

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

HELD AT:

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

BEFORE:

COMMISSIONERS:

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

EVIDENCE LEADERS:

Adv Ishmael Semanya (SC)
Adv Vas Soni (SC)
Adv Fana Nalane (SC)
Adv Nompumelelo Seme
Ms Baitseng Rangata
Adv Phelo Mahlati-Mbanga

REPRESENTATIVES

Adv William Mokhare (SC) (for Jeffrey T Radebe)
Adv Reuben Maphutha (for Jeffrey T Radebe)
Adv Ebenezer Propy (for SAPS)
Adv KD Moroka (SC) – DOJ Representative
Adv Anisa Kessery-DOJ Representative
Adv Varney (SC) – The Calata Group
Adv D Pillay – The Calata Group
Adv Thakor- The Calata Group
Mr Sipho Tlhaole – The Calata Group
Adv Yanela Ntloko- NPA representative

22 SEPTEMBER 2026

DAY 93

PAGES 1 – 82



MzansiSA Business Solutions
Arbour Square
Cnr Melle & Juta Street
Ground Floor, Office 3
Braamfontein, 2001
TEL: 011 339 1289 Cell: 0794374335
E-mail: transcription@mzanzisa.com

PROCEEDINGS ON 22 SEPTEMBER 2026

CHAIRPERSON: Adv Semenya?

ADV SEMENYA: Madam Chair, good morning and so to the other Commissioners. We have former minister Radebe for cross-examination today.

CHAIRPERSON: Thank you. Mr Mokhare, you are representing Mr Radebe.

ADV MOKHARE: Yes, indeed.

CHAIRPERSON: Thank you. Mr Radebe ...[intervenes]

10 ADV MOKHARE: Oh, yes, indeed.

CHAIRPERSON: Thank you. Mr Radebe, you are reminded that you are still under your former oath.

MR RADEBE: Yes, I do know.

JEFFREY THAMSANQA RADEBE: still under oath

CHAIRPERSON: Thank you. Thank you. Mr Varney, the ball is in your court.

ADV VARNEY: Thank you, Chairperson. Good morning to you and the Commissioners.

COMMISSIONER KGOMO: Mr Mokhare, switch off your phone.

20 ADV MOKHARE: Which one; this one?

CHAIRPERSON: Yes.

ADV MOKHARE: I think this one is on.

CHAIRPERSON: Ja, switch it off. Thank you.

CROSS-EXAMINATION BY ADV VARNEY: Thank you, Commissioner. Mr Radebe, good morning to you.

MR RADEBE: Good morning.

ADV VARNEY: And thank you so much for coming back to assist the Commission this morning. Mr Radebe, it is customary that when I put questions to you, you can look at me. But when you answer the questions, then you have to direct your attention to the Chairperson and the Commissioners. Before we proceed, I think I should disclose that our paths did cross many, many years ago in KZN in the early 90s when we were both dealing with the political violence that wrecked our province at that point in time.

10 Having put that disclosure upfront, we have provided you with the issues and questions that we are going to be dealing with today that is in the application to cross-examine; and that is actually at page 1 of your bundle. So I think it will assist us if you could turn to page 1, because we are going to be following that application quite closely. Just to recap; am I correct in saying that you have deposed to two affidavits before this Commission? One is dated 18 November 2025 and the second one is dated 10 July 2026; and of course you testified here on 31 July 2026.

MR RADEBE: Yes, I can confirm that I know Mr Varney way back in
20 Durban when we were both activists of the National Association of Democratic Lawyers. My role at that time was to be a projects coordinator for NADEL monitoring violence in KwaZulu-Natal. Yes, I did attest to two affidavits that are before the Commission.

ADV VARNEY: Thank you. Now if we turn to page 2, we set out a very high-level look at your career. I just want you to confirm that you

were Minister of Justice between May of 2009 and May 2014. And as you can see in paragraph 8, you were also Minister of Public Works from 94 to 99. You were Minister of Public Enterprises from June 99 to April 2004, Minister of Transport from April 2004 to May 2009, and then member of the ANC National Executive Committee from 1990 all the way to 2022. And also during that period, you were a member of the ANC National Working Committee and then head of ANC policy from 97 to 2022. Do you confirm those highlights?

MR RADEBE: Yes, I do confirm this, except on paragraph 8.5. I
10 was a member of the National Working Committee from 1997 to 2022, not from 1990.

ADV VARNEY: Thanks for that correction. So we are essentially going to track these time periods in the course of this cross-examination. On paragraph 9, you can see that we have put up certain extracts mainly from your second statement as well as your evidence-in-chief. And I am just going to attempt to summarise some of these extracts, because ultimately it is these passages that we wish to test today in cross-examination.

So in that first paragraph, you indicate that you were not
20 made aware of any attempts to interfere with the TRC cases. And then if we turn over to page 3, that second paragraph, you state:

“During my tenure as minister, I was not briefed in any detail on the progress or outcome of any TRC-related prosecution, except to the extent that such information was provided to me in the

ordinary course of ministerial reporting on the general work of the NPA.”

And we give that reference. It is actually page 65, sorry, 63 of the bundle. And if we skip a paragraph, you state:

“During my tenure, there was no trigger to my recollection which would have required me to ask for a report specifically on TRC cases.”

You state that, to your recollection, none of the NDPPs who served during your tenure ever brought to your attention TRC cases or
10 sought your view or assistance on the said cases, let alone briefing you about the difficulties. Next paragraph; I am not going to read the whole paragraph, but you indicate in that second sentence:

“I was not advised by the NDPP, by any director or by any person that there were any systemic problems with the handling of TRC-related matters that required ministerial attention.”

You state further:

“I did not receive any complaint from any court, whether from victims, accused persons, members
20 of Parliament or the public that gave you reason to believe that the NPA was not handling TRC-related prosecutions with the required professionalism and independence.”

Next paragraph you point out:

“In these circumstances, there was simply no

factual basis upon which I could have invoked
section 33(2)(a) in relation to TRC-related
prosecutions.”

And if we turn to the next page, I am going to skip those paragraphs, because they are more or less the same. Second last paragraph, I am going to skip that as well. So those are the essential submissions you have made that we intend to test today. You confirm that those are the submissions that you put up in your second submission, your second statement and in your evidence-in-chief?

10 MR RADEBE: Yes, I do confirm.

ADV VARNEY: All right, then let us move on. Perhaps we can turn to page 5 and we are going to start with the first topic of discussion this morning, and that is the question of the negotiations or meetings between the ANC and the former general. Now, to be clear, Mr Radebe, we are not alleging that you were part of these meetings or these negotiations, but because during the 1990s into the early 2000s you were on the NEC and also a cabinet minister.

We just want to put an overview of these developments to you and then to pose some questions. There is quite a bit of evidence
20 before this Commission that these discussions did take place. And perhaps to save time, I am not going to go through them chapter and verse, but perhaps just a few examples. So we do quote extracts from two books. The first one is at paragraph 13, and there the author, a certain Mr Ole Bubenzer, states in his book that these discussions, if you look at that third paragraph, he says:

“The common denominator of the talks was that a legislative solution should be reached in how to avoid prosecutions in the wake of the TRC.”

Let us jump to page 7. At paragraph 15 we refer to the affidavit of one Jürgen Kögel, who arranged and mediated these meetings or some of these meetings on the side of the ANC. Now there are several other passages, but I think we can save time and simply skip them. Perhaps we can jump to paragraph 20 on page 8; and this one reads:

10 “On 5 July 2021, the FW de Klerk Foundation released an editorial titled The NPA's Decision to Prosecute Apartheid-Era Crimes. The editorial referred to an informal agreement not to prosecute apartheid-era crimes.”

Commissioners, that is at page 143 of the bundle and I will just quote the relevant line.

 “Because of an informal agreement between the ANC leadership and former operatives of the pre-94 government, the NPA suspended its
20 prosecutions of apartheid-era crimes.”

So as mentioned, Mr Radebe, during this time, these are the 1990s through to the early 2000s, you were a member of the ANC Executive Committee and you were a cabinet member for part of that time. So were you aware of any of these interactions and were they discussed in the ANC executive or working committee or your policy unit or even

in cabinet, whether formally or informally?

MR RADEBE: I was not aware of all these meetings, mainly because, as Mr Varney is aware, during the time in question, firstly I was an activist of the ANC in KwaZulu-Natal. My only interaction with matters that are related to this was as a member of the National Executive Committee. And in my recollection, I have never heard about these informal discussions. I was only aware of formal negotiations that were led firstly by President Mbeki and later in 1991, when the current president of the ANC was elected. The secretary
10 general headed those negotiations between the ANC and the then-apartheid government. At no stage was I aware of any of these informal discussions.

ADV VARNEY: Thanks for that clarification. So these negotiations between the ANC and the former apartheid government, can you elaborate what the negotiations were about, at least to your knowledge?

MR RADEBE: The negotiations, as I understood them, I first became aware of these negotiations when I was on Robben Island, that there were talks about talks between the ANC leadership and the
20 apartheid regime. And then later in 1989, President Mandela summoned some members of the ANC to Victor Verster to brief them about what those talks were about. But I myself, I was never involved in those talks. The only talks I was personally involved were talks between the ANC and Inkatha and the National Party about peace negotiations in KwaZulu-Natal that led to the formation of the National

Peace Accord in 1991. But those formal talks between the regime and the ANC, I was never, ever invited to be party to those talks.

ADV VARNEY: So the evidence is that in relation to what one might refer to as post-TRC justice, the pursuit of prosecutions after the TRC, that those discussions mainly took place between 1998 and around 2003. So while in cabinet or as a member of the ANC Executive Working Committee, did news of those discussions ever come to your attention?

MR RADEBE: So as a member of the NEC as well as the National
10 Working Committee and Cabinet, I have never been made aware of these talks. The only information we had were those formal talks that ended up in 94 with the elections and after which President Mandela initiated the Truth and Reconciliation Commission of which, as I indicated in my testimony, I personally went there to confess the so-called crimes I committed in defence of our people in KwaZulu-Natal as the commander of the self-defence units. These secret talks, I totally only heard about them when this Khampepe Commission started.

COMMISSIONER KGOMO: Mr Varney, sorry. Mr Radebe, just
20 three timelines – when were you at Robben Island first, and the release of President Mandela from Robben Island to go to Victor Verster, if you can give us that timeline.

MR RADEBE: I was on Robben Island from 1986 until June 1990. The meeting I am talking about that was held, that was initiated by President Mandela in Victor Verster happened in 1989. I was not

party to those talks. Some of our comrades on Robben Island, like the late Ibrahim, were part of those people who were called, Tokyo Sexwale, in my recollection. And when President Mandela was released on 11 February 1990, I was still languishing on Robben Island. We were leading; I was leading the 12-day hunger strike so that we should also be released.

COMMISSIONER KGOMO: Thank you, Mr Varney.

ADV VARNEY: Thank you, Commissioner. Thank you, Mr Radebe.

Let us move to the next topic, which is on page 9, and that is titled
10 "Cabinet's position on the TRC cases between 2003 and 2007". And we raise this issue, because the TRC cases did serve before Cabinet, while you were a Cabinet member, and so we are going to refer to some minutes and documentation for your comment.

But firstly, just by way of context, you will see in paragraph 23, we point out that the TRC released its final report on 12 March of 2003. Then about a month later, on 15 April 2003, President Mbeki made a statement in Parliament on the occasion of the tabling of the TRC's report. He indicated there would be no general amnesty, but pointed out that there were many who did not apply for amnesty, and
20 government was looking at legal arrangements for this group, particularly those who were willing to divulge information. And he indicated that, and that is where we quote:

"Relevant departments are examining the practical modalities of dealing with this matter and they would also establish whether specific

legislation is required in this regard.”

And then on the very next day, 16 April 2003, the question of the TRC cases did arise at a Cabinet meeting, and perhaps we can now refer to that minute. When we prepared this application, we were not in possession of that minute. Luckily, those minutes were circulated about the Commission just last Saturday, following the provision of documents by the presidency.

Now, we have provided the Commissioners and your legal counsel, and hopefully you also have a copy on your desk. I think it
10 is just to the right of your file. It is a separate document. It is not part of the bundle, because it came in late. Can I just check that you have that document? The front page says “index to documents received from presidency”.

