994 what we will and will not tell you. They can motivate and say this will jeopardise personal safety of an operative, this will jeopardise the viability of an operation, this will jeopardise our relationship with the CIA or with the MI6 or whomever. But to say it is classified because we say so is not good enough, and Masetla tells us why.

It would take us back to the Harms Commission, which with respect is widely acknowledged by the TRC itself, as a farce, where the Intelligence Services, the secret police and the security police were allowed to dictate to a Commission of Inquiry headed by Justice Louis Harms what they will and will not say. They appeared in ridiculous disguises and hid their identity, the witnesses. And that was supposed to be put behind us when the Goldstone Commission took a radically different approach and searched and seized and raided even classified documents.

So post-1994, it is untenable for an executive or administrative functionary to say we will tell you what we decide we will tell you. That is not the culture of justification that was emphasised in the access to information cases that have wound their way before the Court, that the Bill of Rights is a breach from a culture of authority to a culture of justification. Now, the difficulty with the proposition that we can declassify for one purpose

but not for another, we can declassify for the purposes of the Commission but not for the public, is that that is a false distinction.

And the way Mr Chaskalson put it was that you can use it for your purposes, your being the Commissioners. But what are the Commission's purposes? The Commission's purposes are to investigate, to report and recommend. And for whom does the Commission do that? Does it do that as an agent of the President? No, it does that as protectors in a sense or investigators on behalf of the public. That is what a Commission serves, is to deal with some kind of malaise in public institutions on behalf of the public.

A Commission serves the public. And how it does that was well put by Justice Louis Brandeis from the US Supreme Court over 100 years ago, where he said, talking about open justice, he said:

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants. Electric light the most efficient policeman.”

So it is the public nature of an inquiry that actually fosters public trust in the possibility of improvement from this, what has been put as a disease in the criminal justice system.

The President was well aware that he was establishing a public inquiry when he proclaimed the terms of reference of this Commission and one part of it may very well be interpreted against me, but I must bring it to the attention of the Commission. The terms of reference in the proclamation of 23 July 2025, paragraph 10, says:

“The Commission shall have all the powers necessary to achieve its mandate, including...”

So it is not a closed list, but the Commission shall have all the powers necessary to achieve its mandate. That, of course, is very expansive. It does not say anything about a specific exclusion that is not provided for in the Commission's Act.

“[10.1] The power to summon witnesses and compel the production of documents.

[10.2] The power to conduct search and seizure operations subject to applicable law.

[10.3] The power to deviate from the Act insofar as it provides for public hearings and to order that the Commission shall sit *in camera*, where necessary, to protect the safety of witnesses, the integrity of ongoing investigations, where appropriate,

and where intelligence and the work of
Intelligence Services are concerned.”

That is an important rider. That is 10.3 of the proclamation of the terms of reference. Now, we submit that is not a blanket exclusion of all intelligence-related information. It is still incumbent on the witness or the evidence leaders to indicate what information should be withheld from public view, because it would jeopardise some legitimate interest for it to be disclosed, and what information is not to be put in public view.

And that cannot hinge on an arbitrary decision to clothe all four corners of a document with secrecy. It must be the information in the document that attracts a justifiable claim to secrecy, because some interest would be jeopardised. And that is our difficulty with paragraph 11 of the first affidavit, the founding affidavit of Mr Popkas, where it is said that:

“The information and documentation referred to above are interwoven throughout Dr Sifolo's statement and the evidence that he is required to give. It is not practically possible to separate those portions of his evidence which concern such information and documentation from the remainder of his evidence without

materially disturbing or limiting the evidence to be placed before the Commission.”

And that is why they say:

“It is accordingly necessary that the entirety of Dr Sifolo's evidence be heard *in camera*.”

This brings me to our second last point, which is that to give Dr Sifolo another opportunity, or the evidence leaders or Dr Sifolo through the evidence leaders, to have another opportunity to justify perhaps document by document or page by page or paragraph by paragraph what should be kept secret and why, is an opportunity that he has already spurned. He has not told the evidence leaders that it is sensitive for this reason or that reason, as far as we know. That is what I understand from the submissions by Mr Chaskalson.

