

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

HELD AT:

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

BEFORE:

COMMISSIONERS:

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

EVIDENCE LEADERS:

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

REPRESENTATIVES

Adv Varney (SC) – The Calata Group
Adv D Pillay – The Calata Group
Mr Sipho Tlhaole – The Calata Group
Ms A Thakor – The Calata Group
Adv KD Moroka (SC) – DoJ representative
Adv Anisa Kessery-DOJ Representative
Adv Gwala (SC) – NPA representative
Adv Yanela Ntloko- NPA representative
Adv Ebenezer Propy (for SAPS)

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PROCEEDINGS ON 8 SEPTEMBER 2026

CHAIRPERSON: Good morning to you all. Mr Semenya?

ADV SEMENYA: Good morning, Chair and good morning, Commissioners. We have Dr Maduna joining us this morning for cross-examination.

CHAIRPERSON: Thank you. Dr Maduna, you are reminded that...
Good morning, Dr Maduna.

DR MADUNA: Morning, morning.

CHAIRPERSON: How are you?

10 DR MADUNA: It depends on the weather. I am fine.

CHAIRPERSON: You are reminded that you are still under your former oath.

DR MADUNA: Yes.

PENUELL MPAPA MADUNA: still under oath

CHAIRPERSON: Mr Varney?

ADV VARNEY: Thank you, Chairperson and good morning, Commissioners and good morning to you, Dr Maduna.

DR MADUNA: Good morning.

20 CROSS-EXAMINATION BY ADV VARNEY: On behalf of the families, we would like to thank you for taking the time to come back and speak with us and assist this Commission in pursuing its mandate. We are grateful. So we have provided you with our questions in our application to cross-examine. I am assuming that you have looked at that application?

DR MADUNA: Yes.

ADV VARNEY: Do you by chance have a copy of it?

DR MADUNA: It is here in front of me, yes.

ADV VARNEY: Oh good, because from time to time we will be referring to it and it might be easy for you to follow the proceedings in that application. And you also have a bundle of documents that accompany the application.

DR MADUNA: Yes.

ADV VARNEY: Wonderful. So before we start in earnest, in your statement and your evidence-in-chief you skimmed a little bit on some
10 aspects of your background, particularly your career before you became Justice Minister. So if I can ask you to take us back somewhat. Perhaps you can describe your role in the struggle against apartheid and then take us through the 1990s up until you became Justice Minister.

DR MADUNA: It is a very... what is this? It is a very long story.

ADV VARNEY: I am sorry, Dr Maduna, when I speak you can look at me, but when you answer the question, you have to address the Commissioners.

DR MADUNA: The Commissioners, yes, yes. It is a very long story,
20 but I will try and cut it short. I became politically active at a very young age, because I grew up in a family environment where nobody loved apartheid. So, and of course the larger township environment was very, very helpful. I am not going to bother the Commission with whether I got any education or not. It stands to reason that I did, because how else could I have become a Doctor of Laws if I had not

gone to school and eventually to varsity. So I am not going to bother you with that.

In the early 1970s I went to university and this was shortly after the late Abram Onkgopotse Tiro had made his profound speech at the graduation ceremony at the then university of Turfloop University, which was very critical for the right reasons of the way we as human beings were treated just because we happened to be of a different colour code, which, if it was a mistake at all, could not be blamed on us. I could not be blamed for being black. I became a
10 member of the South African Students Organisation and at the university became a leader ...[intervenes]

COMMISSIONER KGOMO: Dr Maduna, speaking, I am here, Commissioner Kgomo.

DR MADUNA: Oh, yes, yes.

COMMISSIONER KGOMO: Yes, speaking of Onkgopotse, I do not know whether you read the book written by his nephew, Gaongalelwe Tiro, *Witness to a Bomb*.

DR MADUNA: Yes.

COMMISSIONER KGOMO: Yes.

20 DR MADUNA: Yes.

COMMISSIONER KGOMO: A book about Onkgopotse Tiro, very interesting. That is just by the by in any event. You may continue.

DR MADUNA: Yes, thanks very much, Commissioner. That book was very helpful and instructive, I would say, to any person who wants to acquaint themselves with the history of this country, to read

that book among many books.

So, here we are as young people having to express our profound dislike of the system of apartheid. I remember saying personally that if whites loved apartheid, they can have their apartheid. It is not ours. They are the ones who deny us, a basic right which any democracy accords to human beings, the right, the basic right of citizenship and what flows from it. I mean, for anybody to write on the door or the entrance of a toilet "Europeans only" and subsequently "whites only", that is just plain silly.

10 You go to the Johannesburg Library on Market Street and if you were lucky, such as I was, you would be confined to a small ghetto where blacks sat at the library. The librarian was a good human being. She accommodated a few of us, including Judge Gidfonia Thamsanqa Makhanya, for instance. We sat there, studied, did whatever work we could after having been rusticated for daring to say no to apartheid. I did not go to jail for rape, theft, murder and all sorts of statutory and common law crimes. I had not even sweated a fly to deserve going to jail. But when you dared to challenge the system of apartheid, you had a big problem.

20 You know, this country had a funny law. I was detained under section 6 of the Terrorism Act, 83 of 1967 and that section 6 gave the Minister of Injustice, not Justice, or some power over detainees, *et cetera*. They would unleash their Gestapo on people whose main sin or sole sin was to say no to their apartheid.

Right, in the early 1970s, a chap called Mthuli ka Shezi was

killed, pushed in front of a train in Germiston and killed. The same thing had been done earlier to Albert John Mvumbi Luthuli. We now know that these things happened, though they were being denied. You oppose apartheid at your own peril. And that is unfortunately the reality that we were dealing with. But you know there is an old saying; I do not know where it comes from. You either die wearing your boots or die on your knees. The choice was very limited, so some of us decided we would rather die wearing our boots. So, we made those very difficult decisions.

10 Last time, Madam Chair, I referred to the *S v Maduna and 19 Others*. I struggle to imagine any Maduna saying I am not that Maduna, but we fought. We got detained. We got beaten up and we said if ever there is a time to leave our opposition to apartheid, it is now when you have been beaten up. But fortunately, we never made those choices. One of the 19 people was Judge Jeremiah Buti Shongwe, who retired as the Judge of the Supreme Court of Appeal; very interesting. So, you had that calibre of people that you were working with. We were very, very proud to be part of them, right.

20 So, that case, in fact, you know yesterday I laughed when I was watching TV and section 174 of the Criminal Procedure Act, 51 of 1977 was actually mentioned incessantly in a matter I will not mention; very interesting ...[intervenes]

COMMISSIONER KGOMO: Which we all know.

DR MADUNA: We used that successfully. The case against Maduna and 19 others crumbled. Months later I was behind bars

again as a visitor, as an unwilling visitor of the apartheid state, right, with Johan Visser of Protea and them joking about it; you like visiting us. And I said if I had a choice, I would not be sitting here, but we came just part of the long, arduous struggle against apartheid.

So, the interesting thing is; we were not alone. There were hundreds of thousands of people, black and white, self-respecting people, some of whom were killed, right, for daring to oppose apartheid. So, you did not feel isolated. There was nothing unique about you as a human being. There were many of us who stood
10 against the evil system of apartheid. Some of us eventually went into exile, campaigned against apartheid, and successfully so. It is a long story that would be told by good historians, not the bad ones, who actually peg propaganda as history.

So, what am I saying? I am saying the victory against apartheid belonged to the people of South Africa, black and white, male and female, and not to one organisation or one set of people. We might have been wearing, like a lot of religious people, various colours. Some of us were part of the African National Congress. There were people who were following the PAC. There were people
20 who were following AZAPO. You name them. They were all there and they were fighting to end the system of apartheid.

There were religious bodies. Your Catholic Bishops' Conference, your SACC, *et cetera*, right? And in some instances Adriaan Vlok eventually told this truth. They ordered the bombing of the headquarters of the South African Council of Churches. I mean,

imagine Christians marching as to war, to bomb the South African Council of Churches' headquarters in defence of the evil system of apartheid. This happened. This is part of our history. Imagine Wouter Basson and them mixing of all sorts of toxic concoctions to test them on Frank Chikane of the SACC. These things were happening, right, and they had to be resisted. They had to be fought.

And the interesting thing is; that struggle, multifaceted, multipronged struggle, succeeded. And that is why we can sit here today and look at one another with a smile. That was a victory. So,
10 one of the victories I always like talking about is an invitation the ANC, then led by Oliver Reginald Tambo got from none other than George Schultz, the Secretary of State. You know, there were many fascinating things about that.

COMMISSIONER KGOMO: Secretary of State of the USA?

DR MADUNA: Yes, yes. Firstly, not even the peanut farmer, Jimmy Carter, had invited the ANC to the State House or the White House. The invitation came from Ronald Reagan's government, which was very interesting, because all those were the most, some of the most ardent supporters of the evil system of apartheid, but that meeting
20 happened. George Schultz chaired it. Henry Kissinger was there and quite a number of others.

For us that February 1987 meeting, first and last meeting with them, because after that we saw them in a totally different context that was more than pleasant; Margaret Thatcher's bosom friend inviting us to the State Department. That was a victory of the struggle

of our people inside and outside South Africa.

There were many other things that we did. I want to cut this story short. One of the things we did was not to get involved in American politics. So we were not supporters of the Democrats against the Republicans. We had nothing to do with that. We were pushing and punting the case of the South African people, the need to end the system of apartheid, the South African political Chinese wall that separated human beings from human beings, right?

I remember I learned this good English word from my days at
10 SASO – balkanisation. We would not allow anybody to balkanise South Africa. If you wanted to do that, you should go back to the 30-year war of Europe where Europeans were butchering one another. Here we wanted all people to live with one another in harmony, right? And to a great extent, that was achieved. There is still a lot that has to be done to produce the sort of South Africa that we would want to bequeath to future generations, but that was achieved.

I have seen some documents here which say we came back to fight the enemies of the ANC. The ANC, as ANC, had no enemies, except one enemy, the apartheid system; and that enemy was
20 defeated. That is why, after the adoption of the Harare Declaration in which some of us were involved, by the OAU meeting in Harare chaired by Hosni Mubarak and subsequently having successfully marketed it to the Commonwealth, the UN General Assembly, *et cetera*, the world began to move in one direction. We owe it to ourselves as human beings to end this system which was the vilest

and most violent post-Nazi madness. Nothing other than apartheid has been seen and experienced in this world.

COMMISSIONER KGOMO: Mr Varney, Dr Maduna warned you the other time not to give him a place like this.

DR MADUNA: Yes.

ADV VARNEY: Thank you, Commissioner. I did not want to be impolite, and it was a fascinating account. Dr Maduna, we are grateful for these insights and we are also grateful that you have raised the atrocities of apartheid and put them up in descriptive terms
10 that are really meaningful. And indeed, it is the mandate of this Commission to look into why so many of those horrendous crimes were not pursued in the post-apartheid era. If we can come to just a few highlights of your career in the 1990s; so I am aware, for example, you returned from exile. You were elevated to the National Executive Committee of the ANC. You served as a deputy minister and then as a minister before becoming Justice Minister; if you could briefly outline that part of your career.

DR MADUNA: I came back on 21 March 1990 as part of a delegation of two led by Jacob Gedleyihlekisa Zuma, Umhlanga here,
20 after the release of Nelson Mandela and after Nelson Mandela had agreed with FW de Klerk that we were not going to do two things. To conduct our negotiations outside South Africa, as had happened, say in Zimbabwe for instance, the Lancaster House negotiations. Ours would have to be in South Africa. That is one. Two, we were not going to have any foreign mediators and whatever. So we did not

have to have go-betweens. South Africa had to talk among themselves to carve out their own desired future; and that is what happened.

The process eventually leads to the establishment of CODESA, right. But need I remind the Commission that after the release of Nelson Mandela on 11 February 1990, this country experienced more violence; more, not less. And the question was: why, when all of us are committed to talking ourselves out of the system of apartheid? That was the question confronting all sane and
10 reasonable people; very interesting.

And it became very clear that that violence, which some people cynically refer to as black-on-black violence, was having a source and was the government's security forces' proxy war against their enemy, right? I see somebody put a document here which talks about us having come back to fight enemies, including Inkatha. Oh, for God's sake, we never did that and I am going to give you a detail that people ignore today.