MR RADEBE: Yes, I do have. I received it from my senior counsel yesterday and I perused it through last night.

ADV VARNEY: Thank you. And perhaps you can look at it now, because we are going to go to the minute of 16 April 2003, which is between pages 1 and 5. In fact, the actual minute starts on page 3. You will see at the top of the page it is titled “Minutes of the Cabinet
20 Meeting of 16 April 2003”. We are going to start at number, item 1.21 and then it says a little confusingly, item 2.1,

“Response of the government to the recommendations contained in the codicil of the report of the Truth and Reconciliation Commission”.

In small type underneath it reads:

“Cabinet Memo 7 of 2003, dated 8 April 2003, no file number, Department of Justice and Constitutional Development, refer to item 9.1 of the minutes of the Cabinet dated 21 August 2002 as well as paragraph.”

It gives the number of the minutes of the extended cabinet meeting, dated 22 to 24 January 2003. Before we deal with this particular minute, I know I am asking you to try and recall back some decades,
10 but it does appear that the TRC cases were also discussed at a Cabinet meeting on 21 August 2002. Do you have any recollection of that?

MR RADEBE: Let me just put a context. During this period, I was not really involved in the justice cluster, because I was both a Minister of Public Enterprises and later Minister of Transport. And on top of that, I was a Coordinating Minister of the Economic Cluster, so my focus was largely on economic sector of the Cabinet. So my only interaction with the justice cluster is when they reported to Cabinet. So yes, I do recall this meeting as the minutes indicate, but I just
20 wanted to highlight the point that I was not deeply in that sector. So we are relying mainly on those who were coordinating ministers, in this instance justice, as well as safety and security.

ADV VARNEY: Thanks for that clarification, and that is noted. Commissioners, we have asked the evidence leaders if they can track down the documents referred to in that small print under that heading,

including the minutes of 21 August 2002 and the other documents. We do not have those in our possession at this stage. Let us then turn to just two paragraphs of this minute and then let us start at the next page 4 at paragraph F, and I will read this into the record. So reading it with the first line, it says:

10 “The joint committee discussed the matter and recommended that the Cabinet approves that further consideration be given to the implications of whether the mandate of the task team that currently deals with outstanding matters on amnesty should be broadened in order to attend to matters related to people who remain unaccounted for. Consideration should be given to issues relating to, for example, a proper mandate, timeframes and final closure.”

Mr Radebe, are you able to advise the Commission what this task team was and perhaps who served on it?

20 MR RADEBE: As I indicated earlier on, is that I was not really focused on the justice cluster, because I was not a member of this Cabinet sub-committee. As I said, I was one of the coordinating ministers of the economic sector. So my recollection is just as you have seen this memo; that I cannot recall with specificity what was it about, except to note that there was this task team that reported to Cabinet, as the historic record indicates.

ADV VARNEY: Yes, just to point out that this particular meeting was

not a cluster meeting, but a Cabinet meeting for the attention of all Cabinet members.

MR RADEBE: Yes, it is.

ADV VARNEY: But it does seem as if Cabinet was considering broadening the mandate of that task team that deals with outstanding matters on amnesty. So you are saying you have no knowledge of that particular task team?

MR RADEBE: Not that I do not have knowledge, but I cannot indicate with specificity what were dynamics that motivated the
10 cluster to come up with this initiative. I do recall this meeting, actually.

COMMISSIONER KGOMO: But was it your impression that that mandate was to broaden, as the question was posed, to broaden the issue of amnesty, relating to amnesty? Was that your impression at the time?

MR RADEBE: I cannot recollect what my impression was in 2003. I will not be honest with this Commission if I can be able to say my impression at the time was that, except to note that this is what actually happened and I was present at the meeting, because my
20 recollection is that I attended almost all meetings of Cabinet, except when I was out of the country.

COMMISSIONER KGOMO: And your current impression as you read it now, this F?

MR RADEBE: Can the judge repeat that?

COMMISSIONER KGOMO: I say and your current impression, as

you read this paragraph F now, what is your impression?

MR RADEBE: My impression is that if you go to the other page, there is an act that was passed in Parliament called the Promotion of National Unity and Reconciliation Act. I think that is the context as to how as South Africans we can be able to promote national unity and reconciliation. So probably this was part of that initiative to see how we create this South Africa that we all wanted to achieve a non-racial, democratic and non-sexist and prosperous country.

COMMISSIONER KGOMO: Thank you, Mr Varney.

- 10 ADV VARNEY: Thank you, Commissioner. And if I can just follow up on Commissioner Kgomo's question; would I be right in saying that a reading of paragraph F leaves the impression that Cabinet was considering either a further amnesty or a form of amnesty or indemnity for past crimes?

MR RADEBE: Can you repeat that?

ADV VARNEY: Yes. So I was just following up on Commissioner Kgomo's question on paragraph F, because he raised the question that around the implications of whether the mandate of the task team that deals with outstanding matters on amnesty should be broadened.

- 20 So a reading of paragraph F, would you agree, suggests that Cabinet was considering a further type of amnesty or indemnity?

MR RADEBE: My impression in reading this paragraph is to deal with matters related to people who remain unaccounted for, and the consideration was made whether time frames and final closure should be that. That is all I can see in this.

ADV VARNEY: And the people unaccounted for would be the ones who had not applied for amnesty previously?

MR RADEBE: Yes, probably.

ADV VARNEY: Right, let us turn the page to 5. Let us drop down to paragraph V.

MR RADEBE: Paragraph?

ADV VARNEY: V. It is third from the bottom of the page on 5. I will read that into the record.

10 “Agrees that in dealing with outstanding amnesty
issues, the Minister of Justice and Constitutional
Development, in consultation with the Minister of
Intelligence, must urgently implement the Cabinet
decision on 21 August 2002 when the Cabinet
agreed to a quasi-judicial process to deal with
several matters that arose from the amnesty
process (refer to paragraph 9.1.2(c)(ii) of the
minutes).”

And I assume those are the minutes of that 21 August 2002 meeting.
We do not have a copy of those minutes as yet, but it does seem that
20 at that meeting in 2002, Cabinet agreed to a quasi-judicial process to
deal with matters arising from the amnesty process. Do you recall
that decision of Cabinet?

MR RADEBE: I do not recall this Cabinet decision, but as the minute says, it must have been taken, but I do not recall it at all.

ADV VARNEY: But you would agree that here Cabinet is directing

the Minister of Justice, in consultation with the Minister of Intelligence, to urgently implement that decision?

MR RADEBE: Well, Mr Varney, I think all those two ministers are still alive and kicking, Minister Maduna as well as Minister Ronnie Kasrils. They are the best able to respond to this question. I cannot recall precisely what it was.

ADV VARNEY: Yes, thanks for pointing that out. And Mr Maduna has testified, but unfortunately when he testified, we did not have a copy of these minutes, and I understand Mr Kasrils is going to be
10 testifying in due course. All right, you are unable to elaborate any further on paragraph V, is that right?

MR RADEBE: Not at all.

ADV VARNEY: Okay. All right, then let us then, because I am trying to deal with it chronologically, so let us return to paragraph 9 of the bundle.

CHAIRPERSON: Paragraph or page?

ADV VARNEY: I beg your pardon. Thanks for pointing it out. It is page 9 of the bundle.

CHAIRPERSON: Thank you.

20 ADV VARNEY: Perhaps we can drop down to paragraph 27, because not long after the president's speech and that Cabinet meeting, we point out in paragraph 27 that the then Director-General of Justice, Adv Vusi Pikoli, commenced to develop a policy for the prosecution of the TRC cases that would give effect to the president's speech. That is in his affidavit. It is at page 164 of the bundle,

although no need to go there.

Then if we turn to paragraph 28, the story unfolds further. According to Adv Pikoli, on 23 February 2004, the Director General Forum appointed the Amnesty Task Team to consider and report on the following matters. Chairperson, these are the terms of reference of the Amnesty Task Team that we are all familiar with. It is on page 203 of the bundle. But we have set them out here, which was to consider a report on the criteria that the NPA should apply to the prosecution of cases from the past, consider a process of further
10 amnesty on the basis of full disclosure, and then consider whether further legislative enactments are required.

And if one turns to paragraph 29, that Amnesty Task Team consisted of members of the Department of Justice, National Intelligence Agency, the NPA, SAPS and Department of Defence. It met on 26 February 2004 and 1 March of that year before delivering a report to the DGs Forum on 3 March 2004.

And just to indicate what they recommended, we set this out in paragraph 30. They recommended the establishment of an Interdepartmental Task Team comprising members of Department of
20 Justice, Intelligence Agencies, SANDF, SAPS, Correctional Services, NPA and the Presidency. And that ITT, that task team was then meant to consider the advisability of prosecutions in each TRC case and make a recommendation to the NDPP before the institution of any prosecution.

At the bottom of the page 30.2, receive information or

representations from perpetrators. And then lastly, they proposed new criteria for purposes of declining to prosecute the TRC cases. That is at paragraph 31. These included humanitarian considerations, the offender's sensitivity to the need for restitution, the degree of indoctrination to which the offender was subjected, as well as several other criteria.

So I just wanted to give you this background, because all this leads up to the next Cabinet meeting. Perhaps I should also highlight that, and this is set out in paragraph 32. The DGs Forum considered
10 that report of the ATT and then requested it to consider whether there was a way in which private prosecutions and civil litigation could be eliminated if the NDPP decided not to prosecute. That is in the second report of the ATT at page 218. So that is the context that leads up to the next Cabinet meeting.

And perhaps we can now turn to page 19 of the Cabinet minutes. That is that separate document. Sorry, that is a mistake. We actually need to turn to page 19. I beg your pardon. It is actually page 11 of the Cabinet minutes; apologies for that confusion. So this minute is dated 19 to 21 January 2005. We have been furnished with
20 paragraph, the page dealing with paragraph 3, and that is titled "Minister for Safety and Security, Coordinating Minister for the Cabinet Committee for Justice, Crime Prevention and Security and the Directors-General Cluster". So this is a minute of that cluster meeting.

And then if we turn to paragraph 3.1 and then under that

3.1.1, which reads as follows:

“Minister Ngakula as Coordinating Minister for the cluster briefed the Cabinet by means of a presentation entitled Justice, Crime Prevention and Security, Cabinet Lekgotla, 21 January 2005, Annex B.”

We currently do not have a copy of Annex B. We have asked the evidence leaders if they can trace it. It deals with many topics, but I only want to bring your attention to the topic under paragraph (b)(iii),
10 which reads: “outstanding matters from the amnesty process”. Now, do you have a recollection of the cluster presentation that was made by Minister Ngakula to Cabinet where he deals with the outstanding matters from the amnesty process?

MR RADEBE: I do not have any specific recollection, except the minute that I have just seen.

ADV VARNEY: Thank you. It certainly does go back many years, so it would be difficult to recall. Then if we can return to, and this time also page 11 of the main bundle at paragraph 33. Now we jump a few months to March of 2005 and the Minister of Justice, Ms Brigitte
20 Mabandla, submitted a memorandum to Cabinet to obtain approval, well, firstly to obtain approval of the proposed amendments to the prosecution policy and then to submit those amendments to Parliament.

Perhaps we can actually turn to that memorandum. It starts on page 227 of the bundle. That is the main bundle. So that

document at page 227 is titled "Department, Justice and Constitutional Development, Cabinet Memorandum". It does not give the number, March of 2005, and the subject title is: "Prosecutorial policy and directives relating to the prosecution of criminal matters arising from conflicts of the past and which were committed before 11 May 1994". It is a very substantial memorandum. We are certainly not going to go through the entire document, because it runs all the way to page 248 and it essentially takes the recommendations of the... I just want to check, Mr Radebe; are you on page 227?

10 MR RADEBE: Yes.

ADV VARNEY: Yes, okay. But it did take the recommendations of the Amnesty Task Team, and in this memo you will see that it includes draft amendments to the prosecution policy. That is at page 237 titled "Appendix A".

CHAIRPERSON: Page 200-and?

ADV VARNEY: 237.

CHAIRPERSON: 237.