He has simply told them, I have declassified it for the Commission but not for the public. That is all. And it is so interwoven that I cannot even provide a redacted version of anything. Not because it is replete with security sensitive information, but because it is classified, which are very different things. So that is one reason why we say that giving him another opportunity to justify document by document what should be secret and what should be public,

it just defers the decision from today to another day because he has already told the evidence leaders, I cannot do that.

It is so interwoven that I cannot separate anything out. I cannot redact anything.

CHAIRPERSON: That of course is on the understanding that, or rather, on the assumption that the exception that he offers, which is if there is an approach for this to be extended further than how I have couched it, the part that I read to you earlier. So your submission I think would be acceptable on the understanding that you say. There cannot be or we cannot expect him to revisit his decision in accordance with what I read to you at the beginning of your argument.

ADV WINKS: Yes, thank you, Chair. The approach we suggest is that he does not have to revisit his decision, as Mr Chaskalson has put it, or to reconsider his declassification decision. What we submit the Commission is in a position to do is to tell the evidence leaders and Dr Sifolo that classification status has nothing to do with us. It is the contents of the information and your claims to secrecy, to justifiable secrecy, to the information inside the documents that will determine whether it must be in public view or not.

Now that would be certainly best achieved by

another opportunity, but it can only be given to Dr Sifolo and the evidence leaders with the knowledge that declassification ipso facto is not enough, because that is just the say-so, and the authorities tell us that say-so is not good enough to justify secrecy. You have to explain why the exemption to openness is justified for that particular information, why you cannot even redact that information and release the remainder.

CHAIRPERSON: That, of course, is again subject to Oudekraal not applying, and also there is the point, and we would have to apply our minds to that, there is also the point you made that effectively this would be a non-decision, because you say there is no law authorising classification whatsoever. So if it is a non-decision, maybe, I do not know, one has to think about it, maybe there is substance to your submissions, but also the other question, as I say, there is the question of the Oudekraal principle, but if your point about this being a non-decision is correct, then as a matter of law, perhaps Oudekraal would not be applicable at all. I do not know, I do not know. Those are questions that we would have to apply our minds to quite closely.

ADV WINKS: Yes, Chair, there is, as I understand it, a limitation to the operation of Oudekraal, which is that if the functionary never even had the jurisdiction to make such a

decision, that is not then subject to the binding until set aside from Oudekraal.

CHAIRPERSON: I think that goes exactly to the point I made about this being a non-decision.

ADV WINKS: Exactly. So if somebody who is not the Minister of Intelligence says, I am the Minister of Intelligence and I am making this executive order, you do not have to go to Court to set that aside, simply because he says so. He does not have the authority, the jurisdiction to make that decision. That is an absurd example, but the same applies as we look at the Tasima judgments, for example, where a Court that manifestly lacks jurisdiction to make a particular decision, parties are justified in disregarding that decision.

So, for example, if a Magistrates Court sentences someone for contempt of court, when we know it has no jurisdiction to sentence someone for contempt of court, then parties are entitled to disregard it because it is done without jurisdiction. So we submit that that exception to Oudekraal or something akin to it might operate here, but we of course have not applied our minds in detail to that just yet.

Thank you, Chair. I know I have taken up quite a bit of time. There is a final point, which is the suggestion that the media, this is option three, the media must wait for

the evidence to be over, then go to Court and apply for the record of the evidence, the transcript or recordings and whatever documents may have formed part of the affidavit. That is problematic for two reasons. The first is that it is not clear on what cause of action the media must do that.

Do we apply for the record under the Promotion of Access to Information Act? Is it a record held by the Commission or by somebody else? So we must first request it from the Commission. The Commission must have an information officer who must refuse or grant the access request. Then we take that decision to Court. There is conflicting jurisprudence about whether you have to go to the Information Regulator first.

If that is correct, then in fact it adds another layer. But no matter which way it goes, even if we had a cause of action to review the declassification decision, which does not, those are not the records we want. What we want is what is happening in front of the Commission. So that is not a review that is realistically available to us. It is a review of the decision to hold proceedings *in camera*, if there is such a review.