Once we identified the perpetrators of that violence and the forces behind them, we spoke to the national executive of the
20 community, of which I was a member, and said we need to begin talking to identified and identifiable people about this violence. We need to end it. Your Archbishop Tutus and many others were pleading with us. Let us work together to end it. Hence, the Peace Accord, for instance; hence the Goldstone Commission and a whole host of other things.

So one of the things that we did was; we need to talk to the army, to the generals, because they were behind it. We were lucky in that we had people who understood the need to do so; that one of those was General Constand Viljoen's twin brother, Braam Viljoen. Brother to brother, can you people talk about the need to end this violence? We met them all, Magnus Malan and *et cetera*.

I have read the notes that have been given that Thabo Mbeki mandated, which is far from the truth, a man called Jürgen Kögl, to coordinate and whatever. For God's sake, that is not what happened.

10 We approached people so that we could have meetings with a whole lot of these people with a view to getting them to cooperate to end the violence.

It was now known that Inkatha was armed, funded, deployed, *et cetera*, by the army and the police. Ask Adriaan Vlok, he told the TRC the truth eventually. Ask, who is this man? Why do I forget the man now? He went to jail for his activities. He is out now, living in luxury and the government paying him a good salary which I do not get.

COMMISSIONER KGOMO: De Kock.

20 DR MADUNA: De Kock, Eugene de Kock. We actually spoke to all those people, spoke to Dirk Coetzee, among others, because we all wanted to end the violence. We did not bring violence into this country. Violence always existed, because apartheid by its very nature could only survive a day later thanks to its own capacity for violence. And there were people in the ANC who thought we could

continue fighting Inkatha. We said Inkatha is just a proxy of these elements.

After all, we did not have the means to fight; could have had a few bombs and a few AK-47s, *et cetera*, but you were threatening to fight the only power on the African continent that had nuclear warheads. Tell me, who would succeed against them? Go to Nagasaki, go to Hiroshima. They will tell you. Once the Americans unleashed their violence after the Second World War, people died.

ADV VARNEY: Thank you, Dr Maduna. Because we do want to
10 release you before lunch, we are going to have to move on. But I think the picture you are painting is that you were at the heart of these historic developments since your return from exile.

DR MADUNA: Yes.

ADV VARNEY: You served on the National Executive Committee for a period of time. You were Deputy Minister and then a Cabinet Minister. My team is about to give me those positions. Can you just remind us; was the Deputy Minister of Home Affairs?

DR MADUNA: Home Affairs, yes.

ADV VARNEY: And then subsequently minister of?

20 DR MADUNA: Buthelezi. Yes, and I had a good relationship with him. It is a pity you interrupted me; I was about to end that part of the story.

ADV VARNEY: Please go ahead.

DR MADUNA: Once we decided to see them, it was unavoidable that we should see Inkatha as well. I was part of Zuma's delegation

which consisted of Joe Jele, the late *Ntate* Nkadimeng. I was part of it. We went to Ulundi, the lion's lair where Buthelezi lived and operated from. We saw Buthelezi. We saw the late Goodwill. We saw a whole lot of them and we were pleading for their cooperation to end this violence. Good things emanated from those interactions.

One of those good things was the agreement that much against the opposition of many people in the ANC, Mandela agreed to meet Buthelezi and we met Buthelezi at the Royal Hotel in Durban subsequently. I also led delegations that interacted with the likes of
10 the late Reverend Celani Mtetwa, among others, of the IFP, because it dawned upon us that the IFP as IFP did not like this violence in as much as we did not like it.

You know, imagine people being thrown out of fast-moving trains and killed. You must be evil to even wake up in the morning and say the first person I see in a train I grab and throw out of a moving train. It must be evil. And I could not believe that there are many such people in this country. We did not have so many people who would derive pleasure in killing fellow human beings just because they disagree with them. I certainly was not among those
20 people. I would not kill because I did not agree with you. So, we saw them. And so, we saw the generals. We saw the police. We saw a whole lot of them. One thing I must clarify is Jürgen ...[intervenes]

COMMISSIONER KGOMO: Just there. You saw the generals, Dr Maduna. When was that when you saw the generals?

DR MADUNA: It was in the early 90s, early 90s. There were many

meetings obviously, because the violence was continuing. That violence did not end in 1994. It did not; the so-called Shell House massacre where people were actually marched and brought to the ANC headquarters. We never did that to any party's headquarters. We never took young people with machetes and guns to any party's headquarters. We were attacked, but I am saying that violence did not end because of whatever interventions we were making. The violence outlasted apartheid. We still had violence, pockets of violence, politically motivated violence post-1994.

- 10 COMMISSIONER KGOMO: Yes, Dr Maduna, maybe you will still come to that and when... maybe names would be mentioned of the people that you met, the generals that you met and what were the discussions, but let us leave it there for now. Mr Varney, can you come in?

ADV VARNEY: Thank you, Commissioner. I am grateful for the intervention. Dr Maduna, I think most of us will agree that the terrible violence that took place in the early 1990s, which lasted several years, was perhaps the most violent period in South Africa's modern history.

- 20 DR MADUNA: Needless to say ...[intervenes]

ADV VARNEY: And not only that, I think we can also agree that there was a hidden hand in that violence. There were elements within government and elsewhere who wished to derail our transition, our negotiated transitional process. And I want to segue into matters that are more directly related to the mandate of this Commission.

And you will see from our application from around paragraph 10 onwards that we make reference to various developments in which members of the former regime, particularly army generals and police generals started to make efforts to secure some form of impunity for the crimes they had committed under apartheid. And so, for example, if we look at paragraph 10.1, we make reference to a special cabinet meeting held on 25 April 1994 at which it was noted, and I quote, and the actual minute is at page 22 of the record.

10 “The ANC leadership is at this stage in favour of
such indemnity as part of the process of national
reconciliation.”

So the apartheid era cabinet at that time came under the impression that the ANC was open to some form of indemnity for purposes of national reconciliation. So, do you recall any discussions around April 1994 in this regard?

DR MADUNA: The date is very instructive, Commissioners. The election was on 27 April 1994. Two days before I was not a member of the executive at all and I was also never in any meeting where the ANC said we, like a demigod, will forgive all sins for the sake of
20 national reconciliation. That never happened. You see, what I have tried to describe emanated from deliberate NEC decisions. We were a miseries, mere a miseries of the National Executive Committee of the ANC. So, the views we propounded were NEC views, not our own views. So I have said I was not anywhere near that power, but in the ANC we never said maybe for national reconciliation we can let

bygones be bygones. Now, this is intimidating. I know my mayor here said he has a bomb squad.

ADV VARNEY: I think it is a technical issue, rather than a Stratcom operation.

ADV SEMENYA: Chair, may we have a short stand-down?

CHAIRPERSON: Yes, we will take a five-minute adjournment.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Thank you, Mr Varney.

- 10 ADV VARNEY: Thank you, Chairperson. Dr Maduna, I want to move on from that special cabinet minute. And one of the reasons why I want to move on is because I do not think that cabinet minute necessarily reflected what was happening at that time, as you already have alluded to. Plus, we also know that through the 1990s, several key prosecutions actually did go ahead; for example, as you have mentioned, the prosecutions of Eugene de Kock, prosecutions of Magnus Malan and others, Ferdi Barnard and so on.

- 20 If we look at, if we move on in the application to paragraphs 10.2 and onwards, you will see that there is some evidence of discussions that were taking place between people, like Jan Wagener, who represented many of the old order perpetrators. He alleges that he had discussions with representatives of the ANC and government and that there was some kind of understanding that his clients would not be pursued. Now, this so-called understanding, perhaps we can now move to what you had to say in relation to FW

de Klerk. And I want to quote to you an excerpt from your evidence-in-chief, because you were asked by Mr Semenza about the discussions around a general amnesty; and your response was as follows. You said:

“There was no way I could agree with anybody that we would be right in granting a general amnesty. In any event, I remember we asked de Klerk: de Klerk, you are still the boss. Why do you not just declare a general amnesty yourself?”

- 10 Can you elaborate on that very interesting snippet? It appears that you or your colleagues had an exchange with de Klerk around the question of amnesty, and you put the ball in his court.

DR MADUNA: Can I say something, Madam Chair, which I have not told any of my family and best friends? De Klerk was a regular visitor at my home, because he took to liking me as a person. But Niel Barnard writes in his book that I thought I was the smartest element walking around in this country, or words to that effect. So that is Niel Barnard's view.

- 20 But let me just say this. The ANC's perspective was informed by what were called the Professor Norgaard principles. That is where this stemmed from. Some of us had even met Professor Norgaard to discuss a proper approach to this. And the African National Congress leadership headed by Mandela could not have unilaterally changed that perspective. Mandela was not the kind of person who operated that way. I know your views, but these are mine. My views

were the highway sort of leadership. The ANC would have collapsed around his ankles if he adopted that approach; very consultative, take time to listen to every view, even if he disagreed with you.

So, I do not know Jan Wagener, a fellow lawyer, who was dealing with, according to this statement, with people who were dealing with the likes of me. There must be a reason why Wagener never spoke to me, but the reason is best known to him. Decent human beings, lawyers and non-lawyers would call us seeking to understand where we were coming from and whatever. We
10 addressed numerous meetings. I never for once came across Jan Wagener. So I do not know what he is talking about.

ADV VARNEY: Can we return to what you said in your evidence-in-chief in relation to ...[intervenes]

DR MADUNA: Please do. Please do.

ADV VARNEY: De Klerk, because he is somebody, as you have just said, you had frequent contact with; and just to remind you of that quote. It was in the context of whether general amnesty should be granted. And in your evidence-in-chief you said de Klerk; you said:

20 "In any event, I remember we asked de Klerk: de Klerk, you are still the boss. Why do you not just declare general amnesty yourself?"

DR MADUNA: Yes. You know, in fact, we understood the distinction between a general indemnity or whatever and genuine amnesty as envisaged in the TRC Act. We understood that. And needless to say, the TRC Act is passed by parliament where the ANC and the

majority successfully persuaded people that this was the way to go. Now, the reason why I asked de Klerk that question is easy to understand. People who were running away from police in a small township called Sharpeville were killed. And the bosses just decided to indemnify all the police who had killed those people, because they had done God's work in defending apartheid.

I will sprint ahead and say after killing young people of the age of Hector Pieterse in Soweto for daring to march against the use of Africans to teach us *wiskunde*, mathematics, whatever, right, 10 we were all by the bosses given indemnity. So, you would look at this. They had that history of indemnifying evildoers, because they were the bosses of the evildoers. So, why do not you do the same thing? You are the boss. Parliament is yours.

In fact, I was given indemnity personally under Act 35 of 1990, right? By then, I never went to parliament to get that done. We knew we were not safe in the world of the Basie Smits and Johan van der Merwe, bosses of the Security Branch that butchered many of our people. So, if we did not have a statutory umbrella over us, we were in mortal danger.

20 Last time, in a polite engagement with Adv Moroka, who reminded me that I survived, I mentioned this. We were in mortal danger, so we needed some umbrella to protect us from them. And if we were to be protected, they would be protecting the process of talks about talks that eventuated in negotiations and a negotiated settlement. In other words, we were not just thinking about

ourselves. We were saying the right way to do it is this one.

COMMISSIONER KGOMO: Yes, but Dr Maduna, what did de Klerk say when you said to him well, you are the boss, just declare the amnesty? What was his response?

DR MADUNA: Commissioner Kgomo, it becomes even more interesting. There were two human beings we were discussing, whose release the ANC and the National Party were debating. One was Robert McBride, who was a clear-cut prisoner who had done whatever he did with this thing, a political motive. So we listed him;
10 and when we presented his name, we realised that this was tantamount to waving a red rug in front of an enraged bull.

De Klerk and his cronies immediately put forward the name of a *Wit Wolf*, Barend Strydom, who had mowed down people on Church Square in Pretoria. They put that forward and we said look, we are not here to advocate for the release of your people like the *Wit Wol/we*. We are here talking about the people on the list we have provided you. If you want the *Wit Wolf* to walk, we cannot stand in your way. We cannot stand and we will not stand in your way. My suspicion, and I said this, was that de Klerk wanted to implicate us in
20 the release of a mass killer of blacks, and I would not be associated with that, Commissioner Kgomo.

COMMISSIONER KGOMO: Yes, thank you.

COMMISSIONER GABRIEL: Can I ask a question, Dr Maduna? I am here.

DR MADUNA: Oh.

COMMISSIONER GABRIEL: It is Commissioner Gabriel.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: Why were you given indemnity under Act 35 of 1990, for what reason?