ADV VARNEY: Ja. And that ultimately became Appendix A to the prosecution policy itself. And if we turn to page 235, perhaps we can
20 just pause on paragraph 10 on that page. It says:

"Other departments/bodies consulted and these include statutory committees established in terms of section 31 of the NPA Act, the Inter-Ministerial Committee on Safety and Security, the NPA, the NIA, the SAPS and the Department of Defence."

It does not appear, Mr Radebe that members of the public or civil society, in particular victims and families, they were not consulted.

Do you think they should have been consulted?

MR RADEBE: As far as I understand, the manner in which Parliament process acts of Parliament, they do consultations. So I do not know if they did not do it. I do not know why they did not do it in this instance, but it is common cause that the parliamentary process should have included people affected. That is my own personal opinion about it, but I cannot recall with certainty how this particular
10 process unfolded in Parliament. So I am sure those who were responsible at the time, the speaker or the Portfolio Committee are best suited to respond to such a question.

ADV VARNEY: Thank you. So we will come to the process before Parliament shortly, although currently this memo was not before Parliament, it served before Cabinet; just to be clear on that point.

MR RADEBE: Maybe I misunderstood your question. I thought this was already at a parliamentary level. That is where these public consultations are normally conducted.

ADV VARNEY: Yes. It did ultimately go before Parliament, but as
20 you will see, we see no evidence of civil society being consulted on the proposed amendments. Then let us turn to paragraph 11 on the same page, and the recommendation in this memo is that Cabinet approve the accompanying prosecutorial policy and directives relating to prosecution.

MR RADEBE: Which page, Mr Varney?

ADV VARNEY: I am sorry, the same page, it is 235.

MR RADEBE: Okay.

ADV VARNEY: And it is just below paragraph 10 and paragraph 11, and there the memo from justice has recommendations that Cabinet approve the accompanying prosecutorial policy and directives relating to the prosecution of cases from conflicts of the past, and that the same policy and directives be submitted to Parliament.

So then we can actually turn to that particular decision of Cabinet, and it is actually in two places. Perhaps we can just use the
10 separate document, which is a smaller document at the very last page, 22. So this minute is dated 22 June 2005. The heading at paragraph 9 is "Minister of Justice and Constitutional Development".

And then if we drop to paragraph 9.2, which reads "prosecutorial policy and directives relating to the prosecution of criminal matters arising from conflicts of the past". It reads "the Cabinet approved". And then the very same thing, the prosecutorial policy and directives relating to the prosecution of cases from the past be approved and that those same policy and directives be submitted to Parliament for consideration in terms of section 21(2) of
20 the NPA Act.

Now that we have that background, if I can ask you to go back to the main bundle at page 12; and before we start at paragraph 37, do you have a recollection of being at that meeting where the Cabinet approved the amendments to the prosecution policy in respect of the TRC cases?

MR RADEBE: I do not have a specific recollection, but I read the bundle as sent by the Commission.

ADV VARNEY: Thank you. Let us turn to paragraph 37 on page 12.

And here we seek your comment on the submission of the proposed amendments to the prosecution policy to Cabinet for its approval, given that the Constitution assigns the determination of the prosecution policy exclusively to the NDPP with the concurrence of the Justice Minister. It does not confer that power to Cabinet, nor does it authorise the minister to submit such policies to Cabinet for approval. Do you have any comment or response to that?

MR RADEBE: As I say, I do not have a recollection of the specific memorandum, but from what I have read, it appears to me that this process was initiated by the DGs Forum, as indicated on your page 10 where the Director's Forum was chaired by Adv Pikoli that initiated all these criteria for applying prosecution cases, consideration of further amnesty, *et cetera*, *et cetera*. So maybe Adv Pikoli is better suited to respond, as well as Minister Mabandla.

ADV VARNEY: Yes, but we are seeking your comment or view as a cabinet minister who was in all likelihood at this meeting. We are pointing out that the Constitution and the NPA Act does not authorise or require Cabinet to approve the prosecution policy or amendments to it. So I am putting it to you that it was improper for Cabinet to approve, to consider and approve this prosecution policy and its amendments.

MR RADEBE: Well, I cannot recall, as I have said, with specificity

the context of this. So those ministers who were responsible at the time, in this instance Minister Mabandla, will be better suited to respond to that. I just read it as all others have just read it now.

ADV VARNEY: So let us then carry on, and I am now at paragraph 38 on the same page 12. We wish to put it to you, Mr Radebe that the approval of the prosecution policy, amendments by Cabinet which had the effect of carving out a separate legal regime for prosecutorial decision-making in respect to the TRC cases, and which provided for a special set of criteria applying only to the TRC cases. These were
10 serious cases, such as murders and kidnappings, to decline to prosecute such cases; that this was unlawful and an improper intervention by the executive, since it undermined the NPA's exclusive prosecutorial discretion to institute criminal proceedings or not, and which must be exercised independently and free from political or other interference. Would you agree with that statement?

MR RADEBE: I think you are asking the wrong person. I was not the Minister of Justice. I was not an NDPP at the time. So that question might as well be posed. The whole Truth and Reconciliation Commission, how was it conceptualised, because people committed
20 crimes, but there was a specific process that was agreed upon for people who come to tell the truth, like I did. I got amnesty instead of being charged for the crimes, quote-unquote, I committed during that time. It is the same issue that you are posing now.

ADV VARNEY: Yes, and that is really the reason for the concern, because you were one of the responsible persons who made use of

the amnesty process while it was in effect during the time of the TRC. But now the government was attempting to introduce a new process post the TRC amnesty programme through the amendments to this prosecution policy, which amongst other things would assist perpetrators to escape justice, because they were now given multiple new criteria upon which decisions to prosecute could be declined. And so we wish to put it to you as a serving cabinet minister at the time; that this was an unlawful and improper intervention in the independent exercise of prosecutorial discretion by the NPA.

10 MR RADEBE: No, I cannot say that, Commissioners, because as I am saying that you are asking the wrong person. I was not a responsible minister at the time. The same question you are posing can also be directed to the Truth and Reconciliation Commission. People committed crimes. They go to the commission. They confess. They are given amnesty. Was that a subversion of justice?

ADV VARNEY: No, but we are not talking about those who were properly and lawfully given amnesty under the TRC process. That was authorised by statute and the Constitution. We are simply talking about the attempts to introduce further measures to what, we would
20 submit to this Commission, were endeavours to assist perpetrators to escape justice post the TRC's amnesty process.

MR RADEBE: Well, okay, I cannot take it further than what I have just said. I will just be repeating myself. But as I know, what transpired in this case is that there was a challenge to this act of Parliament which our court of law ruled that it was unconstitutional.

That is why courts are there as the arbiters of disputes.

ADV VARNEY: Yes, and thanks for pointing that out. We also point that out at paragraph 40 where Judge Legodi in the high court struck down the prosecution policy amendments as unlawful and unconstitutional; and, in fact, he described them as absurd. He indicated that the need for the procedure does not prevail, unless the intention is to grant indemnity or amnesty; and we have quoted that paragraph. The extract is at page 266 of the bundle. Mr Radebe, would you agree that the efforts of Cabinet in the meetings that we
10 have discussed is indicative of the intention of Cabinet to effectively control the approach taken in respect to the TRC cases post the TRC?

MR RADEBE: No, I would not assume that. I have already expressed an opinion as to how I feel about it.

ADV VARNEY: Yes. We will be submitting to this Commission that the meetings held, the documents that served before Cabinet in fact do reflect the intention of Cabinet to direct the approach taken to the TRC cases. Perhaps just to finish up before ...[intervenes]

MR RADEBE: But Mr Varney, also in 2003 President Mbeki
20 addressed Parliament as the commander-in-chief of our affairs, just to use Chief Justice Mogoeng Mogoeng's expression, where he outlined clearly the policy and attitude of government to these matters; that those that did not submit themselves to the TRC process must be prosecuted. It is very clear to that. So this, to me, does not reflect the attitude of the government at that time to subvert

justice.

ADV VARNEY: Well, it is then most curious that government would take these steps to provide further avenues for perpetrators to escape justice.

MR RADEBE: Well, I come back to the same issue about the whole TRC process itself. Was it a subversion of justice when people who killed our people in Madola, in Sharpeville, they are walking scot-free, some of them today. Some of whom went to the TRC, confessed their crimes, and they were given amnesty.

10 ADV VARNEY: Well, on that score, my clients would totally agree with you, and it is one of the reasons why they sought this Commission. Perhaps just to wrap up before we pause for tea, Chairperson, I realise that we have now passed 11.

CHAIRPERSON: Yes.

ADV MOROKA: Chair, if I may, I am sorry to interrupt. That last comment by Mr Varney, was it a question or what was it? We did not even understand what he was saying about his clients.

ADV VARNEY: I do not understand the intervention. We were simply, I was simply placing on record that in relation to the fact that
20 they were perpetrators of heinous crimes, such as the Sharpeville Massacre, walking free today, that we agree with Mr Radebe's statement on that point.

CHAIRPERSON: Yes. Thank you.

ADV VARNEY: Perhaps just to wrap up, paragraph 40 on page 13, you did mention that typically when Parliament approves a new law or

new statute, that there is a consultation process. Of course, this is a little different, because it was not a law. These were amendments to the prosecution policy. So paragraph 39, we make the point that the amendments were presented to Parliament, even though there was no legal requirement to do so, but there is no evidence that we can find of any public participation process that preceded their adoption. And we point that out in the extracts, Chairperson; that is between pages 255 and 263 of the bundle. Mr Radebe, would you agree that it was wrong not to engage in a public participation process before

10 the prosecution policy was amended?

MR RADEBE: Well, as I said earlier on, that is a parliamentary process. There is separation of powers, trias politica doctrine. So those questions should be posed to those who were in charge of Parliament, the late Ginwala. There is a current person who was the Deputy Chair, Baleka Mbete. So they are the best able to answer that question, not me. I was a member of the executive, not in charge of Parliament.

ADV VARNEY: Chairperson, would this be an appropriate time for the tea adjournment?

20 CHAIRPERSON: Yes, we will adjourn for tea until 25 past 11.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Thank you, Mr Varney.

CROSS-EXAMINATION BY ADV VARNEY(CONTINUES): Thank you, Chair. As the Chairperson pleases. Now Mr Radebe, we are

still on page 13 of the bundle and we are now going to be dealing with another topic and that topic is titled, "Political concerns around prosecuting the TRC cases". We first make reference to what Adv Vusi Pikoli says in his affidavit that is before the Commission, that is his affidavit that is dated 6 May 2015 and we point to this at paragraph 41.

So according to Adv Pikoli, political interference effectively barred or delayed the investigation and possible prosecution of the TRC cases. Chairperson, his statement is at page 158 of the bundle.

10 He goes on to say that by the end of 2006, powerful elements within government structures were determined to impose their will on his prosecutorial decisions. That is at paragraph 43 of the statement at page 173 of the bundle.

Mr Radebe, in this section we ultimately want you to comment on what we believe is the underlying rationale or the statement decided to manage and supervise the NPA's handling of the TRC cases and the bottom line is that and the bottom line reason is that the pursuit of cases against former apartheid Security Officers would open the door to cases against the ANC. And for this we make

20 reliance on the evidence of the Reverend Frank Chikane as well as a meeting that Adv Pikoli attended in 2006.

To save time I am just going to summarise the evidence of Frank Chikane. We do that in paragraphs 43 to 45 and in Reverend Chikane's evidence he said there was a view held by some in government circles in the early 2000s that in relation to these cases

we should let sleeping dogs lie. This was to avoid destabilising the new democratic order and that there was not much of an appetite to look back. That is in his statement, it is at page 269 of the bundle.

In the next paragraph we have another quote from him. Actually let us skip that one and go to paragraph 45. He added:

10 “Some believed that those seeking to have the 37 ANC leaders arrested, wanted to create a crisis that would force the ANC leadership to back off from post-TRC cases that fell under the category of the unfinished business of the TRC.”

That is at paragraph 34 on his statement at page 271 of the bundle. And finally we are at point 2, a meeting that Adv Pikoli said he attended during 2006. He said he was summoned to the home of the then Minister, the late Zola Skweyiya, the then Minister of Social Development. He was also attended by Minister of Police Nqakula, Minister of Defence Lekota, Thoko Didiza, then Acting Minister of Justice, Mr Loyiso Jafta from the Presidency.