And I am not sure that our cause of action is as clear as Mr Chaskalson indicates. But assuming, if we could bring such an application, the currency of the proceedings is lost, of course. This will then be finally

determined at the very least two years, but more likely four years from now, or from the end of Dr Sifolo's evidence. And that deprives the public of two of the key rationales for open justice. The one is that, and I may cast no aspersions here, but it keeps the witness on the straight and narrow, because the witness knows he is not testifying in secrecy.

He knows that he may be scrutinised by the public. There may be members of the public who can contradict his evidence, and therefore he has to have full fidelity to the truth. That may not be an issue for Dr Sifolo. He may very well have no difficulties in that regard, but the principle must apply depending on whichever witness might testify in front of a Commission, is that it keeps the witness on the straight and narrow to know that right now, someone is watching what I am saying and may contradict me.

The second rationale is public trust in the Commission itself. When, and again I draw the analogy with a Court, but I submit the principle applies with equal force, because a Commission like a Court depends on public trust. In the President v. Mail & Garden media first round in the Supreme Court of Appeal, which was about a judicial report by two judges about elections in Zimbabwe, the Court was invited to invoke a provision of the Promotion of Access to Information Act where the Court can take a so-called judicial peek at the record to the exclusion of the

applicants.

So the respondent or the state body provides it to the Court for the Court's own exceptional look at the document, but the applicants do not see it. And quite rightly we submit, although the appeal to the Constitutional Court succeeded on the part of the presidency, but this dictum is not, we submit, interfered with. The Court said there:

“I think a Court should be hesitant to become a party to secrecy with its potential...”

Well, let me go back a second:

“Courts earn the public trust by conducting their business openly and with reasons for their decisions. A Court should be hesitant to become party to secrecy with its potential to dissipate that accumulated store of trust. There will no doubt be cases where a Court might properly make use of those powers, but they are no substitute for the public body laying a proper basis for its refusal.”

So it is an exceptional thing to ask a public inquiry to be engaged in a secret process with a witness, no less a functionary of the state. It does have the potential, we

submit, with the greatest respect, to diminish the store of public trust in the work of the Commission if there is some secret process going on while the cameras are off, which may influence the recommendations and the public will simply never know.

Even if they find out in four years' time after a successful review or application of some kind, while the Commission is underway, when the Commission releases its report, that public trust is diminished or at least jeopardised or imperilled.

CHAIRPERSON: Do you think that has happened with the many camera hearings we have had? And I might say, of those, I think a minuscule percentage were opposed by the media houses.

ADV WINKS: Yes, Chair, it is an important distinction to draw, because where somebody's personal safety is at issue, of course, anonymisation is appropriate, but still the public knows what malfeasance went on, what was done about it, what was not done about it, why. Yes, and of course why it must be *in camera*, because it is personal safety.

The witness says, I fear for my life, the informant says, it will blow my cover, the undercover operative, the same issue applies. And, for example, medical conditions. There is a clear reason, and the reason attaches to the

information as such. That is very different from where you have a state functionary saying, it is secret because I say so. It is very different. And that is what damages the public trust, especially a blanket *in camera* process.

That trust is restored to a large extent by a witness testifying live, in public, but using code names for operatives who may be relevant to the evidence. Person X, place Y, operation Z. That kind of thing can be achieved. And the Constitutional Court tells us that if some kind of ban on the free flow of information is to be imposed, for good reason, then it must be the narrowest ban possible to achieve the ends.

And it is not good enough, we submit, for the witness or the evidence leaders to say it is impractical to redact information or to use anonymisations. It is not good enough, we submit, to put those practical obstacles in the way of a decision that is going to bear on future Commissions of Inquiry, potentially, when the same issue comes up. And, of course, what can be disclosed in the final report and recommendations. So there is an important principle at stake.

Just for the sake of certainty, we do stand by our position that section 3(1) of the Commissions Act does clothe the Commission with the same powers as a High Court to release, redact, or refuse public access to

information regardless of classification status as such. But it is not even necessary to decide that point because the Commissions Act grants, on its own terms, outside of the inherent jurisdiction of the Court, the Commissions Act and the regulations grant powers to do anything to achieve the mandate, subject, of course, to an exceptional power to operate with anonymisation and the like for the sake of safety and viability of operations, et cetera.