DR MADUNA: No, you know, there were many reasons. One of which was leaving the country illegally. That was a crime. One of which was being a prominent member of the ANC, especially outside South Africa, a campaigner against apartheid. So you could list the whole things which were criminal. You know those who remember
10 anything about Act 83 of 1967 will remember particularly section 2, which criminalised virtually every imaginary thing; aiding, abetting and you name it, right? You did not even have to know that acts had anything to do with the banned ANC. Once you aided, abated; not abated, abetted, *et cetera*, you are guilty of an offence. So you did not have to kill anybody, right?

COMMISSIONER GABRIEL: So this was a list submitted to the then government of ANC members and you were included.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: And that indemnity was granted by the
20 national ...[intervenes]

DR MADUNA: By the apartheid government, by the regime.

COMMISSIONER GABRIEL: And that, if I understand you correctly, was to enable talks upon talks to continue.

DR MADUNA: Talks and eventually real negotiations. One of the things that was very clear to us was that the leadership of the ANC,

like Slovo, Ruth Mompati and whatever, could not come into South Africa without the assurance of that statutory umbrella, right. So, if you recall what happened, a big delegation landed in Cape Town from Lusaka after that act was passed. We could not have talks about talks without your Slovos and many other people, but Slovo would have been picked up at the airport immediately and so would Alfred Nzo and you name them. So we needed that cover and we were given that cover.

COMMISSIONER GABRIEL: Thank you. Thank you.

- 10 ADV VARNEY: Thank you, Dr Maduna. So that 1990 Indemnity Act, that helped to facilitate the negotiations.

DR MADUNA: Yes.

ADV VARNEY: But I think in your statement you point out that it was repealed just before the Truth Commission started and the Truth Commission Act of 95 actually repealed that.

DR MADUNA: Yes.

- ADV VARNEY: So then, if I can move on. We have circulated a statement, which unfortunately is not part of our bundle, but you have a copy before you. Commissioners, we have also placed copies on
20 your desk. It is before the Commission already in bundles 1 and 6 of the Calata Group. It is a statement from the FW de Klerk Foundation. It is titled "The NPA's Decision to Prosecute Apartheid-Era Crimes." It is not dated, but we know from the website that it was released on 5 July 2021. I am not going to read this entire statement into the record. It is too long. I want to draw your attention to the last

paragraph on the first page. I am just going to read that paragraph into the record.

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

And then he goes on to talk, but however, in 2019 in the Rodrigues matter, that case went ahead. So it does seem, Dr Maduna, that FW de Klerk, through all this time and even in the period shortly before
10 his death was under the impression that there was an informal agreement between the ANC leadership and former operatives of the 94 government to suspend prosecutions of apartheid-era crimes. So how does one explain that somebody in such a position, who played such a leading role in negotiations, laboured under that impression for all these years?

DR MADUNA: I would not know. I actually discussed this paragraph with Mr Semenya this morning. And I said, you know, firstly, I had no knowledge whatsoever of an informal agreement. I may have a rusted or rusting knowledge of the law of contracts which I studied in
20 the early 70s. I cannot remember any reference to an informal agreement; and this does not even state who exactly in the ANC had this so-called informal agreement with de Klerk and co. And may I say, Commissioners, I was never party to any discussion that would created any impression of this sort, never.

COMMISSIONER GABRIEL: Mr Varney, can I ask a question about

this extract?

ADV VARNEY: Please do, Commissioner.

COMMISSIONER GABRIEL: This is from the FW de Klerk Foundation. Do I understand correctly that this was after the death of Mr de Klerk?

ADV VARNEY: It is before his death.

COMMISSIONER GABRIEL: Before his death.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: So how do we know that these are the
10 words of Mr de Klerk?

ADV VARNEY: Commissioner Gabriel, the assumption is that FW de Klerk would have signed off on a statement of this nature. He was alive at the time. This is his foundation. It is, underneath that statement, it is an FW de Klerk Foundation editorial. So I think we can make the assumption that he would have signed off on a statement given its far-reaching content.

COMMISSIONER GABRIEL: And do we know who wrote the statement?

ADV VARNEY: We do not, but we assume that it was crafted by
20 perhaps executive or staff members of the foundation.

COMMISSIONER GABRIEL: Okay, thank you.

COMMISSIONER KGOMO: Well, I am not a witness, but it appears, I think the CEO of his foundation appeared on TV. Whether reading this statement or not, but you are correct that Mr de Klerk was still alive, but clearly dangerously ill, but do not take my word for it.

ADV VARNEY: Thank you, Commissioner.

DR MADUNA: Madam Chair, for me ...[intervenes]

CHAIRPERSON: Dr Maduna, oh, sorry.

DR MADUNA: Thanks very much.

CHAIRPERSON: You may proceed.

DR MADUNA: Yes. For me there is an even more interesting question. Has anybody been able to produce the text of the so-called informal agreement? I have not seen it. I have read all the documents your Commission has provided me with. None of them
10 contains the text of this statement in draft form or in signed form.

CHAIRPERSON: Yes. There would not have been a text, because it is alleged that these were informal agreements. But just to probably understand your evidence, the statement alludes to the fact that the informal agreement was between the ANC leadership and you were not part of the leadership. Where were you?

DR MADUNA: I joined the full National Executive Committee of the ANC on the basis of co-option after the death of Chris Hani and the subsequent death of Oliver Reginald Tambo. So I was very much a member of the National Executive Committee.

20 CHAIRPERSON: Yes, so you were part of the ANC leadership.

DR MADUNA: Yes, yes.

CHAIRPERSON: Thank you.

ADV VARNEY: Thank you, Chairperson. Let us move on and you will see in paragraph 10.4.

DR MADUNA: Can I just say something which occurs to me now?

Somebody ought to have gone back to the National Executive Committee of the ANC and told it that we have entered into a quiet informal agreement along these lines. And I was part of the people who were in and out of these talks, these negotiations. I never did that and I never heard anybody refer to an informal agreement.

CHAIRPERSON: Yes, Mr Varney?

ADV VARNEY: Thank you, Chairperson. Dr Maduna, let us move on. You will notice in paragraph 10.4 of the application that we make reference to the fact that in March of 99, the Truth Commission's
10 Amnesty Committee denied the amnesty application of the 37 ANC leaders, which included then-Deputy President Thabo Mbeki, Jacob Zuma, Mathews Phosa, Charles Nqakula and Jackie Selebi. Now, that was after a long process which we do not have to go into, but you are probably aware that initially they were granted amnesty on the basis of collective responsibility. There was then a high court decision that overturned that, which then led to the second amnesty decision.

DR MADUNA: Yes.

ADV VARNEY: And we have attached some of those documents
20 and press releases from pages 33 to 35. We do not have to go there. Would you agree that that was something of a turning point, because from then on there appeared to be steps taken by Thabo Mbeki as well as the ANC to see how perhaps the law could be adjusted to accommodate, on the one hand, ANC leaders on the basis of collective responsibility, and then, on the other hand, to

accommodate the generals who had promised to come clean on a great deal of information, so long as they were guaranteed a measure of impunity. They were seeking some form of immunity, and we set these out in paragraphs 10.6 and 10.7. Do you recall at that stage, so now we are talking from early 99 onwards, discussions either in the National Executive or perhaps in Cabinet or amongst your colleagues, whether these steps could be taken forward?

DR MADUNA: First and foremost, you do not see my name among them, which strikes me as strange. We already had the TRC Act in
10 place, and it left wide open the door of amnesty and had only one simple requirement, full disclosure. That is all, and that applied to all of us, full disclosure. What do you want amnesty for? Disclose everything. If, in fact, in the course of it, of your motivation of your application you find Penuell Maduna's name, you reflect it. You tell the whole truth and only that.

Now, there was no way any court of law would say however, it is acceptable to create a different avenue, which takes us back to the debate on a general amnesty. No. I would not know honestly where this came from, but I know that the matter came before court and was
20 dealt with by the competent court properly. The law was there and all people who came forward and asked for amnesty got that amnesty not only for themselves, but for their parties, bosses and whatever. They got that; and therefore, according to that part of the act on amnesty, you could no longer sue the state if X got amnesty after a full disclosure. That was the law and there was, in my view, no need

to deviate from it.

ADV VARNEY: So, at that time you were not involved in deliberations around possible changes to the law to accommodate, for example, collective responsibility as a grant for amnesty?

DR MADUNA: I respond to the question with the broadest smile I can afford, because we had committed ourselves to a statutory process, and there was no way this lawyer could turn around and say no, we can get around this, man, it is easy. I lived in *tsotsi* territories in this country where all manner and shades of thugs operated, but I
10 am glad to say, in my mid-seventies, I never joined any of the groups that sought to do and achieve anything from thuggery. I can proudly say that. In other words, at an earlier age, thanks to my upbringing, I made a choice. It was either right or wrong and there was nothing in between.

ADV VARNEY: Thank you, Dr Maduna. I can certainly see that you are a stickler for the rules, but let us move on. If we can turn to page 4, because here we then turn to the alleged interactions that took place between the former generals and members of the ANC government; and you see that first heading deals with meetings
20 between former SAP generals, de Klerk and the ANC. Now, to be clear, your name does not appear in any of these interactions dealing with the former police generals.

DR MADUNA: Yes.

ADV VARNEY: But nonetheless, according to an author by the name of Ole Bubenzer, who interviewed some of these generals, as

you can see from 11.2, he writes that according to the generals, de Klerk often consulted with President Mbeki directly or with other high-ranking members of government.

The aim of an organisation by the name of Foundation for Equality Before the Law, which was set up by a former apartheid police commissioner, Johan van der Merwe, was to find a solution to avoid prosecution of former police members who had not received amnesty. And that their proposal was that, although general amnesty was not politically or constitutionally feasible by the Foundation for
10 Equality Before the Law, FEL, proposed an indemnity procedure based on admission of the crime committed, but without the need to make full disclosure. So, were you aware of such discussions and proposals between the police generals and the ANC?

DR MADUNA: I am eternally grateful that, for whatever reason, they never involved me in those so-called discussions. I do not know anything about them.

ADV VARNEY: Noted, thank you. Then let us turn to discussions between the former SADF generals and the ANC, and this is now on page 5 from paragraph 12 onwards.

20 DR MADUNA: Page 5, yes.

ADV VARNEY: Now, I will just indicate upfront, and you are probably aware that your name, amongst others, does appear in relation to alleged discussions between the former SADF generals and the ANC and we are dealing with the same book by Mr Bubenzer. He says that he interviewed former SADF General Jan

Geldenhuys on 10 May 2006. He said that consultations between government and high-ranking former generals of the army commenced from 98 onwards. And it is interesting; you have raised the name of General Constand Viljoen earlier.

DR MADUNA: Yes.

ADV VARNEY: And so does Bubenzer. Bubenzer says that Geldenhuys indicated that Viljoen was approached by Jacob Zuma, then Deputy President of the ANC, to discuss the question of criminal accountability arising from the past. Viljoen apparently referred Zuma
10 to Geldenhuys and the Contact Bureau. This was an entity set up by the generals to liaise with the government at the time and there were similar discussions around a certain indemnity mechanism.

And according to Geldenhuys, he says talks were mediated and facilitated by a Johannesburg businessman by the name of Jürgen Kögel who provided venues and logistical support. He says the talks continued until early 2003 with a few follow-up meetings in 2004. And before we move on, can I just have your comments on these alleged discussions between the former apartheid army generals and the ANC? Were you aware that these were happening
20 and did you from time to time take part?

DR MADUNA: You see, Commissioners, this has at the very least jumbled up. The meetings at the place of Jürgen Kögel happened long before there was a national government, a government of national unity under Nelson Mandela. I have said, and I want to underline that, that these were about the violence that was raging in

the country. They were not about the general amnesty for some people.

And if you look at the dates and whatever, they are all post-1994. I never participated in any meetings of this sort as a minister. I did not have to. I did not and I did not have to. And I have said I do not know these good authors at all. They never bothered to interview me. They quite honourably say these are the people they spoke to and my name is not among those that they spoke to. So I do not know what they are talking about.

10 ADV VARNEY: Let us move on; if we can turn to page 6. You see a heading called "Account of Major-General Dirk Marais"

DR MADUNA: Yes.