20 Now we highlight that you were not present at this meeting but according to Adv Pikoli, the following was said by Adv Skweyiya and I will just quote that last paragraph which is at the top of page 15:

 “The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves

arising out of the activities pre-1994.”

Now while you were a member of Cabinet, did you get to hear of this concern as pointed to by Chikane and Adv Pikoli either expressed formally or informally within ANC circles and Cabinet, by Cabinet colleagues or members of the ANC, NEC, NWC or the ANC Policy Unit?

MR RADEBE: Can you repeat that question?

ADV VARNEY: So this concern as set out by the Reverend Frank Chikane and also pointed to by Adv Pikoli, he points to this meeting
10 he had at the home of the then Minister of Social Development. He expressed the concern that cases like the Chikane matter might open the door to cases against ANC cadres. Did you get to hear about this concern around that time?

MR RADEBE: My recollection is that I did hear because it was in the public domain that 36, 37 leaders of the ANC were to be charged but I cannot recall precisely this concern by Reverend Chikane.

ADV VARNEY: Yes, so more specifically the concern is that pursuing cases against former apartheid security officials accused of human rights violations, if cases were proceeded against them, it
20 would give rise to pressure for cases to be brought against ANC personnel as well.

MR RADEBE: I was never aware of that.

ADV VARNEY: So we will be submitting to this Commission that it was this fear or concern that motivated Government to introduce a measure of control of the handling of the TRC cases and ultimately

saw the closing down during the 2000s. Do you have a response to that?

MR RADEBE: No.

ADV VARNEY: Then let us turn to what Adv Pikoli had said about the improper interference and I am reading now from paragraph 50. He said there have been improper interference in relation to the TRC cases, that he had been obstructed from taking them forward and that the interference impinged on his conscience and his oath of office.

He wrote a secret internal memorandum to Minister
10 Mabandla on 15 February 2007 and we have included that memorandum at page 177. And I will just quote two paragraphs:

“I have now reached the point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter.

It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience
20 and oath of office that I took does not allow that.”

Do you have any reason to dispute the evidence of Adv Pikoli?

MR RADEBE: I cannot dispute because this is what he is saying in this letter, but I was not aware of this letter until I got this bundle that explains it.

ADV VARNEY: All right, let us move to the next heading, perhaps still, and it is titled, "The PEBCO Three case" and I think you are familiar with the PEBCO Three case because in paragraph 17 of your first statement which is at page 48 of the bundle, you mentioned that during 2009 you presided over a ceremony in which the remains of the PEBCO Three were handed over to the families. Do you recall that?

MR RADEBE: Yes, I do recall that.

ADV VARNEY: Ja and of course the families are grateful to you and
10 your Ministry for taking that important step. Now at paragraph 52 you quote in your evidence, this is at your second statement at paragraph 44 at page 67 of the bundle:

"Had I been advised by the NDPP that the Prosecuting Authority was encountering systemic obstacles to the prosecution of TRC-related cases, I might have considered it appropriate to request further information and to take steps to address these systemic issues, but none of these circumstances nor any comparable circumstances arose during my tenure."

20 You confirm making that ...[intervenes]

MR RADEBE: Yes, I do confirm.

ADV VARNEY: Let us turn to paragraph 53. So on 28 May 2009, this is about two weeks after your appointment as Minister of Justice, the then Acting NDPP, Adv Mokotedi Mpshe SC wrote a memo to you, providing an update on the PEBCO Three, Mthimkhulu and

Madaka matters.

Chairperson, that is at page 279 of the bundle. And importantly as we point out in paragraph 54, this was preceded by a previous report that Mpshe had sent to you in terms of section 33(2)(b) of the NPA Act. Unfortunately we do not have a copy of that earlier memorandum, we are trying to locate it through the good offices of the evidence leaders.

But pertaining to the 28 May 2009 memo, the memo discloses its purpose which was to inform you of matters arising from
10 Mpshe's earlier meeting with you on the 27 May 2009. That was the day before or rather his meeting on the 27 May that Mpshe had with the families of the PEBCO Three, Mthimkhulu and Madaka cases, and the context of the memo was to explain his decision to temporarily withdraw charges against two former Security Branch members charged with the PEBCO Three abduction and murders.

Now from page 280 of the bundle, that is where the memo is. He sets out in great detail which we are not going to go into, the delays in finalising a review that had been brought by certain of the accused in that matter to overturn the amnesty decision, a refusal to
20 give them amnesty and that review was delayed by several years, amongst other reasons with the years it took to compile the record.

I am going to ask you to, just to save time, to jump to page 18 and to paragraph 60. And actually I think it is worth going to the source document where this paragraph is reflected. It is at page 281 of the bundle. It is at page 21 at the bottom of the page, paragraph 4.

There is a heading, "Other matters arising" and I will read it into the record:

"4.1 The problem surrounding the PEBCO Three matter and the justifiable dissatisfaction of the families serve to highlight a general problem with all TRC-related matters, namely that since the closure of the TRC, these have never been properly investigated."

Now Mr Radebe, this was a memo directed to you. Is this
10 not a rather blunt reporting of the systemic issue, blame against the TRC cases?

MR RADEBE: Well my recollection is that this memo was in May 2009, the month in which I was appointed Minister of Justice and Constitutional Development. This was like a memorandum to explain to me what the NPA is dealing with, so it cannot be construed as a specific memo to lodge a complaint about it. Even if it were, but the NDPP in this case, Adv Mpshe, had the power and authority to do as what any NDP ought to do in cases of this nature.

ADV VARNEY: Yes sir, so he has taken the step of sending you a
20 detailed memo and as he says in that paragraph, he highlights a general problem which I think would classify as a systemic problem with all TRC-related matters, namely that since the closure of the TRC these have never been properly investigated. So he is really saying that between 2003 when the final report was handed over and May 2009, that these cases were never properly investigated. That

surely should have sent alarm bells ringing?

MR RADEBE: Well as I understand it, the investigation of crimes in South Africa is the responsibility of the South African Police Service, so those who were in charge of the police, are the ones who should be asked all these questions and also for NDP to complain, but the NDPP has an arsenal of weapons at their disposal to deal with people who are subverting law or defeating the ends of justice.

COMMISSIONER KGOMO: Yes, just there Mr Radebe, could you not have spoken to your counterpart, Minister of Police, to say look,
10 this is what the NDPP is saying, what are you doing about it or do something about it, not that he should account to you too?

MR RADEBE: Well my response to that Commissioner, is that as I have highlighted, this was a general memo to me as a new Minister of Justice. It was not the only report that I received, all the various departments of which I was responsible, they would report so that I became *au fait* with what the Department of Justice and Constitutional Development is all about.

It was not like a specific meeting with myself or report asking me to do something about it, but as I am saying it is very general, no
20 one has ever come to me to say, "Investigating Officer So-and-So is the one who does not want to investigate, Commissioner So-and-So", nothing specific, it is just general that there is a problem.

COMMISSIONER KGOMO: But is your answer then that as a result of that you did not do anything because ...[intervenes]

MR RADEBE: Not ...[intervenes]

COMMISSIONER KGOMO: Of the generality ...[intervenes]

MR RADEBE: Not that ...[intervenes]

COMMISSIONER KGOMO: Obviously ...[intervenes]

MR RADEBE: I did not do anything, Commissioner.

COMMISSIONER KGOMO: Yes.

MR RADEBE: As I indicated in my testimony, when it was specific to me at the time, a report I got that I realised that there are problems, I actually wrote to the then National Director to give me a report as to why there were so delays in these TRC matters, not that I just sat
10 down and did nothing.

COMMISSIONER KGOMO: Thank you. Mr Varney.

ADV VARNEY: Thank you. And as a follow-up to the Commissioner's question, and I did put it to you that this memo raised specific issues in relation to specific cases, namely the PEBCO Three and the others identified, but it also raised a systemic issue which you described as a general problem. So in fact the NDPP was raising specific problems dealing with specific cases, but also pointing out that this was a systemic problem dealing with all the TRC cases. Is that not correct?

20 MR RADEBE: Well I have read it but as I have said, I cannot take it any further than that, this report under this topic of May 2009. I was hardly a month in the Department of Justice, I was still understanding the whole gamut of the activities of the Department. As I am saying here it does not even disclose who are these police officers who are obstructing.

ADV VARNEY: Do you think with the benefit of hindsight and as Commissioner Kgomo asked, do you think you ought to have picked up the phone at that time and called your counterpart in the Ministry of Police to implore on him to take up these matters?

MR RADEBE: Well the last time I was here I was asked about the same question, the benefit of hindsight is a very perfect science, so I think it is neither here nor there what I would have done if I had a benefit of hindsight.

ADV VARNEY: Now if you look at page 281, you can see that it is
10 paragraph 4 and in that paragraph we have ...[intervenes]

MR RADEBE: Which page?

ADV VARNEY: It is page 281 of the bundle.

MR RADEBE: 231?

ADV VARNEY: Ja.

COMMISSIONER GABRIEL: 81.

MR RADEBE: 281?

ADV VARNEY: 281. So this paragraph is right at the bottom of the page under the heading, "Other matters arising" and at paragraph 4, that is 4.1. And then if you turn the page, you know there is nothing,
20 that is where our copy of the memo ends which is really unfortunate because we assume that NDPP, Acting NDPP Mpshe was setting out, probably setting out other issues relating to these cases that were problematic. We will be submitting to the Commission that we do not think that the exclusion of those pages was necessarily by coincidence.

Luckily there is another document which has a small portion of what was presumably on the next page and so we point this out at paragraph 62, that is page 18 where we say that this memo which we refer to as the Mpshe memo as well as yourself and the PEBCO Three case featured in a later document which we think is a sense of what was stated on the missing page or pages and this is a memorandum from the former NDPP Batohi to then Minister of Justice Lamola dated 2 December 2020, titled "Briefing of the TRC cases".

10 And that memo is at page 292 of the bundle. Now this is a very detailed memo, we are not going to go through all the pages, it is multiple pages but if I can draw your attention to paragraph 2.27 of that document now which I believe is at page... So it is, ja, from 299 to 300 and I have quoted the relevant sections in the application to cross. If you go to paragraph 2.27, it reads:

"The matter did not receive any further attention resulting in the charges being withdrawn."

And this of course is a reference to the PEBCO Three case.

20 "This led to Adv Mpshe on 28 May 2009 writing to Minister Radebe and making the following comment."

So this is of course the same memo which has been talking about the incomplete one and you will recognise the first line because that is paragraph 4.1 in that memo, dealing with the fact of a claim that simply closed the TRC cases. These have never been properly

investigated and then the quote goes on and I will read this into the record:

10 “Although my office has held a number of meetings with the senior management of both SAPS and NIA, the process has not developed to the point where investigators have been appointed and investigations instituted. The Minister is requested to take this matter up with his colleagues, the Minister of Safety and Security and Intelligence in order to fast track the process.”

So it does appear from this report, this later report but referring to the Mpshe memo of 28 May 2009, that you were in fact pertinently asked to take up the systemic problem of lack of investigations with the Minister of Safety and Security. What is your response to that?

20 ADV MOKHARE: Before that Chairperson, before the witness answers, I would prefer that our learned friend when he makes certain statements which are loaded, he must also indicate why he is putting them to the witness. For instance, if you go back to page 281 ...[intervenes]

COMMISSIONER KGOMO: You say why he is putting them?

ADV MOKHARE: Page 281.

CHAIRPERSON: 281?

COMMISSIONER KGOMO: 281.

ADV MOKHARE: The letter is incomplete and he then says to the

witness that this was not by accident or coincidence.

CHAIRPERSON: Yes.

ADV MOKHARE: And he just leaves it there as this statement which is not appropriate and whether he is attributing that to this witness or to somebody else.

CHAIRPERSON: Yes. No, we can read in between the lines, Mr Mokhare. That is definitely not attributed to this witness.

ADV MOKHARE: Yes. Chair ...[intervenes]

ADV MOROKA: Chair, if I may ...[intervenes]

10 ADV MOKHARE: But he should put it also then that ...[intervenes]

CHAIRPERSON: Yes.