Thank you, Chair. Sorry for taking so much time. And, Commissioners, of course, we are available for any questions, but those are our submissions in main.

CHAIRPERSON: Thank you. I will be repeating myself, but I think I did make the point when you made a similar point or the same point earlier about what the Commission may do. I said to you, but within the law, which means that we cannot disregard other existing laws.

ADV WINKS: Certainly, Chair. And the only comment we would make in that respect is that the Intelligence Services, whether on their own or through the evidence leaders, must show us that law because we do not know it.

CHAIRPERSON: Thank you very much, Mr Winks.

ADV KHUMALO SC: I think in your conclusion you say the respondents, the media houses, respectfully submit that a total *in camera* relief should be refused. So I read from there that you think a partial *in camera* is acceptable, but

not a total. And then I read that with 34.1, but can you just explain 34.2? To what end? Because you say part of the evidence can be in public, safe for passages that are not for public consumption. And then 2, you say before the witness testifies, evidence leaders should identify those documents that they believe, I assume, are security sensitive. And then what happens once those documents have been identified?

ADV WINKS: Thank you, Commissioner. The position practically, it seems, would be much along the lines as the Chair has intimated as an inclination, which is that if there are certain portions, passages, names, dates, places that need to be kept secret, those should be identified in advance of Dr Sifolo testifying, and where practical, replaced with codenames.

If that is impossible to deal with codenames, then there may be certain portions of evidence that, on a proper motivation, Dr Sifolo may say, I am now testifying again about a joint operation with a foreign intelligence agency, which is still underway. So, for that reason, I need to spend the next 30 minutes speaking in total *camera*.

And, of course, the media would have some kind of opportunity on an ultra-urgent basis to approach the Commission and say, no proper basis has been laid for that. But the likelihood, as in the past where police officers and

informants have had to testify, an agreement would be reached of some kind.

ADV KHUMALO SC: So, in my summary of your argument to Mr Chaskalson, I summarised it correctly. I just want to make sure that I did not...

ADV WINKS: Yes, certainly, that is correct. We say the application should be dismissed, but it is not to say there must be a vacuum. It is that there should be some regime in place that claim may be laid to secrecy of certain information, but that claim must be made based on the nature of the information rather than its status, and it should be done in advance of the testimony being given, if possible.

ADV KHUMALO SC: All right, thank you.

CHAIRPERSON: Mr Chaskalson.

ADV CHASKALSON SC ADDRESSES THE COMMISSION:

Thank you, Chair. Just a few points in reply. The first is, what is the purpose of this Commission? And that is an issue that was addressed in the SARFU judgment, and we are not here to act on behalf of the public, still less to provide daytime television. Section 147 of the SARFU judgment says:

“A Commission of Enquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he

or she can obtain information and advice.”

We are here to gather information for the President, to advise the President. That is what our function is. And this entire debate needs to be framed within that function.

So while we, in our individual capacities, may feel very strongly that the public has an interest in some of the material that Dr Sifolo has given us, our primary question has to be, given our function, to obtain information and to furnish advice to the President, in circumstances where some of that information is given to us on a partially declassified basis, so as we cannot disseminate it further, so as to prevent further dissemination, how do we deal with that situation?

That is the central inquiry. That begs a number of questions. The first is, do we have a power to vary the partial declassification? The answer to that question, I submit, is no. We do not have that power. The institution that has that power is the High Court. And when Mr Winks addressed you on that question, he just did not engage with the relevant reasoning in the Masetla judgment, which is pinned on section 173.

Section 173 of the Constitution gives the High Court that inherent jurisdiction, which vests it with the power to override a decision on classification in relation to its own process. This Commission does not have that

power. And let me illustrate that proposition with an analogous example.

The High Court's jurisdiction under section 173 of the Constitution vests it with the power to coerce compliance with an order, any order, by making a finding that the person not complying is in contempt of court and ordering that they should be imprisoned until they comply with the order. That is a power that is used, certainly in England very frequently, less so in this country, to coerce compliance with orders directing the production of documents.