ADV VARNEY: And around 11 years after the book by Mr Bubenzer was published, another journalist and author by the name of Michael Schmidt, in preparation for his own book which he called *Death Flight*, he conducted an interview in December 2019 with Major-General Dirk Marais, who unfortunately passed away in January of this year; and that according to Marais, the government at the time was seeking a so-called *quid pro quo*.

20 And Marais claimed that Mbeki in one of their discussions stated they do not want us to be charged and they do not want them to be charged. You will see in paragraph 14 he sets out the individuals who were involved on the side of the generals. And then if you turn to paragraph 15, he then says that on the ANC government side, Mbeki's team usually consisted of individuals from the security

cluster.

And if you look at that fifth line, I am sorry, fourth line from the bottom, it included Minister of Justice Penuell Maduna. So let us pause there. It is alleged by this Major-General Marais, as recorded by Schmidt, that you were involved in discussions from the side of the government.

DR MADUNA: I am happy that the sentence, "Zuma's security cluster team would most likely have included", and it continues, because it also would most likely have excluded some people. It is
10 an assumption that because you could breathe, you took in oxygen and exhaled carbon dioxide. It is as bad as that. For me this is a non-argument, most likely have included. I was not at these meetings.

ADV VARNEY: Thank you.

COMMISSIONER GABRIEL: Can I ask a question, Mr Varney?

ADV VARNEY: Yes, please.

COMMISSIONER GABRIEL: Dr Maduna, were you interviewed by this author, Michael Schmidt?

DR MADUNA: Not at all.

20 COMMISSIONER GABRIEL: Thank you.

DR MADUNA: Not at all. He has his own reasons for avoiding talking to me.

COMMISSIONER GABRIEL: Why do you say that?

DR MADUNA: Well, if he did not have any reasons, he would have called me. I have always lived in this country since 1990.

COMMISSIONER GABRIEL: Okay, thank you.

DR MADUNA: Ja.

ADV VARNEY: So if we turn to page 7 and at paragraph 16, Schmidt writes in his book that during the interview with Marais, he was shown an unsigned handwritten letter he prepared for the signature of the former Chiefs of the SADF in early 2004. And copies of the photographs of that letter are in the bundle at page 70. We have put some extracts on this page, so we do not have to go there. I just want to read certain extracts and get your response. The letter

10 states in part:

“A process of communicating between the ANC initially and the government lately with the former chiefs of the SA Defence Force was initiated by the Deputy President of South Africa, Mr T Mbeki, when he approached General Viljoen in 19...”

It is not clear what that date is.

20 “General Viljoen, after consultation with the former chiefs of the Defence Force within the structure of the SADF Contact Bureau, conveyed our preparedness to communicate with Mr Mbeki in his capacity as Deputy President and President of the NEC of the ANC. A convenor, Mr J Kögel, apparently empowered by Mr Mbeki, arranged for a meeting at his house in Johannesburg. That meeting was in the form of discussions, followed

by a dinner hosted by Mr Kögel. It was attended
by Mr Mbeki and various of his ministers as well
as the premier of Mpumalanga, Mr Phosa.”

DR MADUNA: I never went as a minister to any meeting of this sort.
I had my office. I had my government residencies. So, if people went
to Kögel's house as ministers, let them be named. These are the
people who were at Kögel's house as ministers. But I have used
deliberately a phrase, jumbled-up thinking, because the activities
around Kögel's place happened much earlier than 1994, for that
10 matter.

When we had no facilities of our own and when we could not
invite these people that we, our... what do you call them,
interlocutories, to any of our houses or to the ANC headquarters,
temporary headquarters. We could not. They would not go there.
Neither could we go to have sensitive meetings with them at their
offices. Mutual trust did not exist then. So, I do not know what they
are talking about.

ADV VARNEY: So, to be fair to you, Doctor, Major-General Marais
is not alleging or suggesting that you were present at those meetings.

20 DR MADUNA: Yes.

ADV VARNEY: So your name is mentioned, but at later meetings,
which we will come to.

DR MADUNA: Yes. I am happy that he does not mention me,
because he is telling the truth. I was not there.

ADV VARNEY: And we can let you know that there is an affidavit

from Mr Kögel before this Commission and he admits that the meetings took place, although he says his role was simply confined to providing venues and the like.

DR MADUNA: Yes.

ADV VARNEY: But let us move on. In that third paragraph, Marais writes in this letter:

10 “There was enthusiastic agreement that the commenced communication should be continued and that more meetings should follow. We, the former chiefs of the SADF, being aware of the deputy president's tight work schedule, suggested that he appoint one of his ministers to represent the ANC in future deliberations. Mr Mbeki, however, expressed the opinion that the process of communication, which was mutually agreed to, was so important to him that he preferred to remain the prime representative of the ANC in future deliberations. Many deliberations followed and mutual agreements were reached. When Mr

20 Mbeki could not attend, he authorised somebody, usually a minister, and later on when he became president in 1999, Deputy President Jacob Zuma represented him. In execution of mutual decisions, much effort was put in by the Contact Bureau and some ministers to prepare papers

and submissions for acceptance by the deputy president and later on the president.”

And then in the last paragraph that your name is mentioned:

“In similar fashion, we, the former chiefs of the SADF and as members of the forum, were flown to Cape Town for discussions with Minister Maduna and Nqakula and thereafter with Zuma on 17 February 2003.”

And it is on the next page that that meeting in Cape Town is spoken
10 about in more detail. It is under the heading “Apparent breakthrough
in 2002”. Before we get there, I understand from your statement that
you do not deny that meeting took place. You accept that it
happened?

DR MADUNA: I have absolutely no recollection of a meeting where
Charles Nqakula and I met them. And they just talk about Cape
Town. Cape Town is not a small village. It is a big city, the mother
city. There must have been an address, an office or a house where
these meetings took place. I do not know whether you have any
affidavit by Charles Nqakula confirming or denying this.

20 ADV VARNEY: Well, if I can just refer you to paragraph 13 of your
statement.

DR MADUNA: Yes.

ADV VARNEY: It is on page 4 of your bundle. It looks like it is
paginated number 928. And if you do not have it before you, I will
just read it.

DR MADUNA: Please read it.

ADV VARNEY:

10 “I confirm that I met with various stakeholders in
Cape Town by virtue of my office and I would
have discussed matters related thereto. I also
confirm that I had discussions at various times,
though I cannot confirm the date that I had them
with this particular delegation. I do, however,
confirm that that is indeed the position the
government adopted and I have always insisted
that all amnesty be granted following full
disclosure as the law required.”

So in your statement you appear to be accepting that you did meet
with these generals and perhaps we need to jog your memory, take
you through the version that the generals have put up for you to
comment on.

20 DR MADUNA: Yes. As a minister, I could not say to people I do not
want to see this one, for whatever reason. People made
appointments, people came to talk to me about a whole range of
things and some of them were still happy on the issue of a general
amnesty without any full disclosure and there was no way I could in
all sincerity say I think I agree with you. Though the law says the
following, we can do something on the side, on the sly; that never
happened.

ADV VARNEY: Noted.

CHAIRPERSON: Mr Varney, is this an appropriate time to adjourn for tea?

ADV VARNEY: Yes indeed, Chairperson; apologies I overlooked that.

CHAIRPERSON: Yes.

DR MADUNA: Madam Chair, I have been having my coffee all along. You did not stop me.

CHAIRPERSON: Well, you can have a proper coffee now, Dr Maduna.

10 DR MADUNA: I learned from General Nhlanhla Mkhwanazi that you provide for yourself.

CHAIRPERSON: Yes.

DR MADUNA: So whatever they put in front of me I did not touch and the experience of Lieutenant-General Dumisani Khumalo is instructive. He tasted Madlanga water and was hospitalised for almost four weeks. So I said at home please pack my coffee, the coffee that I am used to. I have been safe so far, Madam Chair.

CHAIRPERSON: Yes. So shall we adjourn and reconvene at 12 o'clock?

20 ADV VARNEY: As the Commission pleases.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Mr Varney.

PENUELL MPAPA MADUNA (still under oath)

CROSS-EXAMINATION BY ADV VARNEY (continued): Thank you,

chairperson. Dr Maduna, before we return to the apparent breakthrough in 2002, I just want to deal with a few matters arising from your earlier evidence.

DR MADUNA: Yes.

ADV VARNEY: Now, you mentioned that you have not been approached by the author Michael Schmidt. I was reminded that there is some evidence that he did try to make contact with you, and we have circulated two pages from his book. Do you have a copy of that before you?

10 DR MADUNA: Page 47 and 93?

ADV VARNEY: So it is page 47 ...[intervenes]

DR MADUNA: And 93.

ADV VARNEY: Commissioners, this is before the Commission in bundle 8 of the Calata Group at page 47. It is page 270 of the book *Death Flight*. I am just going to read two extracts to you, and you can comment. So in the middle of that page, there is a paragraph which starts:

"[VERNACULAR] Names:

Only Zuma, Panuell Maduna and others..."

20 And then in the next line is the one I will read:

"Former Presidents Mbeki and Zuma did not respond to queries by the time of going to press, and neither did Maduna and Nqakula."

And then if we turn to that footnote 3, or rather end note 3 on the next page, that is paginated page 93, I will read that end note 3:

"Author emails addressed to Mbeki's and Zuma's spokespeople, to the Ministry of Defence for Nqakula and to Maduna personally, May-June 2020."

So according to Mr Schmidt, he did try to approach you, he says he emailed you personally during May and June of 2020.

DR MADUNA: No, commissioners, he did not try hard enough. I have never moved to Mars, I have always lived in the city of Johannesburg, and I always had offices. In 2020 I was still the
10 deputy chairman of Bowmans, among other activities, I was still there. If he really looked, he did not have to look under carpets for me, I was always visible. I did not do anything to hide from him, I had no reason to.

ADV VARNEY: Noted, thank you. Let us turn to another development, and this comes from the year 2001, June 2001, to be specific. I want to refer you to a News24 article, which appears at page 149 of the bundle, and I will just wait for you to get there.

DR MADUNA: I am listening.

ADV VARNEY: So this is an article dated the 10 June 2001, it is an
20 article titled Amnesty Plan for SADF Generals, and I just want to read portions of it into the record. Your name does appear, and then we will get you to comment afterwards. So it reads:

"A report recommending amnesty for several former SADF generals and 37 senior ANC leaders, among them, President Thabo Mbeki, is

ready for consideration by the Cabinet. The recommendation was completed in March this year by a combined work group established three years ago under Mbeki's initiative, and consisting of former SADF generals and the ANC government representatives. Legal implications were explained in the report."

Before we move on, can I just ask, do you recall such a report being prepared for Cabinet?

10 DR MADUNA: No, I have no recollection of it, and nobody has been kind enough to provide me with a copy thereof.

ADV VARNEY: And we do not have a copy either, but we are trying to find a copy, and we will seek the assistance of the evidence leaders in this regard as well. Just to carry on:

20 "The position of the generals and the ANC leaders was spotlighted by the formal closure of the Truth and Reconciliation Commission the week before last. The generals refused to apply for amnesty for what they regarded as 'legitimate acts of war' during the apartheid era. In turn, amnesty granted to ANC leaders by the TRC was set aside by the Cape High Court. The disbanding of the TRC rendered both groups vulnerable to possible prosecution.

According to a reliable source, feelers have been

put out to all political parties about their support for the dual amnesty plan. Legislation will be required to give the plan legal standing. The generals and those in their command could be granted amnesty for some 70 operations. They would, however, be required to supply full details on the premise that they acted as professional soldiers, even though they were under the political mind of the apartheid government..."

10 On the next page:

"The ANC leaders would also have to supply details of acts during the freedom fight for which they want amnesty."

It is quite a lot of detail, but I am going to jump paragraphs to save some time. So I am jumping three paragraphs and reading from about the middle of the page:

20 "If the amnesty plan becomes a reality, the generals and the ANC leaders would safeguard themselves against public or private prosecutions in South Africa, similar to that granted by the TRC."

And then jumping to the second last paragraph:

"Mbeki is expected to look into the report upon his return from an official visit to Britain."

And then the last paragraph, where your name appears:

"Deputy President Jacob Zuma and Justice Minister Panuella Maduna represented the government in the workgroup, while former SADF Chief General Hennie Geldenhuys acted as key negotiator for the generals. Former SADF Generals Magus Malan, Constant Viljoen and George Meiring regularly attended meetings of the workgroup."

So do you have a comment on this news article, which
10 places you, amongst others, in a workgroup with the generals?