ADV MOKHARE: I am not disputing, because otherwise it remains hanging like that.

CHAIRPERSON: Yes.

ADV VARNEY: Chair, with ...[intervenes]

ADV MOKHARE: So I am just saying that he should be careful with some of the statements that he makes. Thank you.

ADV MOROKA: Chair, with respect if I may, we represent the Department of Justice. We put up some of these documents and I
20 was going to ask for an explanation because if somebody says it would seem that it was done by coincidence, is he attributing this to the Department or to somebody else?

CHAIRPERSON: Yes.

ADV MOROKA: I was forced by my junior to keep quiet, because I was concerned about that statement myself.

CHAIRPERSON: Yes, I mean your concern would neither be here nor there Ms Moroka, but it is for Mr Varney to respond to that assertion. Mr Varney?

ADV VARNEY: Yes ...[intervenes]

ADV MOROKA: I do not understand my complaint is neither here nor there, what does that mean?

CHAIRPERSON: Yes, I mean Mr Varney will be able to explain why he says it was neither coincidental or otherwise.

ADV VARNEY: Yes. Chairperson, I chose my words very carefully
10 and I made reference to the fact that we do not believe that the omission was coincidental. We certainly did not attribute that to this witness, there is no basis whatsoever to suggest that and we did not. We simply, I simply said that we will ultimately make a submission when we make our closing submissions, that the exclusion of those pages were probably not coincidental.

CHAIRPERSON: Yes and who do you attribute the omission to?

ADV VARNEY: Well at the stage ...[intervenes]

CHAIRPERSON: For the Commission?

ADV VARNEY: At the stage we do not know who to attribute to.

20 CHAIRPERSON: So why do you say they were not coincidental?

ADV VARNEY: Chairperson, we say we think it is likely to be not coincidental because those pages were likely to contain detail about other systemic issues plaguing the TRC cases.

CHAIRPERSON: But you have just referred us to a document which seem to contain reference to the omitted assertions to that

statement?

ADV VARNEY: Yes indeed, but only one sentence, it only includes one additional sentence, not ...[intervenes]

CHAIRPERSON: Yes.

ADV VARNEY: The balance of the document.

CHAIRPERSON: Yes. Mr Varney, I really do not understand. I know that you are going to argue, ultimately it is an issue for argument but it is a matter for great concern that you should say it is not coincidental, yet you do not have any evidence to suggest
10 otherwise.

ADV VARNEY: Chairperson, at this stage we do not have any evidence in relation to the omission of those documents, but nonetheless, in argument we will submit that we do not believe that was coincidental.

CHAIRPERSON: Yes and who would you attribute that omission to if you do not believe that it was not coincidental?

ADV VARNEY: Chairperson, we ...[intervenes]

CHAIRPERSON: You cannot say it was not coincidental, yet you do not have evidence on who to attribute the omission of the documents
20 to.

ADV VARNEY: But Chairperson, I think that is probably premature because we are still hoping that the balance of that document will be found and if it is found, I think we will be in a better position to make submissions.

CHAIRPERSON: Yes, it would equally be premature of you to say it

was not coincidental, do you not agree?

ADV VARNEY: Chairperson, that is simply the view held by my client.

CHAIRPERSON: Yes, thank you.

ADV MOKHARE: Chairperson, I think he should withdraw his statement. It is an appropriate [indistinct] for ...[intervenes]

COMMISSIONER KGOMO: Sorry Mr Mokhare, the second, the second microphone, please.

ADV MOKHARE: Yes, I have to repeat ...[intervenes]

10 COMMISSIONER KGOMO: Yes, it is one now, it is on now.

ADV MOKHARE: I have to repeat then for recording purposes?

COMMISSIONER KGOMO: Yes.

CHAIRPERSON: Yes.

ADV MOKHARE: Yes, thank you, Chairperson. I was saying that I do think that Mr Varney must withdraw that statement because he cannot then make such a statement when on the same breath he says that, "I do not have any evidence and I do not even know who did it".

CHAIRPERSON: Yes.

20 ADV MOKHARE: Especially when this letter was addressed to my client or to this witness and he must then at least have a basis why then that other person who he says he does not know, would want to conceal a letter which was addressed to this witness.

CHAIRPERSON: Yes.

ADV MOKHARE: It is absolutely inappropriate.

CHAIRPERSON: Yes.

COMMISSIONER GABRIEL: Mr Varney, I may be missing things, but what efforts have been made to find these missing pages? Have you followed up with evidence leaders?

ADV VARNEY: Yes, we have Commissioner, when we noticed that it was an incomplete document, we did raise it with the evidence leaders.

COMMISSIONER GABRIEL: And are they taking the matter up on your behalf?

10 ADV VARNEY: I hope that they are.

CHAIRPERSON: Yes, in which case Mr Varney, I think it would be appropriate at this early stage not to ascribe the assertion that you have put to this witness that it was not coincidental that these omissions were made.

ADV VARNEY: Chairperson, in order to move forward, we will provisionally withdraw that.

CHAIRPERSON: Yes.

ADV VARNEY: And we will reserve our right to make submissions in due course.

20 CHAIRPERSON: Yes, at an appropriate stage.

ADV VARNEY: As the Chairperson pleases.

CHAIRPERSON: Thank you.

COMMISSIONER KGOMO: Mr Mokhare, the other microphone is still on.

CHAIRPERSON: Thank you Mr Varney, you may proceed.

ADV VARNEY: Thank you, Chairperson. Mr Radebe, if we can then return to that paragraph at 2.27 of that memorandum which is on page 300 and I am just going to read into record the missing portion as quoted, this is the portion of the Mpshe memo as quoted here and once I have read it I will appreciate your response:

10 “Although my office has held a number of meetings with the senior management [and this is of course Adv Mpshe writing] of both SAPS and NIA, the process has not developed to the point where investigators have been appointed and investigations instituted. The Minister is requested to take this matter up with his colleagues, the Minister of Safety and Security and Intelligence in order to fast-track the process.”

So according to the extract that I have read, Adv Mpshe in fact did ask you to take this up with the Minister of Safety and Security?

MR RADEBE: Yes, this is what the report says.

ADV VARNEY: And do you recall taking it up with the Minister of Safety and Security?

20 MR RADEBE: I do not recall taking it up but we used to have periodic meetings of the Justice and Security Cluster because I was the Chairperson of the Cluster, so I must have raised this matter with the said Ministers of Intelligence as well as Safety and Security, but I cannot recall what transpired after that.

ADV VARNEY: Then let us turn to the next paragraph. I am on

page 300, paragraph 2.28. It reflects as following and I am just going to read the first sentence:

“Nothing however resulted from this memorandum but
Adv Macadam continued to lobby SAPS.”

And he sets out the lobbying that took place. And you will see from the bottom of that paragraph, that eventually in January 2010, General Lebeya of the DPCI, head of the DPCI, agreed to investigate but only after the conclusion of the 2010 Soccer World Cup. So it appears that the steps that you took in relation to raising
10 the matter with the Minister of Safety and Security did not yield any results, forcing the NPA to continue its lobbying efforts with SAPS.
Do you accept that?

MR RADEBE: Accept what?

ADV VARNEY: That whatever steps you take did not yield any results.

MR RADEBE: Well I cannot recall what eventually happened to it, but I have just read this ...[intervenes]

ADV VARNEY: All right.

MR RADEBE: This extract, Chair.

20 ADV VARNEY: But you do not dispute what is said there?

MR RADEBE: No, I can neither dispute nor accept that, but I have just read it.

ADV VARNEY: And then let us turn to paragraph 2.29. I am just going to read the first two sentences:

“The irreparable damage caused by the blocking of

investigations for a period of seven years [and we read that to be between 2003 and 2010] cannot be underestimated. In addition to prescription now being applied to a number of new cases, a number of accused and State witnesses have died.”

And then he goes on to say the impact of that on PEBCO Three and Cradock Four and other cases. Do you accept that to be a fair statement?

MR RADEBE: I have no personal knowledge of this, but I think the
10 appropriate people who are responsible for investigations. They are the ones who can answer how this came about.

ADV VARNEY: No, the question is not how it came about, the question is whether the failure to investigate over that seven-year period would have caused irreparable damage to cases like PEBCO Three and Cradock Four and others?

MR RADEBE: What I am saying, the responsibility for investigations lie with the police, so I am not the appropriate person to be asked basically this question.

COMMISSIONER KGOMO: But is it a fair statement? You can say
20 yes or no.

MR RADEBE: Judge which statement?

COMMISSIONER KGOMO: What was read to you now. The question was, is that a fair statement?

COMMISSIONER GABRIEL: So it starts with if I may?

COMMISSIONER KGOMO: Yes, yes.

COMMISSIONER GABRIEL:

“The irreparable damage caused by the blocking of investigations for a period of seven years cannot be underestimated.”

MR RADEBE: What is the question?

COMMISSIONER GABRIEL: Is that a fair statement that this delay caused damage? Am I correct, Mr Varney?

ADV VARNEY: Yes, that is correct, I will just read it into the record again.

10 MR RADEBE: What I was responding to, the manner in which Mr Varney is posing the question, he seems to be blaming this to me. I am not responsible for investigation as a Minister of Justice, that is the sole responsibility of the police.

COMMISSIONER GABRIEL: I suppose if I may Mr Varney, you applied for amnesty ...[intervenes]

MR RADEBE: Yes, I did.

COMMISSIONER GABRIEL: Minister, and you have told us that, so you were aware of the amnesty process?

MR RADEBE: Very well.

20 COMMISSIONER GABRIEL: And you were Minister of Justice ...[intervenes]

MR RADEBE: Yes, I was.

COMMISSIONER GABRIEL: For a period. Now what is your view about a seven-year delay in the investigation and therefore prosecution of TRC cases?

MR RADEBE: It is wrong.

COMMISSIONER GABRIEL: It is wrong?

MR RADEBE: On the face of it, yes.

COMMISSIONER GABRIEL: Thank you.

MR RADEBE: But I do not know the underlying reasons for that.

COMMISSIONER GABRIEL: Thank you.

ADV VARNEY: Thank you Commissioner and thank you, Mr Radebe.

So yes, for the moment we are not dealing with the underlying reasons or responsibility, we simply wanted to know from you
10 whether that seven-year delay resulted in irreparable damage, whether that was a fair statement and I understand you to say you accept that.

CHAIRPERSON: That has been responded to, Mr Varney.

ADV VARNEY: Okay, let me move on, Chairperson. Let us sir, if I can ask you to jump to page 21? You will see that there is a heading towards the top of that page titled, "What happened to the PEBCO Three case". And I just want to paint the context to you. The bottom line is as we say in paragraph 73:

20 "The PEBCO Three case remains unresolved even up until today."

We know that the High Court in 2009 ordered the Department of Justice to reconvene an Amnesty Committee but the Department never reconvened that Committee and the charges were never reinstated. Chairperson, we set that out in the affidavit of Amelia Galela between pages 314 and 317 of the bundle.

Mr Radebe, we believe that the docket was held by the DPCI at the NPA's head office between 2011 and 2019, although we are not aware of any progress achieved or any work done on the case during that period. And then if we turn the page to 22, we point out at paragraph 78 that virtually all the suspects have died and I am not going to take you through the list, it is there between 78.1 to 78.7.

So really what we can see is that you know, over the last decades the suspects have been dying off at a steady rate. We want to, we will be putting it to this Commission ultimately that the post-
10 apartheid order had ample time to deal with the PEBCO Three case but did not.

We are now at a stage where some 12 years later, this is from the Mpshe memo and perhaps my arithmetic is wrong so I will not specify a time period, but certainly more than a decade, there is only one suspect left that is from an askari by the name of Joe Mamasela and he even claims that he is now unfit, medically unfit to appear in court, but during your term as Justice Minister, six of the suspects were alive but by the end of your term, five remained living and then 12 years later we only have one left.

20 So really what I want to put to you Mr Radebe, whether you agree that the post-apartheid state has failed the families of the PEBCO Three?

MR RADEBE: Ja, it is just very obvious that from what is said that there was no prosecution of them.