So when someone fails to comply with their discovery obligations or an order to discover certain documents, the English Courts, and occasionally our Courts, can make a finding of contempt and order that that person be imprisoned until they comply. Now, it would be very nice if this Commission had the same power. I mean, take the topical example of Mr Karim, who is now been failing to provide documents to this Commission for four months.

It would be wonderful if this Commission could issue an order directing that Mr Karim goes to jail until he furnishes the documents we have been asking him for, for months. But we do not have that power. So much as we do not have the section 173 power to make an order of

contempt, to coerce compliance with one of our rulings, so much as it would be nice if we could, we cannot. We do not have the power.

And the present situation is ...[intervenes]

CHAIRPERSON: I doubt that even the High Court has that power.

ADV CHASKALSON SC: Chair, I will debate that and I can refer you to many English – it is a power of contempt.

CHAIRPERSON: Their constitutionalism or their constitution, I think, differs from ours markedly. Of course, there is the European dispensation, to which I do not know after Brexit what the position is, but to which they have been subject and which may create similar constitutional obligations to ours. But their constitutional...

ADV CHASKALSON SC: It is a collateral argument and I do not want to spend too much time on it. But the notion that the High Court retains its power to commit a witness in contempt to prison for coercive purposes, has not ever been pertinently disputed by the Constitutional Court in this country. And indeed, in the Zuma judgment, where coercion was no longer possible because the Zondo Commission had ceased to operate, the Constitutional Court was happy to commit for contempt as purely punitive, whereas the inherent jurisdiction is a coercive power.

But it is not a debate that is central here, but the

point that I am advancing is that there are many powers of the High Court under section 173 about regulating the process of the High Court, which would be very nice for this Commission to have, but we do not have them. And so much as the Commission or the individual Commissioners may think that there is a public interest in some of these documents and that the public would be better served if the documents could be publicly ventilated, the Commission does not have that power. It is the High Court that has that power.

And my learned friend said, well, we are not dealing with Oudekraal because there is no legal effect. With respect, that is wrong on multiple levels. The documents in question, again, our learned friends have not seen them precisely because of the situation, but they all come with a classification and with a notice in terms of the Protection of Information Act. And section 4(1)(b)(iii) of that Act makes it clear that it is a criminal offence to disclose any document which has been entrusted to you in confidence by any person holding office under the government.

Now, it may or may not be constitutional. I suspect it is way too overbroad. But for present purposes, there is a very stark legal effect of the issue of these documents with the notice under the Protection of Information Act,

which is that if we disclose them when they have been expressly entrusted to us in confidence, it is a criminal offence. It is not just the Protection of Information Act.

Section 28.1 of the Intelligence Services Act, to which I referred the Court earlier, makes it an offence if any person not being a member discloses classified information without permission of the Director General. These are very clear legal consequences. 26(1)(a)(iii) of the Intelligence Services Act. So, the notion that this Court can simply ignore the classification because there is no legal consequences that flow from it is, with respect, wrong.

And in relation to the argument that there is no legal power to classify, it was not raised, but I have little doubt that there is a legal power to classify. And we can locate that legal power to classify. From what I understand, the minimum information standards are issued in terms of an enabling power under the Public Service Regulations. But I can find the specific provision of the Public Service Regulations and furnish it to the Commission, copying our learned friends.

CHAIRPERSON: Please do so as soon as you are able to, Mr Chaskalson.

ADV CHASKALSON SC: So we sit with a situation where there is a classification, and there are documents that have been entrusted to us with expressing confidence, not for

further dissemination. The Commission is not legally empowered to go behind that. It does not have the power to question or to interrogate the classification, to interrogate the declassification.

And there is, with respect, a conceptual flaw which has run through the entire argument of the media respondents, which is the distinction between an obligation to produce documents and answer questions and the distinction between an obligation to produce documents and answer questions in public. All of the provisions of the regulations, the provisions of the Act to which they address, concern that first issue, provision of documents and answering questions.

They do not concern the second issue, which is doing that all in public. And much as I or the individual Commissioners may think that the public interest would be better served if this material could be ventilated publicly, the Commission does not have the power to make that determination. It is the High Court that does. So we would stand by the request for the *in camera* ruling that we have advanced.