DR MADUNA: I was party to no workgroup with generals of the apartheid regime at all. I do not know what they are talking about. Again, nothing prevented the author from just calling me and saying we want to interview you about this, these are the minutes of the meetings in which you featured and this is what took place. You do not just wake up in the morning and write an article, a real thumb suck.

ADV VARNEY: Yes, this article is not recent, in fact, it is dated the 10 June 2001.

20 DR MADUNA: Yes.

ADV VARNEY: So you would have been Justice Minister at that time.

DR MADUNA: Yes, I was at Justice then.

ADV VARNEY: Ja, and then the last ...[intervenes]

DR MADUNA: And who is the author?

ADV VARNEY: The two reporters, their names appear just below the

title, Tim Du Plessis and Freek Swart.

DR MADUNA: No, I never spoke to them about it at all.

ADV VARNEY: Not?

DR MADUNA: Ja.

ADV VARNEY: And then earlier in your evidence, if I recall correctly, you said that it was never the policy of the ANC to seek general amnesty. I just want to refer you to another News24 article at page 73 of the bundle.

DR MADUNA: This bundle here, 73?

10 ADV VARNEY: Ja, of the same bundle.

DR MADUNA: Yes, I am there. This is the letter I had difficulty reading all the notes, but it is there now.

ADV VARNEY: Yes, the typing is quite small. I am just going to read the first few paragraphs. So the article is titled:

"ANC to seek broad national amnesty.

Published 11 December 2002.

And then the first few paragraphs read:

20 "The African National Congress is to hammer out the guidelines for a broad national amnesty, which could take the form of presidential pardons for apartheid-era human rights violations at the ruling party's 51st National Conference in Stellenbosch next week. ANC Presidency Head, Smuts Ngonyama, said the dramatic proposal was motivated by ANC branches and politically-

divided KwaZulu-Natal. It comes hard on the heels of a bitter legal battle by the Inkatha Freedom Party.

It has delayed the release of the last draft of the TRC's final report until next year. We need to find a way to balance the situation, said Ngonyama. There has been a strong call for some sort of solution in KwaZulu-Natal. The ANC branches there moved to have a special amnesty policy discussed at the conference, and they have been asked to bring along a concrete proposal."

10

And then the last one I will read:

"The ANC supported a broad national amnesty, said Ngonyama, and a unique solution was required."

Do you have a recollection of calls for a broad national amnesty?

DR MADUNA: No, if it had happened, I am not saying Smuts is lying, but I am saying there was not this generalised demand. Eventually, any suggestion would have percolated to the National Executive Committee, and it would have required a proper resolution.

20

But something says to me, I must say, that some of us who tried at all times to be sane and sincere also accepted that we would never have Nuremberg-type of trials. Nuremberg trials were victors' trials trying to be vanquished.

We had not, for God's sake, defeated the might of the apartheid state on the basis of bombs and arms, bullets and whatever, we had not. So you accepted that you had to deal with this peculiar situation in order to be able to move forward.

And there are those of us who then championed the adoption of the TRC Act with a broad highway for amnesty. We did it deliberately, you had to do it, it did not matter who you were, and that was the law. So we could not turn around and on the basis of the reality that we were confronting seek solutions which would create
10 problems for us.

As an ANC leader then, I cannot imagine myself going to widows, widowers, orphans and telling them that, you know, we have resolved to forgive and forget, I could not. I would never play God who forgives when it pleases him, but otherwise it remains the jealous God of the Old Testament, I would never do that.

So that never happened. We, together with our adversaries, maybe erstwhile adversaries, would have to find a solution together, right. And that solution was there in the law, and you could not hope for a better solution than that one, you see, because we would have
20 to sell the solution and its consequences to the masses of people.

You know, I was young in the 70s, in my 20s. I can remember this vividly, the police unleashed violence, starting with the killing of a 13-year-old Hector Peterson. How do I go to my township and say the killers who mowed you people down have been forgiven? They would not accept it, right, so we looked for all sorts of ways.

I said earlier on that we, I mean, part of the path took us to the Peace Accord, it took us to the Goldstone Commission, in other words, the search for solutions never stopped ...[intervenes]

CHAIRPERSON: If I may interpose, Dr Maduna...

DR MADUNA: Yes, Madam Chair.

CHAIRPERSON: The question is, what is your comment with regard to the remarks which are associated with Mr Smuts Ngonyama?

DR MADUNA: I would rather not comment on them because these remarks were never made at any meeting of the National Executive
10 Committee at which I was present. And, you know, fortunately, Madam Chair, the minutes, the old minutes of the ANC are still available. The ones from exile are at the University of Fort Hare. If I ask Prof Andre Odendaal, he does his research there, he gets what we say we said it verbatim and publishes it.

CHAIRPERSON: Yes, thank you.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: Can I just ask a question, Mr Varney? Sorry to interrupt you. Dr Maduna, on page 812, the same article we have been looking at ...[intervenes]

20 DR MADUNA: Page 812?

COMMISSIONER GABRIEL: 812, The same, the very same article that was read out by Mr Varney.

DR MADUNA: I am not there, but ...[intervenes]

COMMISSIONER GABRIEL: Oh, sorry, red 73.

DR MADUNA: Page 73?

COMMISSIONER GABRIEL: Ja, in red.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: Towards the middle of the page it says,
I just want your comment on it, it says:

"The ANC had first approached the IFP with a
special amnesty offer in 1996."

Do you have any recollection of that?

DR MADUNA: Yes. We tried to persuade the IFP to join the broad
process that would lead us to a negotiated peace settlement. There
10 is a lot of silliness on their part, may I say. They were even opting to
be an independent state, and we said, okay, if that is what you want,
you can have it. You did not ask for it when apartheid was dishing out
your TBVC solution. Why do you want it now? But if you want it, go
through the people, have a referendum.

COMMISSIONER GABRIEL: All right. So it says 1996.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: Would this have been before the
passage or the enactment of the Truth and Reconciliation Act?

DR MADUNA: Yes, that was.

20 COMMISSIONER GABRIEL: It was before?

DR MADUNA: It was before.

COMMISSIONER GABRIEL: Okay, thank you.

DR MADUNA: Yes, it was before, and, in fact, a remark was made
earlier on that I started my service in the executive as Deputy Minister
to Buthelezi. And over time, Buthelezi and I developed a real rapport,

he began to understand and like some of us, right.

People who were junior to me in the ANC became ministers before I became a minister, because the ANC saw that I could play a critical role. And eventually, I know that Buthelezi went to the grave still professing that God spoke to him through Prof Washington Okumu. The fact of the matter is that we were talking to Buthelezi, talking to Viljoen and others.

Those who remember anything of that period will remember that Mangope in so-called Bophuthatswana was also fighting to retain
10 his so-called "independent state". You remember also Terblanche and them were fighting on his side.

You remember the spectacle of an old Mercedes-Benz and whites lying down, having been shot by the Bophuthatswana policeman. You will remember Mangope flying out with a young soldier screaming, "[VERNACULAR]", right. You will remember that, that is part of our history.

But we never stopped talking to these people, one of them, some of the meetings we had at Jürgen Kögl's place with Bophuthatswana delegations. I remember Godfrey Mothibi who
20 became an advocate in Pretoria.

I remember, what's his name, I will remember it, but they came to see us because we were able to persuade them that one of the things that must happen is, if there is such a word, to collapse all this Bantustan, debalkanize this country, have one country that belongs to all of its citizens and all who live in it.

COMMISSIONER GABRIEL: So the outcome of all these discussions, if I understand your evidence correctly, was the enactment of the Promotion of National Unity and Reconciliation Act?

DR MADUNA: Yes.

COMMISSIONER GABRIEL: Thank you, Dr Maduna.

DR MADUNA: And, of course, Buthelezi was minister now, so he could not say I accept the will of the people, as encapsulated in this Act, whatever, enacted by Parliament and whatever, he could not say that as a minister in the GNU. But you still had to nudge-nudge some
10 people along.

COMMISSIONER GABRIEL: Yes, thank you. Mr Varney.

ADV VARNEY: Thank you, commissioner. Dr Maduna, you have fascinating and important stories. I will encourage you to put pen to paper and spend some time writing.

DR MADUNA: My children have all failed to persuade me to do that. And I have given them one very simple reason, by the way, a good author would write the truth, no matter how bitter it is. So I would have to talk about some of the things that happened in the ANC.

I would have to talk about my participation, for instance,
20 instructed by the late Oliver Tambo in the emptying of the Quatro Detention, whatever, in the ANC. I would have to talk about that, and talk about the views of some of my people in the leadership. So how do you skate around that without, you know, imagining at the end there is a liar who wants to sit on some aspects?

We had the Stuart Commission as a result of our own

problems. We had the Sam Motsuenyane Commission as a result of our own problems. So we did not want to gloss over our own problems, and the root took you through the Amnesty Committee, that is it, that is what happened. Go there, get it.

ADV VARNEY: Thank you.

DR MADUNA: Ja.

ADV VARNEY: Let us move on. If we can turn to page 8. There is a heading there titled, Apparent Breakthrough ...[intervenes]

DR MADUNA: Red 8?

10 ADV VARNEY: Yes, red 8, exactly.

DR MADUNA: Yes, yes.

ADV VARNEY: It is titled, Apparent Breakthrough in 2002.

DR MADUNA: Yes.

ADV VARNEY: So I want to move fairly quickly from here on.

DR MADUNA: Yes.

ADV VARNEY: But you can see what is outlined here, the author, Bebenzi, writes that:

20 "General Geldenhuys and Kögl advised him that by the end of 2002, the parties had reached a detailed proposal for the enactment of a legal mechanism, which amounted to a new amnesty. And they had in mind an amendment to the Criminal Procedure Act to allow for a special kind of plea based on the TRC's amnesty criteria, followed by an inquiry by the presiding judge.

And that by late 2002, the proposal and the draft legislation has been finalised by the Justice Department, and was ready to be presented to Parliament for enactment."

And then if we can jump to paragraph 20, which is where you come in.

DR MADUNA: Yes.

ADV VARNEY: It says:

10 "Towards the end of 2002, the SADF generals appeared to be on the brink of a breakthrough. General Marais advised that after seven years of negotiations, the generals and the Cabinet security cluster had agreed on a legal framework for a post-TRC amnesty process. According to Marais, the government arranged for a law writer in Cape Town to come up with the new legislation."

In paragraph 21:

20 "On 17 February 2003 a delegation of SADF generals, led by Geldenhuys, met with Justice Minister Panuelli Maduna and Minister of Safety and Security, Charles Nqakula, in Cape Town. The law drafter, apparently a state official in the Department of Justice, was called in to read out the proposed legislation..."

And just to paraphrase, what appears from the account that Marais gave to Schmidt, is that the draft legislation had in mind disclosure, which the generals were not keen on doing, which resulted in the collapse of that initiative. Do you recall any of that?

DR MADUNA: Yes, I do. There was no way I could subscribe to a perspective that would say, despite the clear letter and spirit of this law, we will find a "bad door" to general amnesty. Even if you said, look, all this must be dealt with by a judge, and whatever, I still would say, and if my memory serves me well, I did say that, that by the way,
10 you know, it is only judges and magistrates, judicial officers who listen to evidence and come to conclusions one way or the other, find people guilty or not guilty.

So interposing a system that involves a judge was no major, if any, change. The prosecutor, the police, et cetera, do not sit in judgment, and that is the situation in all known democracies. So there was no way you could say this is an improvement on what we have, right.

And so if, for instance, you went to court and said, you know, the TRC wanted us to make full disclosure, but we have come to you,
20 M'Lord or M'Lady, to scatter around that requirement, no judge would listen to that. There are lovely voices behind the curtain.

So no judge would allow you to do that, because the argument would be, sir or ma'am, they think they are avoiding the consequences of a clear injunction of the law, and that cannot be allowed to happen. So that is why it has collapsed, I fully recall that

there was a lot of to-ing and fro-ing about it.

You could not skirt around the requirement of full disclosure. That was a legal requirement. I have read in the documents that I was given that, indeed, some attempt was made to use section 84(2)(j) of the Constitution the power of the President to pardon all sinners and criminals, and whatever, right. There was no way, I have argued, you could use section 84(2)(j) of the Constitution to skirt around an existing law.

10 President, for God's sake, use your power, man, you have this power in the Constitution, just forgive us, man. I mean, this is not, we were not indulging in the Lord's Prayer and forgive us our trespasses, as we forgive them that trespass against us. That is not what you are dealing with here. You are dealing with reality on the ground.