ADV VARNEY: Yes indeed, no prosecution, no accountability. We

have an inquest that is starting on the 12 October, some decades later, but that is all we have and only one suspect left and only an askari who claims he is unfit to appear. So would you agree that the post-apartheid state had ample time to pursue the PEBCO Three case but did not and then in so doing, they failed the families of the PEBCO Three?

MR RADEBE: Well I can only respond by saying that those who were responsible for investigating or prosecuting them, did not do what they were supposed to do.

10 ADV VARNEY: Let us turn to the next heading on page 23. We are going to be dealing with the NPA's performance between 2009 and 2014 which coincide with your tenure as Justice Minister. Now in your evidence and this is your second statement at paragraph 42, it is at page 67 of the bundle, you state the following:

20 "I do submit in the circumstances as I found them with the Prosecuting Authority functioning effectively and independently with dedicated units handling TRC-related matters and with no complaints or concerns having been brought to my attention, there was no occasion that required or justified my invocation of section 33(2)(a) of the NPA Act."

You confirm that statement in your ...[intervenes]

MR RADEBE: Yes, I did say the statement.

ADV VARNEY: Ja, so I want to put to you certain reports, annual reports from the NPA which we will be putting to you, are inconsistent

with your statements about the functioning of the NPA during your tenure as Minister of Justice, and the first one is the NPA annual report for 2008/2009. We have that extract at page 327 of the bundle and as you can see from the quote, the report says:

“The TRC guideline was declared unconstitutional.”

We have dealt with that matter.

“A decision to appeal the judgment will be made early in 2009. A further delay in the prosecution of cases emanating from the TRC process is therefore inevitable.”

10

Now the NPA annual report is saying because the decision to appeal still has to be made, this is going to delay, further delay the prosecution of the TRC cases. Would you agree that an appeal process is no reason to stop prosecuting cases?

MR RADEBE: Well firstly the NPA annual report of 2008/2009, I was not a Minister of Justice, I was a Transport, so I may not be able to answer that question. Yes, in 2009/2010 I was a Minister of Justice but as I have said, that the appropriate people there is the police who do not investigate these particular matters.

20 ADV VARNEY: Thank you, but as the Minister of Justice from 2009 which is when the appeal was being considered, an appeal process in a civil case is no basis not to pursue prosecutions of the TRC cases?

MR RADEBE: Well I think the question is to ask why there were no prosecutions. In your earlier questions you are attributing this by the lack of investigation by the police, so the police have to answer why

they never investigated those matters.

ADV VARNEY: Let us turn to the next NPA annual report for 2009/2010. We deal with that at paragraph 83.2 and Chairperson, it is at page 330 of the bundle. Let me read into the record the relevant extracts. The heading is "TRC cases".

10 "Matters need to be fully investigated before any final prosecution decision can be made. Since 2003 the NPA has struggled to secure necessary cooperation in this regard. Currently the DPCI has indicated that it will conduct the necessary investigations but only after the conclusion of the 2010 FIFA World Cup."

So in quite a public way because this is a public report, the NPA is stating that it has struggled since 2003 to have these cases investigated and that they will only be investigated after the 2010 World Cup. Again would that not have that public statement, not have come to the attention of your office?

MR RADEBE: I come back to who is responsible for investigations, why are... Those are the ones who have to be held responsible for that but also the NDPP has the power if a person does not do their
20 job in this instance, to charge them if they are in violation of the law. So what I am trying to say is that all the NDPPs who are complaining here, they had the power and the authority to do their job.

COMMISSIONER GABRIEL: Did any of this come to your attention that you can recall?

MR RADEBE: My recollection as I said, the first report was like a

report when you are a Minister to become familiar with the terrain, but the one that I can recall with certainty is when the Director-General, Ms Sindane in Cape Town, told me specifically about the delays in the TRC cases. They drafted a letter for me which I signed to the NDPP Attorney Nxasana to ask directly.

The point I am trying to say that the manner in which Mr Varney is posing the question, is like these complaints were so rife in the Department that it must strike my memory. It was never raised like that, just ordinary reports that were being posed.

10 CHAIRPERSON: Yes, but did this NPA report come to your attention?

MR RADEBE: Yes, yes.

CHAIRPERSON: Yes?

MR RADEBE: Yes.

ADV VARNEY: Thank you, Chairperson. Let us move on, let us turn to page 24. I want to direct your attention to paragraph 84 and I am dealing with a Constitutional Court case in the matter of *Albutt v Centre for the Study of Violence and Reconciliation and Others*. A judgment was issued in February 2010 while you were Minister of
20 Justice and indeed the Minister of Justice was the 9th respondent in that matter and this was a challenge to the President's special dispensation on political pardons.

Part of the challenge was based on the fact that victims and families were excluded from that process and which the Court ultimately found was a violation of the rule of law. Do you recall that

judgment coming to your attention and did it alert you to the past approach of Government in relation to the TRC cases which the victims in that case said was about accommodating apartheid era perpetrators at the expense of the rights of victims and families?

MR RADEBE: I cannot recall with specificity but I do recall in general that the pardon that the President had issued, resulted in this Constitutional Court judgment.

ADV VARNEY: All right, let us move on to page 25. You see the next topic, the heading, "Records that contradict Mr Radebe's
10 evidence-in-chief" and I want to put to you certain documents which we suggest are inconsistent with your evidence that you were unaware of the difficulties that the NPA was experiencing in relation to the TRC cases and these documents the Commission obtained from the Department of Justice during July 2026. And I am not going to rely on all of them, just the documents we referred to in paragraphs 88.2 and 88.3 and 4.

So the first document is a ministerial memorandum from the Acting NDPP at the time, Jiba to yourself. It is dated 30 May 2013. It was submitted in terms of section 32(a) of the NPA Act. It is titled,
20 "Report on investigations and prosecutions emanating from the TRC". Your signature appears, noted at page 15 of that memo. Chairperson, that memo is in the bundle at page 341.

In the next document we will refer to, is a ministerial memorandum from Acting NDPP Jiba to yourself, dated 13 August 2013 and again your signature appears at page 4 of that memo.

Chair, that memo is at page 356 of the bundle. Sir, let us then deal firstly with the first memo and if I can ask you to turn to the next page and at paragraph 89.1 we refer specifically to the 30 May 2013 memo from Adv NDPP Jiba to yourself. That is at page 341 of the bundle and as you can see from paragraph 1, the purpose is:

10 “The purpose of this memorandum is to provide the Honourable Minister with a comprehensive report on the investigations and prosecutions of matters emanating from the TRC as undertaken at the meeting of 5 April 2013.”

It is quite a long memorandum, we do not have time to traverse it in detail and I want to refer you to paragraph 5.17 which is at page 347 of the bundle and we have quoted it. Adv Jiba points out:

“Both the DSO and SAPS were requested to investigate the remaining 50 cases but declined to do so.”

Another extract is at 5.25 on page 348:

20 “SAPS notified the ANDPP (at the time Adv Mpshe SC) that it would not continue to investigate TRC cases pending the outcome of the Ginwala Commission.”

Further on that same page, paragraph 5.27:

“After the findings of the Ginwala Commission being handed down, the PCLU commenced negotiating with SAPS with the investigation of the remaining 10 cases.”

And then the rest also relates to the fact that DPCI would

only start after the World Cup. We have dealt with that and I also point you to paragraph 7.2 on page 354.

That is under paragraph 7 titled "Comments" and perhaps I will just read that into the record:

10 "Unfortunately statements are readily made in the media to the effect that the TRC had gathered extensive evidence justifying a substantial number of prosecutions and that the NPA is guilty of dereliction of duty by not having implemented a number of prosecutions. I am of the view that it would be deemed appropriate that once the above cases had been investigated and decisions taken, that the record in this regard is set straight."

And then finally under conclusion:

"It is recommended that the Honourable Minister bring the contents of this memorandum to the attention of Cabinet."

20 So in the light of this memorandum from the Acting NDPP that you signed, if you look at page 355 your signature appears on the last line there as Minister of Justice, I think it is the 11th or 12 July 2013 and there is a handwritten note. I am not sure but that is from Deputy Minister Nel or yourself:

"Can a Cabinet memo be drafted for submission to Cabinet?"

So firstly would you agree that the issues relating to the TRC cases were pertinently brought to your attention in this

memorandum?

MR RADEBE: Yes, it is.

ADV VARNEY: Now that handwritten note, "Can a Cabinet memo be drafted for submission to Cabinet", is that your handwriting or is it Deputy Minister Nel?

MR RADEBE: Where is the handwriting?

ADV VARNEY: Sorry, that is on page 355.

MR RADEBE: Sorry, that is my handwriting.

ADV VARNEY: And do you know whether that memo was drafted
10 and submitted to Cabinet?

MR RADEBE: I cannot recall but I assume that a Cabinet memo was prepared and submitted to Cabinet.

ADV VARNEY: Thank you. Chairperson, as far as I am aware, we do not have a copy of that memo, the Cabinet memo and perhaps the evidence leaders could take steps to recover it together with the ...[intervenes]

CHAIRPERSON: Yes.

ADV VARNEY: Cabinet, the minutes of the Cabinet meeting which it served.

20 CHAIRPERSON: Yes.

ADV VARNEY: I am indebted to the Chairperson. If we can then turn to the 13 August memorandum from Acting NDPP Jiba to yourself and that is on page 356 of the bundle. Now this memo deals with the specific case, the subject is titled:

"Memo to the Minister in terms of section 33(2)(a) of the

NPA Act, kidnapping and torture, disappearance and murder of Nokuthula Simelane.”

As mentioned, the date is 13 August 2013 and perhaps let me just read that first paragraph, the purpose of the memorandum into the record:

“The purpose of this memorandum is to inform the Honourable Minister of development in connection with the above matter as well as” ...[intervenes]

MR RADEBE: Which page there? Sorry.

10 ADV VARNEY: Sorry, it is page 356.

MR RADEBE: Page?

ADV VARNEY: 356. It is under paragraph 1 near the bottom of the page:

“The purpose of this memorandum is to inform the Honourable Minister of developments in connection with the above matter as a result of threatened legal action against me. The Honourable Minister was copied in two letters addressed to me by the Legal Resources Centre.”

20 So those letters are dated 31 July 2013 and 5 August 2013.

And we just want, I want to read into the record an extract from the 31 July 2013 letter which is at page 366 of the bundle. So it is a letter from the Legal Resources Centre to the Acting NDPP in which she was put on terms either to take a decision to prosecute the perpetrators in the murder of Nokuthula Simelane or direct the

holding of an inquest. And as Minister of Justice...

COMMISSIONER GABRIEL: So the relevant paragraph is on page 368.

ADV VARNEY: Thank you.

COMMISSIONER GABRIEL: At paragraph 9.

ADV VARNEY: Yes, that is correct. Thank you, Chairperson. Before I go there, if you look at page 369 under the signature line, you will see that you were copied on this letter and if can just quote paragraph 3:

- 10 “3. Our client and her family have been seeking justice, truth and accountability for nearly 30 years. September this year will be the 30th anniversary of the disappearance of Simelane. It is being some 17 years since an investigation docket was opened into her disappearance.
5. As appears from correspondence, my client has engaged in an extensive and strenuous endeavour to persuade the authorities to take action over many years. Her pleas had fallen on deaf ears.
- 20 6. My client has understandably lost all faith in the ability and/or willingness of the NPA to ever conclude its investigations. My client is of the view that if the suspects in this matter could not be prosecuted, it should have been referred to a judicial inquest years ago, if not decades ago.”

Now so you were informed in that letter that if a decision was not going to be taken, that the Simelane Family would bring legal proceedings against the NPA. Are you aware that ultimately that is in fact what happened, the Simelane Family in subsequent years did bring a case to compel a decision in that matter?

MR RADEBE: I cannot recall with specificity but I do recall reading in the media that Minister Simelane who was the sister of the deceased, did take the Government to court. As to what eventually transpired, I am not aware.

10 ADV VARNEY: So would you agree that both Adv Jiba's memo of August 2013 together with the letter of demand that we just placed on record, that that brought to your attention the difficulties in relation to a specific case, namely the Nokuthula Simelane case?

MR RADEBE: Yes, I do recall, also I do recall that I did sign the memorandum that was indicating this and I assumed that something had been done because the responsibility was that of the NDPP, but I cannot recall with specificity what precisely happened at the time.