And we do so on the clear understanding that whatever emerges in this questioning will be recorded, will be available in recorded and preserved form. And that if at a later stage the respondents want to gain access to it,

want to ask the High Court to order that they be given access to it, and that the classification decisions were unreasonable, unacceptable or unlawful for any reason, the material will be there.

ADV KHUMALO SC: Mr Chaskalson, when you say we cannot vary the classification, I assume you also mean that we cannot disregard it.

ADV WINKS: No, we certainly cannot disregard it. We can only exercise our powers in accordance with the law. And once the classification is there, there is a criminal offence if you make that information further available, if you publicise that information.

ADV BALOYI SC: Mr Chaskalson, just to clarify my understanding of the terms of this limited declassification, it refers to two categories of documents that are declassified. And then it says you may not disseminate beyond the Commission, the secretary and the evidence leaders without the consent of Dr Sifolo.

ADV CHASKALSON SC: Indeed.

ADV BALOYI SC: That is how I understand it. What is it in that limited classification that necessarily means his testimony must be heard *in camera*? I mean, I am assuming, knowing very little about what his testimony is going to be, where this is about documents and their dissemination, that is as I understand the terms here. Why,

but for whatever protections that may relate to those categories of documents, why must necessarily arising from paragraph 15, his evidence must be heard *in camera*? Mr Popkas has spoken to the inconvenience of having to delineate and do redactions. Other than that, what is it that arises from 15 that makes a case for an *in camera* hearing?

ADV CHASKALSON SC: Well, we could not question him publicly on those documents, because questioning him publicly on those documents would amount to, at least indirectly, to a form of dissemination of the contents of the documents.

ADV BALOYI SC: But you can question him on anything else that is not in those documents that may well arise from testimony of other witnesses. I am just trying to understand a blanket then how that is supported by what he says in paragraph 15, but also keeping in mind that he says you must seek my consent if you want to use this feather, so he has not outrightly said it can never, ever be done unless you go to Court.

ADV CHASKALSON SC: My own sense of the import of Dr Sifolo's evidence is that there is a section of his statement that introduces himself, explains who he is, what his past is, and the like. There is a brief description of how the National Intelligence, the statutory framework relating to the Intelligence Services. Apart from that, the primary and

indeed the overwhelming purpose of his questioning relates to those documents.

If all we were interested in was his CV and his outline of how the National Intelligence Coordinating Committee sits in the statutory framework of the intelligence legislation, we would not be calling him a witness. We would just be handing him a three or four page statement. Why we are calling him a witness is we want him to speak to classified documents.

ADV BALOYI SC: But are we at a point where he has, because he says you have to get my consent, and for purposes of my discussion with you now, I am assuming that he is entitled to take the position that he has taken. He is legally correct to have taken that position. Are we at a point where we have sought his consent and he has refused to give it? Because he does give, he does open the door for you to treat these documents differently beyond, in fact to distribute it beyond Commissioner, secretary and evidence leaders by saying seek my consent if you want to do that. Are we at that point?

ADV CHASKALSON SC: No, we have not, we have not, we are not at a point where he said I am not giving any consent. And it was with that in mind that my earlier submission to the Chair was do not make an order, it would be wrong to make any order that affects him at this stage,

at best the evidence leaders should be sent back to seek his consent to partial or full disclosure of documents.

ADV BALOYI SC: Thank you.

ADV CHASKALSON SC: Sorry, that is...

CHAIRPERSON: Those are your submissions.

ADV CHASKALSON SC: I do not have further submissions, but I will send through the reference for the source of the minimum information security standards.

CHAIRPERSON: Right, thank you, thank you very much. The Commission reserves its ruling on this. The ruling will be announced in the usual manner, which is what public dissemination in the manner in which the Commission's spokesperson, Mr Michaels, has done in the past, of course including direct service on the parties, the respondents. Let us adjourn. Just a minute, just a minute. Oh ja, we just adjourned. Let us adjourn.

INQUIRY POSTPONED SINE DIE

INQUIRY ADJOURNS

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