ADV VARNEY: Thank you, Dr Muduna. So at that time, Dr Maduna, or at least your department had proposed the special plea process based on the TRC amnesty criteria, which would then be followed by an inquiry, as you say, by a judge or a magistrate. And if the judge or the magistrate accepted the special plea, that would in effect be the
20 end of that criminal case.

DR MADUNA: Ja, but no judge would listen to an argument based on a special plea if you deliberately obfuscate the history, you do not tell the truth, et cetera. You know, in fact, they had a very sound reason, they knew what they had done, right, they knew what they had done. And there was no way any sincere and honest leader in this country

could say, oh no, no, just forgot about it, let them have it.

The people who had bled and died in the cause of the struggle would not allow that to happen. You must remember, Madam Chair and commissioners, that the majority of people who were killed by apartheid and its proxies were people in the country. The people who were impacted upon by the various PW Botha States of Emergency, were people in the country.

It did not affect me in London, in New York, in Paris, and whatever, it did not affect me. They had no extraterritorial jurisdiction
10 where I was. A bomb could explode and kill me, as it did to Ruth Fest and them, blow Judge Albie Sachs' eardrum to smithereens, blow his one arm off his body, and whatever.

They could do that, and they did it, for God's sake. But the bulk of the brunt of the violence of the apartheid system was borne by people in the country itself. So you could not sell those things, those perspectives to them, they would not accept it. I did not want ordinary people to "throw stones and all sorts of missiles" at me.

ADV VARNEY: Do you per chance, and this is a flyer, but do you per chance have a copy of that draft law?

20 DR MADUNA: No, I have not been in government for 22 years now, from 2004 to 2026. I did not pack all my papers, or any papers, because you see, you have to surrender everything to the successor and do a handover, so I do not, ja. But I readily concede that there were these debates, these discussions, et cetera, and they are kind enough to say, listen, our position, our perspective did not meet their

expectations, if not demands.

So the thing collapsed, I agree with them. If they were dealing with pushovers, they would have said, hey, we cannot believe our luck, man. We killed a lot of their people, and the survivors have forgiven us. That did not happen.

ADV VARNEY: Thank you, Dr Maduna. I want to turn to aspects from your evidence-in-chief.

DR MADUNA: Yes.

10 ADV VARNEY: And that will dovetail with the next heading, which is called, Amnesty Task Team.

DR MADUNA: Yes.

ADV VARNEY: And Commissioner Gabriel put certain questions to you, and I just want to read an extract from the transcript. Commissioners, at page 59 of the transcript of the evidence-in-chief from the 21 July this year. So Commissioner Gabriel says to you:

"COMMISSIONER GABRIEL: What I am really focussing on is the Cabinet position. Are you saying that these TRC cases were never discussed at Cabinet level?

20 DR MADUNA: There was no TRC report before Cabinet.

COMMISSIONER GABRIEL: Okay, it came out in 2003.

DR MADUNA: In 2003, yes. So there was no way we could have discussed TRC cases as

Cabinet. We would, in fact, be wrong in discussing cases unknown to us. The TRC identified the people who could be pursued for purposes of prosecution. Before then there was no memorandum before Cabinet telling us these are the people to be pursued. In any event, the Cabinet would have been wrong to discuss that question at all, because according to the Constitution, relevant parts of which have been
10 read into the record, that function, that discussion, that decision vested solely in the NPA."

We would certainly agree with you on that sentiment. But post the issuing of the TRC report, and while you were a Cabinet member, were the TRC cases, to your recollection, discussed in Cabinet?

DR MADUNA: No, they were not. Any matter pertaining to the whole panoply of issues under the rubric of administration of justice would have been tabled by the Minister of Justice before Cabinet, and I
20 never tabled any memorandum. You see, it has got to be accepted that the right way to approach this was exactly the way we did.

We said, together with the National Director of Public Prosecutions, Bulelani Ngcuka, we said what sits on our desks, because the TRC also gave me my own set of its reports, the five volumes, so what sits on our desks... Oh, by the way, I still have it, I

took it, it is one of the government documents I took, that report, because it makes excellent reading.

But what confronted us was a simpler question: what does the NPA, the Police, the National Intelligence Agency, et cetera, do about this? And once you say, "cases to be prosecuted", you are not saying the police who were not part of the NPA will replace you. But you have got to have systems and resources to be able to do that.

Someone has got to walk out with handcuffs, maybe a gun as well, a handgun, look for Jack, who might have killed, etc., and find
10 them. And that can only be a police officer, in some instances, of course, because of the complexity of matters, the Scorpions would also play a role.

But the critical thing is, you needed a streamlined system to deal with the report, especially the amnesty parts of the TRC report, you had to, right. And that is what we thought, you did not need Cabinet approval or resolution. I had the authority to consult with the relevant people and say let us discuss what is to be done.

It is a simple question that was asked by the late Lenin Ulyanov, Elias Lenin, the question, "What is to be done?", that is the
20 only question that faced us. So Vusi Pikoli and them came up with a good idea, the DG's committee, et cetera, that would help us streamline all this. And each one of the participants in the activities of that entity had a specific role to play, right.

I was asked why Mr Jafta, who was part, and the question was wrong-headed, part of the Executive, he was part of this, and I

said, oh, come on, man, check how your Constitution describes the Executive.

It is the President, the Deputy President, and Cabinet ministers. And Mr Jafta was not one of them, but it made sense that the head of the Executive must be kept abreast of what we were doing, and I saw nothing wrong with it.

There must be somebody who is able to sit down with the president and say, president, we have had this meeting, and these are the issues that are arising, without saying to the president, president, give me your list of people to be prosecuted or to be
10 spared prosecution. That never happened.

ADV VARNEY: Thank you, Dr Maduna. So I want to refer you to page 157 of the bundle.

DR MADUNA: 157?

ADV VARNEY: Ja, the same bundle, that is red page 157.

DR MADUNA: 157,162... Please bear with me? I am in my mid-70s now, I am much slower. Ja, I am on it, yes.

ADV VARNEY: So this is a Cabinet minute that has been declassified.

20 DR MADUNA: Yes.

ADV VARNEY: It is classified top secret, it is dated the 22 June 2005. And we are aware, of course, that you were no longer in Cabinet at this time, but we will get to the relevance shortly. With the help of the Commission, it was declassified on the 26 February of this year. You can see that stamp at the bottom there. If I can refer

you to 9.2, which reads:

"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."

I am going to come back to the small print shortly.

DR MADUNA: Yes.

ADV VARNEY:

10 "The Cabinet approved the prosecutorial policy and directives relating to the prosecution of cases arising from the conflicts of the past, and which were committed before 11 May 1994. That the prosecutorial policy and directives be submitted to Parliament for consideration in terms of section 21(2) of the NPA Act."

And if we return to the small print ...[intervenes]

DR MADUNA: No, but I want to comment.

ADV VARNEY: Okay, please go ahead.

20 DR MADUNA: This route, in my humble view, was utterly wrong. Section 196 of the Constitution says the National Director of Prosecution (NDPP) makes policy. It does not use those words, but I am just paraphrasing, with the concurrence of the minister. It does not say, however, you have got to go to Cabinet, you have got to go to Parliament and have a lengthy debate.

The policies I inherited when I replaced the late Dullah Omar

were not coming from Parliament, they were coming from Bulelani Ngcuka and them. And I was kindly given the opportunity to go through them, criticise them, if I had to, add whatever I wanted to. But eventually that was and is *the* source of prosecution policies. It is not Parliament, neither is it Cabinet. So the matter, and I may be wrong about it, was improperly before Cabinet.

ADV VARNEY: Yes, and we certainly agree with you that the Constitution is clear that this is not the business of Cabinet or Parliament.

10 DR MADUNA: Yes.

ADV VARNEY: And, in fact, we have yet to hear a coherent answer as to why it was seen fit to get Cabinet's approval for the amendments to the prosecution policy.

DR MADUNA: Yes.

ADV VARNEY: But if we can return to ...[intervenes]

DR MADUNA: The small print.

ADV VARNEY: The small print, and with your mid-seventies eyes, I am going to help you, although I am only a few years younger than you. So in brackets it says:

20 "Cabinet Memorandum 4/2005, dated March
2005. File number 1/3..." [intervenes]

COMMISSIONER KGOMO: Is it March?

DR MADUNA: Yes.

COMMISSIONER KGOMO: Am I looking at the wrong place?

ADV VARNEY: I think that is a reference number, Commissioner

Kgomo.

COMMISSIONER KGOMO: Oh, okay.

ADV VARNEY: Ja, but you are right that that memo is dated March of 2005, the file number with a reference number, I will not read that:

"Department of Justice and Constitutional
Development. Refer to item 3.2.1 of the minutes
of the Cabinet, dated 16 April 2003."

DR MADUNA: Yes.

ADV VARNEY: Now, 16 April 2003 was one day after President
10 Mbeki's speech to Parliament.

DR MADUNA: Yes.

ADV VARNEY: The joint sitting on the occasion of the handover of
the final report of the Truth Commission.

DR MADUNA: Yes.

ADV VARNEY: So it does appear that this issue served before
Cabinet on the 16 April 2003. I can tell you that we have been asking
for the minutes of that meeting, we have not got them as yet. But
there is a chance, of course, that you might have attended that
meeting as Justice minister.

20 DR MADUNA: Unfortunately, there is no record of the meeting itself.
I would have attended in that capacity, no doubt about it, but
unfortunately, there is no record of the Cabinet meeting. There is
reference to a Cabinet meeting. I will stop there.

ADV VARNEY: Yes, we are all at the same disadvantage as you. We
have asked the Commission to approach the Presidency, in fact, they

have, they are still waiting for a response on that particular minute.

DR MADUNA: Yes.

ADV VARNEY: But it does seem to point to the fact that not only were there TRC cases serving before Cabinet by way of getting an approval for the amendments to the prosecution policy, but as early as April of 2003, the TRC cases were actually being discussed in Cabinet ...[intervenes]

DR MADUNA: Not in my presence, and not with me participating in their discussions. I relied on my dangerously average knowledge of
10 the Constitution and the law sufficiently not to be able to go along with these things. I would have cautioned against that, I would have said, look, the Department of Justice and the other relevant departments would deal with these questions.

They do not need, I may, you know, speak English which came with the English-speaking people and their guns and took our land, the imprimatur of Cabinet. What was Cabinet supposed to do if you placed this thing, a memorandum in front of them, to do something they were not empowered under the Constitution to do? You would have been wrong as minister.

20 Please, let us get the minutes, I will comment on them. And the Department of Justice also ought to be helpful, because surely the memo emanated from the Department of Justice. So you do not surrender the whole thing and never keep a copy in the minister's office.

ADV VARNEY: Yes, we believe that it exists and we are certainly

pursuing its extraction.

DR MADUNA: Yes.

ADV VARNEY: And certainly from the side of the families we are in total agreement with you that it is improper for the Cabinet to be dealing with the TRC cases. And I do not know whether you are aware, but post your departure from Cabinet, the Justice and Security cluster actually had a subcommittee dealing with the TRC cases, which we also regard as improper.

DR MADUNA: I am aware. The documents, copies of which I have
10 been furnished with, say so much about what happened subsequently. But I would prefer not to comment on that because I was not involved, I may be espousing a completely wrong view. People who participated in the process after my departure may be able to explain why, in their wisdom, certain things were done.

ADV VARNEY: Noted. Then Commissioner Gabriel also posed questions around the Amnesty Task Team to you, when she said:

"Now, we have heard from Mr Pikoli that during
this time there was an Amnesty Task Team that
was formed which produced a secret report.

20 What do you know about that?"

You said you know virtually nothing, and then Commissioner Gabriel asked you:

"But was Cabinet aware of the formation of the
Amnesty Task Team?"

And your response, and Commissioner, this is page 28, and I

apologise, I gave the wrong page number for the previous transcript, that was page 27. And on page 28 of the transcript ...[intervenes]

DR MADUNA: Oh, the transcript. No, I do not have that.

ADV VARNEY: My apologies, the transcript is not part of the bundle. That was actually prepared before you testified. But I am going to read verbatim your response to that question, you said:

10 "Cabinet was made aware. Two things actually happened, if my memory serves me well, one, because I could not give a nod to the formation of a task team, any task team, without reporting to Cabinet. I did report that we shall need a special task team. Eventually we got approval to have established a committee of Directors General, your topmost top-level officials, who would then be advising the Minister, Right. The report was not a secret report as far as the Minister was concerned."