ADV VARNEY: Now ultimately and you have referred to this early in your evidence, you did send a letter to the then NDPP Nxasana,
20 requesting a status report on the prosecution relating to matters emanating from the TRC process. That letter is dated 14 May 2014, that is about a year later and that is at page 364 of the bundle.

MR RADEBE: Page?

ADV VARNEY: Page 364, so that is the Ministry letterhead.

MR RADEBE: Yes.

ADV VARNEY: It is addressed to Mr MSO Nxasana, NDPP. It is dated, actually the handwritten date is the 20 May 2014. It is titled:

“Request for status report on prosecutions relating to matters emanating from the TRC process and update on the work of the Missing Persons Task Team.”

And I will just read the first two paragraphs into the record:

10 “- I have noted with concern the apparent lack of progress made by the NPA’s PCLU in terms of its mandate to manage and direct investigations and prosecutions relating to matters emanating from the TRC process.

- You are kindly requested to facilitate the urgent submission of a status report on this matter to my office with emphasis on the reasons for and circumstances surrounding the apparent lack of progress in this regard.”

You recall sending that letter dated 20 May 2014?

MR RADEBE: Yes, I do recall.

20 ADV VARNEY: And can you describe the circumstances which prompted you to send this letter?

MR RADEBE: As I mentioned earlier on, I had had a meeting with Sindane who was a Director-General of the Department who gave me a briefing about this problem in particular. So it was on that basis that I wrote this letter so that I can get a full report from the NDPP at the time, Attorney Nxasana.

ADV VARNEY: All right, we in terms of the record, it seems that it may have been prompted by a ministerial memorandum and here I am reading from paragraph 88.4 at page 26:

“A ministerial memorandum from the Acting Chief Director, TRC Unit, Ms L Mmbadi to the Minister of Justice, Mr Radebe, dated 12 May 2014.”

And this culminated in you sending a letter to the NDPP, the one that we have just read into the record. So that ministerial memo is at page 361 to 362 of the record. So it appears that it was not
10 Ms [Indistinct] but Ms Mmbadi that prepared this particular letter and requested you to send it. You can take a look at page 361 of the record. Do you accept that?

MR RADEBE: I do not actually understand your question because I say I had a meeting with the Director-General who gave me the report as to the problem at hand which was then followed by this memorandum that I include in the letter that I signed.

ADV VARNEY: Thank you. All right, so we noticed Mr Radebe, that nearly a year elapsed between the Acting NDPP's letter to you in August 2013 and then the action that you took in May 2014. It is
20 probably less than a year, my team will tell me exactly how many months but it looks like it might have been eight or nine months. Why was there such a long lapse between Acting NDPP Jiba's memo and you taking action in May 2014?

MR RADEBE: I cannot recall with specificity your question but as I have said that May 2014 is when I had a sit down meeting with the

DG who explained the problems at hand. The other reports were general reports to me as an Executive Authority but the power has always been with the NDPP to do their job of prosecuting perpetrators.

ADV VARNEY: All right. We know that subsequently the family of Nokuthula Simelane did go to court but this was after you had left office. This was in 2015 and the point that the families have made to this Commission is that for a period of some eight years and six months namely between the plea and sentence agreement that was
10 struck on the Reverend Chikane matter in August 2007, and the issuing of an indictment in the Nokuthula Simelane matter in February 2016, there were no prosecutions and indeed no TRC case related inquest.

And we make the point Mr Radebe, that for five years of this period of non-delivery was during your tenure as Justice Minister. Now my question is and as a matter of perhaps principal leadership, would you expect, accept a portion of the responsibility for the failure to deliver on the TRC cases during that period?

MR RADEBE: Well I think we should apportion responsibility to the
20 appropriate authorities, it is the police who have the constitutional responsibility of investigating crimes and in this instance, TRC crimes and to prosecute is the NDPP who have the sole responsibility to prosecute without fear or favour or prejudice. The Minister of Justice is not responsible for prosecuting people, because the NDPP, NPA is independent of the Minister of Justice.

ADV VARNEY: Mr Radebe, I want to put to you an affidavit from a Mr Vusi Gama who made reference to it on page 30 of the bundle, and a signed copy of his affidavit is at page 382 of the bundle. Now Mr Gama is the uncle of Mbuso Khoza, the son of Sbho Phewa. Mr Phewa disappeared in Lamontville on 19 May 1987 and it is believed that he was abducted and disappeared by the erstwhile Security Branch.

Now attached to Mr Gama's affidavit is an e-mail that he sent to you on the 30 August 2010. There is a copy of the e-mail at
10 page 41 of the bundle and I will just quickly read it into the record and I will wait for you to get there.

MR RADEBE: Page?

ADV VARNEY: 41.

MR RADEBE: Yes.

ADV VARNEY: So it is from Vusi Gama dated 30 August 2010. It is sent to the Ministry of Justice and copied to various e-mails. Subject, "Missing MK soldier-Sbho Phewa" with the TRRC reference number:

"Hi Mr Minister

1. E-mails herewith attached refer.
- 20 2. I have brought the matter referred on the subject to the attention of Mr Menzi Simelane NDPP NPA.
3. I was later referred to Mr Ramaite. His office acknowledged the receipt of my e-mails on the 11 August 2010.
4. I have tried to make contact with Mr Ramaite so that

I could discuss the matter with him. This exercise has proven to be futile.

5. It is more than two years I have been trying to get assistance regarding the matter of Sbho Phewa from Lamontville. I have been sent from pillar to post. According to the TRC report, Sbho died 23 years ago.

6. Could you please intervene?"

And then there is a response from the Ministry of Justice that
10 is on page 42. We do not need to read this, it simply acknowledges the letter from Mr Gama and it says that the matter has been raised with the NDPP and that NDPP will look into this matter. And then lastly if we can turn to page 43 of the bundle?

It does seem as if Mr Game heard nothing further because he then writes to the President. From, you can see from this e-mail that it is sent on the 7 June 2011 and it is also titled, "Missing MK soldier-Sbho Phewa". And he essentially says:

"Hi Mr President

2. The Department of Justice has not attended the
20 subject since October 2010 where they acknowledged receipt and promised to take action.
3. Nothing has happened since then.
4. Therefore could you please help to resolve this problem?"

Now I can tell you that notwithstanding the efforts of Mr Vusi

Gama, it seems little or nothing was done because it was only in 2022, some 12 years later did the NPA announce that an inquest into Sbho's disappearance would be held and that in November 2023 it appears that a decision was made to pursue certain charges against some former police officers. So it took some 12 years to act, so what I want to put you as set out on page 30, paragraph 99 and that is:

10 "That your characterisation of the NPA as functioning effectively and independently in relation to the TRC cases is not consistent with the documentary record before this Commission."

And that in fact you know, individual cases such as the case of Sbho Phewa were specifically brought to your attention.

MR RADEBE: What is the question, Mr Varney?

ADV VARNEY: So the question is, your characterisation of the NPA as functioning effectively and independently, does not appear to be consistent with the evidence that we have put up.

MR RADEBE: Well my understanding at the time, I was a Minister that were functioning independently but there were challenges as it is normal in any organisation. But insofar as responding to Mr Vusi
20 Gama, I think we should also read paragraph 97 because it was brought to my attention this matter and the response was forwarded to Mr Gama. It was the NPA that did not do their job as indicated.

COMMISSIONER KGOMO: Yes, can you read paragraph 97 then?

MR RADEBE: Is says that:

"The Minister of Justice and Constitutional

Development, Mr Jeff Radebe, is in receipt of your e-mail letters dated 27 and 30 August 2010. He has noted the contents and is in the process of liaising with the NDPP in relation to the matter. The National Director will look into the matter in coordination with the branch dealing with these kind of issues and report back to you. You may therefore expect to receive a further reply from the National Director's office soon."

COMMISSIONER KGOMO: Yes, thank you.

- 10 ADV VARNEY: Thank you, Commissioner. So just before we conclude Mr Radebe, do you have any comment on the fact that in the decade since the winding up of the TRC, very few cases of the TRC matters have been prosecuted and very few families have reached closure?

MR RADEBE: Ja on, in the scheme of things it is true but I think the people who should answer that are all those NDPPs who were empowered by law to prosecute TRC matters.

- ADV VARNEY: Now the Terms of Reference of this Commission includes paragraph 1.4 which requires this Commission to consider
20 whether in fairness and law, constitutional damages should be paid to the families. And this is in the context that most of the cases cannot be resuscitated mainly because witnesses, accused persons have died, so families had to accept that in many if not most cases, their cases cannot be taken further.

Now in the light of the requirement imposed on this

Commission to consider whether in fairness and law constitutional damages should be paid to any particular person, do you have a view on, perhaps and not on the question of the law but just on the question of fairness, whether in your view it would be fair to pay constitutional damages to the families whose cases had been neglected and which cannot be resuscitated?

MR RADEBE: Well I think our Constitution is very clear that any South African has a right to take a matter to any court of law if they feel that they have been undone by anything or the other, so this is
10 not an exception, so I do concede that everybody has that right in terms of this new democratic Constitution of ours.

ADV VARNEY: No further questions, Chairperson.

CHAIRPERSON: Thank you, Mr Varney. Mr Semenya?

ADV SEMENYA: Chair, I do not intend to be long and maybe we can go a little over the lunch hour.

CHAIRPERSON: Yes.

ADV SEMENYA: Mr Radebe, I invite you to help me understand what the Constitution says and I will refer you to that clause, but as a background I take it that you would be familiar that the TRC
20 recommendation included in it amongst others, that those who did not apply for amnesty should be prosecuted where the evidence supports it or investigated where the investigation is still necessary. You are aware of that, do you not?

MR RADEBE: What is the question, advocate?

ADV SEMENYA: That the TRC recommendations amongst others

would have said that those who did not apply for amnesty, to be prosecuted where the evidence supports such a prosecution and/or investigated where investigations were necessary. You are aware of that?

MR RADEBE: Yes, I am aware of that.

ADV SEMENYA: Yes and you would have said as well that those whose application for amnesty were refused, would stand that risk of prosecution and/or investigations depending on the facts, correct?

MR RADEBE: Yes, I do know that.

10 ADV SEMENYA: Now against the questions that have been put to you is how one draws the line between the prosecutorial independence guaranteed by the Constitution and posited on the power of the NDPP. You are familiar with that?

MR RADEBE: Yes, I am familiar.

ADV SEMENYA: And by definition it would mean whether you prosecute or you do not, is an exclusive preserve of the NPA?

MR RADEBE: Yes, it is.

ADV SEMENYA: And others if the Ministers, any attempt at dealing with specific cases may leave such a Minister open to criticism of
20 Executive interference, would you agree with me?

MR RADEBE: Ja, I do agree that the NDPP is independent of the Minister or Justice or anybody, they have to take that decisions independent of any outside influence.

ADV SEMENYA: And a member of the Executive would have to tread very carefully not to cross that boundary?

MR RADEBE: Yes indeed, even in my earlier testimony here I did allude to the point that the Minister of Justice in relation to the NDPP is slightly different than a normal department where you can be able to direct what the Director-General must do, but the NDPP is solely independent and subject to the Constitution and the law.

ADV SEMENYA: And the reading of the recommendations of the TRC would tell any reader that it is directed at investigation for one, correct?

MR RADEBE: Yes, it is.

10 ADV SEMENYA: To prosecutorial decisions in respect of those matters that stand to be prosecuted.

MR RADEBE: Yes, it is.

ADV SEMENYA: Now in the hierarchy of responsibilities, you then have a section 20... I mean 179(6) which says to whoever bothers to read it, that the Minister of Justice would have final responsibility over the work of the NPA.

MR RADEBE: Yes, I do know that.

ADV SEMENYA: Now maybe help me with this quandary, it would have been inappropriate or let me step back, constitutional dictates
20 would have had it that the police do policework under section 205.
Am I right?

MR RADEBE: Yes, it is.

ADV SEMENYA: And it is an exclusive power of the police to do so under 205?

MR RADEBE: Yes, it is.

ADV SEMENYA: So it would have not been fitting for you to do those decisions but that of the police, I would imagine?

MR RADEBE: Those who cannot.