Perhaps I will just finish reading it:

20 "They would have to come and say this is where things are now, right, and we made sure that at all times we made no concession to the demand for a general amnesty."

Do you recall giving that evidence?

DR MADUNA: Yes, I do, and I may add that all government documents have these words "secret", "confidential", whatever, not

because you want to hold secrets about prosecutions, and things like that. It is the way the system works, you cannot run government at a bus stop and say, all ye men and women who are blessed enough, come and listen to the preacher.

That is not what happens, right. But you will never find a document marked secret which says we therefore resolve or recommend that the following shall be prosecuted or shall not be prosecuted, it does not exist. I never worked with crooks. None of the people I worked with was friends with the likes of [indistinct] and
10 people like those.

They were honest South Africans trying to do their best for this country, too, and we worked with some of the finest lawyers as well. We bounced all sorts of views with them ...[intervenes]

ADV MOROKA: Chair, if I may interrupt, apologies. It would seem that [indistinct].

CHAIRPERSON: Yes, Ms Moroka.

ADV MOROKA: [Indistinct].

CHAIRPERSON: No.

ADV MOROKA: I was saying there is a problem, and I am being told
20 that it is being fixed, but people online cannot hear us, we have been cut off. And seeing that it is three minutes to 2, maybe we can, chair, with your leave, get them to fix it.

CHAIRPERSON: Yes. Can the problem be fixed?

ADV MOROKA: Yes.

CHAIRPERSON: Yes.

MALE SPEAKER: Yes, it has been restored [indistinct] ...[intervenes]

CHAIRPERSON: Has it been restored?

MALE SPEAKER: Yes.

CHAIRPERSON: Okay. We will adjourn until 2 o'clock.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Mr Varney.

ADV VARNEY: As the chairperson pleases. Dr Maduna, I hope you had a relaxing lunch, and you have sustenance for this afternoon.

10 DR MADUNA: The food was scrumptious, it is for those who are above the middle class, and I enjoyed it.

ADV VARNEY: Thank you. Dr Maduna, can I ask you to come a bit closer to the mic? Because I think if you are too far away, some might have a problem hearing you.

DR MADUNA: But I can hear myself.

CHAIRPERSON: But it is not important that you hear yourself; we have to hear you.

PENUELL MPAPA MADUNA (still under oath)

20 CROSS-EXAMINATION BY ADV VARNEY (continued): Yes, indeed, and in particular the commissioners have to hear you, because they are the ones that make decisions here. Before lunch, we were talking about the Amnesty Task Team, and I am not going to repeat the questions. I do have a few follow-up questions, though.

Before we return to the Amnesty Task Team and its main product, the amendments to the prosecution policy, I want to take you

back to the draft law that you spoke about before lunch. This was the draft law which provided for a special plea procedure based on the TRC Amnesty criteria involving disclosure. And we know the story, the generals did not want to go down the road of disclosure.

But am I right in saying that that plea procedure in the draft law would only have applied to TRC cases, in other words, only perpetrators who committed crimes in the political conflicts of the past, in other words, where there are cases filed within the mandate of the TRC, only they could invoke such a plea procedure, is that
10 correct?

DR MADUNA: That was the suggestion.

ADV VARNEY: Now, these crimes would have included some of the most serious crimes known in South African law, for example, murder and kidnapping. But it would not apply to murders and kidnapping that fell outside of the TRC mandate, as you just mentioned.

So would I be right in saying that the Ministry of Justice at that time had in mind a plan that effectively created a special legal regime for perpetrators of apartheid-era crimes? Well, perhaps let me just add to that... Sorry, my mic has just gone out. Can I just do an
20 audio check if I can be heard?

CHAIRPERSON: Yes, you are audible.

ADV VARNEY: Thank you. So, Dr Maduna, that plan would have created a special legal regime for apartheid-era perpetrators, and it would have created avenues for them to escape justice, because they could invoke the TRC amnesty criteria in the special plea. Would that

not have been manifestly unconstitutional to have created a separate legal regime for that group of perpetrators, because those avenues of escaping justice would only be available to them and not to other perpetrators of similar crimes?

DR MADUNA: In my earlier answer I said, indeed, I would be surprised if a judge accepted that kind of position, namely, that there is a special category of human beings who, having committed crimes similar to those that were committed by others, could use this special avenue to get out of jail.

10 It would have been unconstitutional in my view. The regime as it stood was fine for me, the policy was fine. The NPA prosecutes and they do their work. You do not have to create an avenue to skate around that. I do not think judges would have accepted it.

ADV VARNEY: Yes. We will return to that concept shortly because it also arises in the amendments to the prosecution policy. And perhaps I can take you to page 11 of the application.

DR MADUNA: Page 11. This is 10. Oh, ja.

ADV VARNEY: So now we are back to the Amnesty Task Team. This task team did its work during February and March of 2004, whilst you
20 were Minister of Justice. Its first meeting was on the 26 February 2004, and the second meeting on the 1 March 2004. Given that you assisted with its establishment and getting Cabinet approval for it, can I draw your attention to the Terms of Reference?

We have reproduced them at paragraph 31.2, those sub-paragraphs, and the actual Terms of Reference are page 75 of the

bundle, although that copy is marked "Draft". Essentially, the terms of reference say what criteria should the NPA apply in deciding on current and impending prosecution of cases flowing from the conflicts of the past.

Secondly, the formulation of guidelines that will inform current, impending and future prosecution of cases flowing from the conflicts of the past, and whether legislative enactments are required. And then, lastly, whether any of the two bills that have been formulated can be proceeded with, bearing in mind the views of the intelligence agencies. Do you have a recollection that this was the tasks given to the Amnesty Task Team?

DR MADUNA: A vague recollection. All I know is that efforts were always being made to streamline the work that was necessary to get to a point where a decision by the NPA could be made whether or not to prosecute. It was not about protecting people at all. How do we get there, how do we get to the information, et cetera?

There are people who were armed with tons of information, who knew what had been happening in this country, and who knew what they themselves had done, who instructed them to do it, et cetera. There is no one who only in the NPA could put all that information together, it was an impossible task, right. Unless you stop the ordinary functions of the NPA until you have got this one aspect right.

Something suggests to me that you would not have been right in saying we do not need specialised agencies, but we want to

give priority to these cases. Because coming before our courts of law, both lower and higher courts daily are predominantly criminal matters.

Imagine that you get arrested and you are told there are cases that are more deserving of priority than yours, stay here, we will see you later. I do not think that would have been allowed in this system, right.

If you follow a simple rule that a person generally has to appear before a court of law within 48 hours. The 48 hours has
10 expired, but you have got some funny rule that says there are people, special people who, thanks to the past, get priority. I do not think that would have been right.

ADV VARNEY: Just a reminder to direct your answers to the commissioners.

DR MADUNA: Madam Chair, I am absolutely sorry. It is not because I am avoiding looking at you, it is one of those accidents that come with age.

ADV VARNEY: Thank you, Dr Maduna.

DR MADUNA: Yes.

20 ADV VARNEY: If I can just seek your help. So the terms of reference in paragraph 4 on page 75, it speaks of two bills that have already been formulated. Now, we know one of the bills was a new indemnity bill, because we do have the first two pages, the preface and the long title of that bill, although we do not have the balance of it. Although we do not know what the second bill might have been,

could it potentially have been the bill that your department worked on for the special plea?

DR MADUNA: No, no, the whole concept came as a suggestion. I want to believe that there were people who honestly believed that you needed a special statutory regime for these cases. But as they themselves felt, the thing collapsed when we could not agree on what would go into that special plea.

We walk in and say, judge, I am sorry, man, in the course of the madness of apartheid, I killed a few blacks, man. my name is X.
10 Hey, sorry blacks, man, what a pity I killed you. Nobody would accept that, whites are sorry for unleashing violence upon us. nobody would accept that.

So government would have been wrong, in my view, to accept that. A remark was made in the morning that, in any event, there had been cases already. The case of Clive Derby-Lewis was a classical example, the KwaMakhutha killers, who included Minister Magnus Malan, had also come before our own courts. So the normal ordinary work of the NPA was continuing.

ADV VARNEY: Yes ...[intervenes]

20 COMMISSIONER KGOMO: But the question, Dr Maduna, was you were given what the first bill, or one of the bills was about, but the second one. Can you remember what it was about, if you look at 4, the two bills?

DR MADUNA: My age disability, unfortunately, though I do not get a disability grant, does not allow me to remember that.

COMMISSIONER KGOMO: Okay. Mr Varney.

ADV VARNEY: Thank you, Commissioner. Before we turn to the recommendations that the Amnesty Task Team came up with, after it submitted its first report, the DGs then issued directions. We do not have to go to them, Commissioners, that is in the second report, page 88 of the bundle.

They issued certain directions to the Amnesty Task Team to explore whether there was a way in which private prosecutions and civil litigation in respect to the TRC cases could be eliminated if the
10 NDPP decides not to prosecute ...[intervenes]

DR MADUNA: No...

ADV VARNEY: Now, that is at page 89 of the second report ...[intervenes]

DR MADUNA: No...

ADV VARNEY: So my question, Dr Maduna, and of course, yes, I do want your comment, but I can tell you that the legal advice received was that this was not possible ...[intervenes]

DR MADUNA: Yes...

ADV VARNEY: But I want to ask you, what does it say about
20 governments and the DGs that they were exploring that possibility?

DR MADUNA: You know, in fact, recommendations are just read. There are many things the human being has been given by nature, one of those is to think. So they will come up with all sorts of ideas, and some of those ideas would be accepted, and others would not. You see, the Criminal Procedure Act of 1977, 51 of 1977 is very clear

on this. Once the prosecution has decided not to prosecute, they must issue a certificate *nolle prosequi*.

That is the law, they must issue it. In other words, you would be wrong to take away my right to be heard by courts of law, it would be wrong. They have decided, for whatever reason, not to prosecute, issue the certificate. That is law, it goes way back to apartheid, issue that certificate.

Secondly, the right to sue those who have caused you harm could not be taken away. The only element that would allow that to
10 happen, interestingly enough, was a relevant position in the TRC Act, the amnesty provision.

If I told the whole truth and nothing but the truth, and the amnesty committee was satisfied that it had the full story, it would cover not only me from civil suit, civil litigation, it would also cover the ANC itself, that is what it says.

And so what surprised someone like me was that people did not want to take advantage of that, it really surprised me. Here is a "get-out-of-jail-quickly ticket in the game of political monopoly", and you do not want to take it, very interesting.

20 ADV VARNEY: Yes, indeed it is, Dr Maduna. Let us turn to the actual recommendations made by the Amnesty Task Team, and these are summarised at paragraph 31.4. The actual recommendations are in the bundle from page ...[intervenes]

DR MADUNA: Page 12.

ADV VARNEY: Yes, we are on page 12, although, for the purposes

of the Commission, the original document is at page 81 of the bundle. Here we return to criteria, because the ATT recommended that new prosecution criteria be developed for the TRC cases. And essentially what they said was, it would include the TRC criteria, which we are familiar with and do not have to go through again, but you know them, explain the full truth, and the like. But then they added others, and I am only going to highlight a few, so for example, under 31.4.1:

10 "The degree of indoctrination to which the
 offender was subjected, willingness to abide by
 the constitution, and the offender's attitude
 towards reconciliation."

And, indeed, these found their way into the ultimate amended prosecution policy. So it is similar, in a sense, to the special plea, because here you have the TRC criteria, plus additional ones like these providing a basis for the NPA not to prosecute just these cases. Do you agree that that is fundamentally objectionable?

DR MADUNA: Absolutely. Fortunately, as you quite correctly say, they were dealing with recommendations. You see, for instance, 31.4.1.1:

20 "The degree of indoctrination to which the
 offender was subjected."

It is a very interesting one. Would you not need a psychologist of sorts to perform some task? Who indoctrinated you, what did they say to you, what did they teach you, et cetera, right? You might actually even have to say, Professor XYZ taught me that

women must not become advocates and lawyers because they are women. We once had such a law in this country, right.

So I do not think in the post-apartheid constitutional order that would be acceptable, I do not think so. It would take us down a totally different path, which would require a specialised exercise. I do not want to say that all white children were taught that blacks were not human beings. It is possible that quite a big number of them were taught and they believed that, and that was part of indoctrination.