ADV SEMENYA: And about the other leg of this would be that prosecutorial independence that dictates no Executive intervention, they had to do their work without fear, favour or prejudice. Am I right?

MR RADEBE: That is correct.

ADV SEMENYA: Now give me the content of what is called final
10 responsibility as I see in 179(6). Do you have an idea, that is placed on the Minister?

MR RADEBE: My understanding, it is a polite way of giving something to the Minister of Justice when in fact he has no power or authority in terms of the Constitution, because the Constitution is clear, it gives total independence to the NDPP to prosecute that fear or prejudice and also no one can interfere with the decisions or intended decisions of the NDPP.

So my understanding of final responsibility is to support the NDPP. If for an example they give you a programme of action that
20 requires budget, we have to fight the National Treasury to put more funds to the NDPP. You may only ask a question from the NDPP like I did in one instance that I alluded to before this Commission last time I was here, but at no point can I as a Minister of Justice tell Advocate Mpshe, Simelane, Jiba, Nxasana who he or she must prosecute or not prosecute.

ADV SEMENYA: And the ambit of your typical section 33 of the NPA Act, reports that you require would be of what kind?

MR RADEBE: Of any kind where there is a query that has been put to the Minister of Justice or the Minister of Justice himself or herself can ask an explanation on any matter that involves the NDPP. Like I indicated here, I once asked the NDPP, Adv Simelane, why he went to Kimberley to start the prosecution of John Block. He gave the explanation, that was the end of the matter.

ADV SEMENYA: Okay.

10 MR RADEBE: And also to that letter that I wrote to Attorney Nxasana to give an explanation as to where there were delays in the TRC matters.

ADV SEMENYA: And as the record it show and our investigation as evidence leaders would confirm, no investigators were appointed in relation to the TRC matters during your tenure as Minister?

MR RADEBE: Can you repeat that?

ADV SEMENYA: I am saying as the evidence it show and our investigation can confirm there were no investigators appointed during your tenure to look into the TRC matters?

20 MR RADEBE: Yes, it does indicate that but I think that the, those who were responsible for the police are best able to answer that question, why investigations did not take place and why the various NDPPs did not do anything about the reluctance of the police to investigate those matters.

ADV SEMENYA: Yes, for now it is not a question of appropriating

any responsibility to anybody, but as a matter of fact, a non-action of a matter so sensitive for a period over well seven or more years depending on who you are talking to, is jarring. You would agree?

MR RADEBE: Yes, I do.

ADV SEMENYA: I have no further questions, Chairperson.

CHAIRPERSON: Thank you, Mr Semenya.

COMMISSIONER GABRIEL: Former Minister Radebe, just when you thought you were off the hook, you are not off the hook. I have one last question. It seems and the record shows that the NPA
10 battled to get investigators to investigate these cases and that through various memos this was brought to your attention?

MR RADEBE: Yes, it was.

COMMISSIONER GABRIEL: Okay, now what did you do to take it up with your counterpart responsible for the police?

MR RADEBE: Well as I indicated earlier on today is that there is a Justice and Security Cluster of which I was the Chair, so whenever it was brought to my attention, I would bring that to the attention of those responsible.

But I must also indicate the context here, that in the Justice
20 Cluster it was not only the TRC matters that we had to deal with and also as a Minister of Justice and Constitutional Development, there were a lot of transformative initiatives that I was also currently involved at that time, including the transformation of the judiciary as you will recall that we created the office of the Chief Justice in order to ensure that we give a total independence to the judiciary, a

process that is unfolding right now.

So what I am trying to say, that the scope of the Department of Justice was very wide and so on, so I am not trying to justify anything, but I am just saying that the portfolio of justice is very huge, so an impression must not be created that the only thing that the Minister of Justice was doing, was just to look over the issue of TRC even though painful as it might be from what I can hear now, the whole spectrum of the challenges that are being faced.

COMMISSIONER GABRIEL: So with respect to the TRC cases and
10 the recommendations of the Amnesty Committee, you cannot recall any specific intervention that you made with your counterpart in the Executive to resolve this problem of a lack of investigators?

MR RADEBE: Besides speaking with them I do not recall specifically and I cannot say, that it is not as if Mpshe, Simelane, Jiba, Nxasana came to me, that "Hey Minister, we have this problem, police So-and-So or National Commissioner, whoever, is giving us obstacles to this thing". These were just general reports.

The first time where I realised that it does seem that there is a challenge, is when DG Sindane brought to my attention as the
20 memo here indicates and I wrote a letter then, but of course at the time I was on the departure lounge as I was left with the three days ...[intervenes]

COMMISSIONER KGOMO: Where to?

MR RADEBE: To the President.

COMMISSIONER GABRIEL: So the answer to my question is you

cannot recall any specific intervention that you made with your counterpart responsible for that [indistinct] ...[intervenes]

MR RADEBE: Except to discuss in general terms.

COMMISSIONER GABRIEL: Okay, thank you very much.

CHAIRPERSON: Mr Mokhare, any re-examination?

RE-EXAMINATION BY ADV MOKHARE: Thank you Chairperson, just one or two questions to Mr Radebe for clarity purposes. Mr Radebe, if you go to page 25 of the Calata Group bundle, there is a topic there, "Records that contradict Mr Radebe's examination-in-
10 chief". Do you see that?

MR RADEBE: Yes, I do see it.

ADV MOKHARE: And Mr Varney put to you certain propositions to suggest that there is in fact documentation in the form of memorandums that he referred you to from Jiba, Mpshe and so on, which in fact contradict what you said that you were actually not informed about these matters.

But what was not put to you or at least put on record which I would like you to do, is that the documents that he provided or he brought to your attention, are documents which featured in your
20 evidence-in-chief and you dealt with them except for the Mpshe memo which was not brought to your attention. With the benefit of the evidence leaders, they provided a bundle.

I do not know if it is front of you there, that the evidence leaders provided a bundle on Saturday and if you go to that bundle at page 287, it is the transcript of your evidence-in-chief when you were

here on the 31 July 2026. I just want you to just have a look at it and confirm that that is indeed the transcript of the evidence you gave in-chief ...[intervenes]

MR RADEBE: Yes, it is.

ADV MOKHARE: On that date. So on that transcript if you turn to page, let us start from page 306 ...[intervenes]

MR RADEBE: I am having a different bundle here.

ADV MOKHARE: It should be the ...[intervenes]

MR RADEBE: Oh ja, the last.

10 ADV MOKHARE: The last one, yes.

MR RADEBE: Yes.

ADV MOKHARE: If you are at page 306, you will see there that I introduced to you a bundle of documents and if you look from the top there where I said, "Look at page 28 of that bundle" and do you confirm ...[intervenes]

MR RADEBE: Yes, sir.

ADV MOKHARE: That was the bundle that it was put on record that was provided to you or through your lawyers by the evidence leaders which consisted of various memorandums?

20 MR RADEBE: Yes, I do.

ADV MOKHARE: And when you look at that evidence, I am not going to make you to read it but it continues all the way, you will see page 309 you deal with the 2013 memo at the middle of the page and later then with the, both the November one, I mean the August one, the May one ...[intervenes]

MR RADEBE: Yes.

ADV MOKHARE: Of Jiba and when you go to page 312, you deal with the 2014 memo.

MR RADEBE: Yes.

ADV MOKHARE: And as well as then the [indistinct] memo which you also dealt with it.

MR RADEBE: Yes, sir.

ADV MOKHARE: In your evidence-in-chief.

MR RADEBE: Yes.

- 10 ADV MOKHARE: Yes, so what is your response to this heading at page 25 of the Calata Group which suggests that there is some evidence which is documentary which was left out in your evidence-in-chief, which contradicts your evidence?

MR RADEBE: No, I do not agree with that heading.

ADV MOKHARE: Thank you. Then coming to the Gama affidavit, you were referred to Mr Gama's affidavit which is right at the end, I think it will be page 384 thereabout, 382 that is where it starts ...[intervenes]

MR RADEBE: In the earlier bundle?

- 20 ADV MOKHARE: We are back now to the Calata Group bundle.

MR RADEBE: 3?

ADV MOKHARE: 382. That affidavit is signed at page 385, Vusi Samson Gama. Do you see that?

MR RADEBE: Yes.

ADV MOKHARE: So what, the proposition that was put to you with

regard to Mr Gama is that he wrote to you and that was in 2010, he sought your intervention but it was also in fairness put to you that you did respond through your relevant official within your Department to Mr Gama and you said that, "I will be engaging with the National Director of Public Prosecutions on these issues and that you will be contacted by that office". Am I right?

MR RADEBE: Ja, that is correct.

ADV MOKHARE: And to your recollection did you indeed then passed that information to the National Director of Public
10 Prosecutions, given that the nature of the complaint of Gama was a lack of prosecution in respect of the death of his uncle?

MR RADEBE: Yes, I do recall. Just for information is that I was familiar with this case, as I indicated in my earlier testimony that I was involved in the KwaZulu-Natal military operations, so that victim was part of the Operation Butterfly that a close comrade of mine was a commander of Colonel [Indistinct]. So I was familiar with that precisely.

ADV MOKHARE: Yes, thank you. What was also put to you was that although prosecution did take place, that the perpetrators were
20 charged with murder and kidnapping that happened 12 years later. To your recollection did Mr Gama return to you to say that, "Minister, you responded to me that you will take this matter up with the NDPP and that nothing has happened and therefore I seek your intervention?"

MR RADEBE: No, he never came back to me.

ADV MOKHARE: Because what you were shown was Mr Gama now having approached the President. Did you know at any stage that Mr Gama has decided at that time to approach the President?

MR RADEBE: No, I was not aware, I only became aware now when I saw this bundle.

ADV MOKHARE: With regard to the PEBCO Three, it was, a proposition was put to you that the PEBCO Three perpetrators were never prosecuted but I did not understand it to be that the blame was put on you because it is clear, even in terms of the law it does not
10 require any argument that it is the prosecution that must make prosecutorial decision, but what was sought from you is what did you do.

So I want you to recap what you said in chief and you repeated it here but slightly so that it becomes clear on evidence, insofar as that which fell within your powers as the Executive at the time, can you recap the part that you played with regards to the PEBCO Three?

MR RADEBE: Firstly the PEBCO Three were comrades that were very familiar to us, even though I never worked with them, but they
20 were part of a unit that was commanded by some of my comrades when I based in Lesotho, so I was completely familiar with the issue of the PEBCO Three. My main role I played on the PEBCO Three when I was Minister of Justice as I said in my first testimony, was a ceremonial event that took place in the Eastern Cape to lay their mortal remains in terms of the reburial that was coordinated by the

Missing Task Team that was part of the NPA.

And when it was brought to my attention about these challenges as I was in the departure lounge, I did write to the NDPP in order for them to expedite this matter as shown in my letter of the 20 May 2014.

ADV MOKHARE: Thank you very much. No further questions, Chair.

CHAIRPERSON: Thank you, Mr Mokhare. Mr Radebe, we wish to express our profound gratitude for having made yourself available to
10 this Commission with a view of assisting it to discharge its mandate properly. We thank you for your attendance, you are now excused as a witness.

MR RADEBE: Thank you very much ...[intervenes]

CHAIRPERSON: Thank you.

MR RADEBE: Justice.

NO FURTHER QUESTIONS

CHAIRPERSON: These proceedings are adjourned until the 28 September at 10:00.

INQUIRY ADJOURNS UNTIL 28 SEPTEMBER 2026

CERTIFICATE OF VERACITY

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

JUDICIAL COMMISSION OF INQUIRY INTO TRC

FORUM OF ORIGIN	:	Inquiry
CASE NUMBER	:	N/A
TRANSCRIBERS	:	M Brits, M Botha
DATE COMPLETED	:	2026-09-23
NUMBER OF PAGES	:	84 (Including front page) M Brits: Page 1-28 M Botha: Page 29-82

TRANSCRIBERS

:

 

TRANSCRIBER'S NOTE:

- Where no information provided, names transcribed phonetically.
- Grammar errors types verbatim.



MzansiSA Business Solutions
Arbour Square
Cnr Melle & Juta Street
Ground Floor, Office 3
Braamfontein, 2001
TEL: 011 339 1289
E-mail: transcription@mzanzisa.com
E-mail: mzanzisa1@gmail.com