10 You know, which is a silly thing in this country, there was a heaven for whites in their heads, there were burial, what you call, sites, or whatever, for whites only, and you can imagine there was a totally different God for whites ...[intervenes]

ADV VARNEY: Yes, I think what you are saying is that the culture at the time, Christian national education ...[intervenes]

DR MADUNA: Yes...

ADV VARNEY: In theory, everybody was subjected, white people were subjected to indoctrination, giving them the possibility to make that claim.

20 DR MADUNA: Yes. Now, I am saying I do not think it would have been right for people to say, oh, I am sorry, man, I was indoctrinated. You know, in fact, there is a simple English word called "agency". All of us are agents of what we do and say. We take responsibility for that, right. During the Nuremberg trials, for instance, they, you know, the killers, mass killers were told you cannot hide behind "I was given orders".

They were told you cannot implement an illegal order, and you cannot change that now and say, you know, we know the poor souls were indoctrinated and they accepted unlawful orders, and whatever, and killed in Sharpeville, killed in Soweto, and whatever, that would not be right ...[intervenes]

ADV VARNEY: I am happy to advise you that after you left your post as Minister of Justice, these criteria were incorporated. I am not happy to tell you about this part, but they were struck down eventually, but these criteria were incorporated as part C of the
10 amended prosecution policy. That was in December 2005, but they were struck down by the high court in 2008.

DR MADUNA: I am so happy that I have actually summarised what a decent court of law would have done with these, I am very happy. I have never been a judge, but I have always imagined that ...[intervenes]

COMMISSIONER KGOMO: You appointed judges, acting judges.

DR MADUNA: Oh, no, no, no ...[intervenes]

COMMISSIONER GABRIEL: Over here.

DR MADUNA: No, no, no, appointed on the recommendations of the
20 Judicial Services Commission, it is in the Constitution. You know, one of my predecessors, Kobie Coetsee, could just pull out a list of senior counsel and go to the president and say I want the following as judges, and they would rubber stamp them, right. And we could not accept that that was the way to appoint people to the judiciary, we changed it.

ADV VARNEY: Thank you.

COMMISSIONER GABRIEL: Dr Maduna...

DR MADUNA: I am listening.

COMMISSIONER GABRIEL: I am over here.

DR MADUNA: I can see you.

COMMISSIONER GABRIEL: Okay. I know this was beyond your time as the Minister of Justice ...[intervenes]

DR MADUNA: Happily so.

COMMISSIONER GABRIEL: Happily so, because your view was,
10 the challenge was about streamlining the process to give effect to prosecutions, and with the assistance of investigations.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: Now, I am trying to understand why it is that the DGs would have come up with these ideas. Are they not, as one DG said, "the implementing agents of their political masters"?

DR MADUNA: Yes and no.

COMMISSIONER GABRIEL: Okay.

DR MADUNA: Yes, in the sense that, as section 34 of the NPA Act says, the Minister of Justice assumes full responsibility for the
20 functioning of the NPA, right, but, no, precisely because the system was and is intolerant of interference.

COMMISSIONER GABRIEL: I am talking about DGs within your Ministry.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: Right.

DR MADUNA: No, I am also talking about them.

COMMISSIONER GABRIEL: Okay.

DR MADUNA: They made recommendations ...[intervenes]

ADV MOROKA: Apologies, chair, if we could get clarity from the commissioner, she says, "DGs within your Ministry". There is only one DG.

COMMISSIONER GABRIEL: There is only one DG. I mean DGs within political Ministries or, you know, the various Ministries, Intelligence, Justice.

10 DR MADUNA: No, those were not political Ministries.

COMMISSIONER GABRIEL: No, I am using the term incorrectly.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: But they had what I call "political masters", in other words, the ministers as their masters.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: And the way one DG expressed it to us was, the DG was the implementing agent of his particular Minister of Justice. Now, I am trying to understand why the DGs would have come up with this Amnesty Task Team.

20 DR MADUNA: By the way, they were not expected to do more than that. They were only expected to think, to conceptualise, et cetera, and make recommendations. The responsibility lay elsewhere. Imagine a bunch of politicians accepts ...[intervenes]

CHAIRPERSON: You mean the implementation?

DR MADUNA: No, the implementation, say, for instance, a new or an

amended prosecution policy, right. So it would come say from the NDPP... Is it after or in consultation with the minister?

COMMISSIONER GABRIEL: In consultation.

DR MADUNA: Ja, whatever, it would come from there, the assumption being that the minister has agreed to this. Because if the minister says, hey, look, the English words you have used are very interesting, and I like the language of the people who came in gumboots with English, et cetera, and took whatever they could, but you cannot do these things.

10 I suppose placing the minister in a position where a debate could take place was the right position, because there was no way that at all times and on all issues the NDPP would be right and everybody else would be wrong.

So there was space left for a discussion before the adoption of policy, and for me, that was more than fine, because, indeed, I would have had an opportunity for a discussion: why do you want to do it this way? Right, in other words, for me, recommendations were nothing more than recommendations.

COMMISSIONER GABRIEL: Okay, thank you.

20 DR MADUNA: Yes.

CHAIRPERSON: Mr Varney.

ADV VARNEY: Thank you, chair. So let us move on. Another key recommendation, which is also on page 81, we summarise it at 31.4.2, was the creation of a departmental task team to include a number of different office bearers.

We set them out at 31.4.2, and in the ATT report itself it is paragraph 3.2 on page 81, but the office bearers would include Department of Justice, the Intelligence Agencies, the South African National Defence Force, South African Police Service, Correctional Services, NPA, and the Office of the President. And the proposed functions are set out in the next paragraph, and the functions in paragraph 3.22 on 81 says:

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

And then to save time I am not going to take you through the rest, but there was an application procedure made provision for on page 82. So that team could receive applications from perpetrators, and then make recommendations to the President, the NPA and others.

20 Now, I can tell you that Adv Vusi Pikoli objected to that first
 function on the basis that it would create, what he referred to as a
 "two-stage process", because then the NPA would have to wait for a
 recommendation and advice from these other entities.

And actually, this did not find its way into the amended prosecution policy, but once the task team had been set up, then Commissioner Selebi and the Intelligence Agencies insisted that this happen, that the NPA wait for a recommendation before it acts. So I

want to ask for your view, is this consistent, for example, with section 179 of the Constitution?

DR MADUNA: No, it is not.

ADV VARNEY: Can you elaborate?

DR MADUNA: You see, you could not put a roadblock between the NPA and the perpetrators of whatever is meant by "offences pertaining to our past", so that there is a screening machinery which your NDPP, your NPA would have to listen to, to be guided by.

10 You would actually be politicising this, because depending on who participated in whatever process, you might find that, indeed, those people have power that they do not have under the Constitution and the law. We would not listened to, we told you do not prosecute X, prosecute Y, it would be improper in the extreme.

So the entities that we agreed to have set up had only one simple task: streamlining the process, which entailed, among other things, collecting information, et cetera. But they could not, constitutionally and legally, participate in deciding who to prosecute and who not to prosecute.

20 That is clear in the Constitution itself, in fact, you know, the NPA Act is even more interesting in this regard. 32(1)(b) criminalises, read with section 41 criminalises any interference with that task, the task to decide who to prosecute and who not to prosecute. You would have wiped the system for political answer, no doubt about it.

ADV VARNEY: Thank you, doctor. I want to put to you the ...[intervenes]

COMMISSIONER GABRIEL: Sorry, Mr Varney. Dr Maduna, with that extend, you described this as "Putting a roadblock before the NPA", would that extend to this task team making recommendations to the NPA?

DR MADUNA: That would include it.

COMMISSIONER GABRIEL: Okay, thank you.

DR MADUNA: That would be included.

COMMISSIONER GABRIEL: Thank you.

10 DR MADUNA: The law is very simple for me, police arrest with or without warrant, and they must produce you before a court of law within 48 hours, right, and there is no AT, whatever, as a roadblock, they must just do their work.

COMMISSIONER GABRIEL: Thank you, Mr Varney.

ADV VARNEY: Thank you, commissioner. I would like to put to you some evidence that we heard from a former NDPP, Bulelani Ngcuka, who testified before this Commission. And we learnt from his evidence that after the first meeting of the Amnesty Task Team on 26 February 2004, he received reports from his representatives.

20 And according to Adv Ngcuka, when he learned that the ATT was developing new criteria for the TRC cases, he instructed his representatives to immediately cease their participation. And when he was asked under cross-examination why, he said he did not agree with the proposals.

And he went further, he said: "There were persons in that meeting concerned about the ANC 37 case, and further participation

would (in his words) 'compromise us"', and we have attached the transcript at page 93. Do you agree with Adv Ngcuka that the NPA would have been compromised?

DR MADUNA: Absolutely, absolutely. You know, the NPA could not take instructions from any external force, they could not. They do their work, they have picked up someone on the street or in some house, et cetera. Theirs is to eventually prosecute that case, I mean, the police have picked up someone, or the Scorpions could also do that, pick up someone, Theirs is to prosecute.

10 Now, if they allow the interposition, is that the right English word, of a process or a structure that says you cannot make simple prosecution decisions before that structure, which I call a "roadblock", has made recommendations, then you have got a big problem.

 You know, I have said, commissioners, that we had a very interesting reason. none of these structures had ministers participating in them. They were all part of the administration, and the reason was very simple: you do not want to imagine politicians deciding we cannot touch comrade X, right, we cannot.

20 I have said to people, you know, during my days it would not happen that two people who have committed the same crime, one walks through OR Tambo with dollars, pounds, whatever, he keeps them in the house in excess of a certain number, and in excess of the allowed period, right.

 And the other one does the same thing, oh, indeed, you come, you hear from the people who work at my house that there are

dollars there. It is improbable that members of the majority party then in the National Assembly would see nothing wrong with that: one law for a lower class and a law for a higher class.

And this is why we are sitting where we are as a country now, where you do not have people who are able to say, no, but this cannot be right, there is only one law for all of us, subject to the Constitution, right. and, of course, there are strange things that are happening now, please protect me from humiliation ...[intervenes]

COMMISSIONER KGOMO: Do not go there, Dr Maduna
10 ...[intervenes]

DR MADUNA: No, no, no, I was just giving you an illustration of what happens when a simple process has been warped by politics, by political interests.

COMMISSIONER KGOMO: No, I hear you, we hear you.

DR MADUNA: Yes.

COMMISSIONER KGOMO: But these are matters that are even before the Court, so I say do not go there ...[intervenes]

DR MADUNA: No, no, no, Judge Kgomo, allow me to finish what I am saying. The person who actually presided over the National
20 Assembly meeting, which decided that there was a lot wrong with the Ngcobos and whatever posture is now sitting before Court, expected to be protected, but we are nowhere to protect her today, not even [indistinct] is working, thank you.

CHAIRPERSON: Thank you, Mr Varney.

ADV VARNEY: Thank you, chair. Yes, Dr Maduna, I am going to

bring you back to the matters that are squarely before this Commission.

DR MADUNA: Yes, yes.

ADV VARNEY: I am now on page 14 of the application.

DR MADUNA: Yes.

ADV VARNEY: It is titled: Moratorium on the TRC Cases. Now, you raised this in your statement ...[intervenes]

COMMISSIONER GABRIEL: Mr Varney...

ADV VARNEY: Yes.

10 COMMISSIONER GABRIEL: I am sorry. Have you finished with the report of the Amnesty Task Team?

ADV VARNEY: For the moment, yes, chair.

COMMISSIONER GABRIEL: Okay. Do you mind if I ask a question?

ADV VARNEY: Please do.

COMMISSIONER GABRIEL: Okay. Again, Dr Maduna, I know this was after your time, and you have been very firm in your views that political guidance or recommendations or intervention in the prosecutions is a no-no in your eyes.

DR MADUNA: That is it, ja.

20 COMMISSIONER GABRIEL: Now, there is a paragraph on page 86 of the bundle, red 86.

DR MADUNA: Yes, I am there.

COMMISSIONER GABRIEL: This is the report, I think it is the first report of the Amnesty Task Team, and there is a curious recordal in paragraph 3.3.2, which says:

"In the light of the views expressed by the President regarding a further amnesty process, the task team decided not to make a recommendation in this regard, and to leave it in the hands of government. Should government, however, decide to proceed with such a further process, a draft indemnity bill is attached as annexure B for consideration."

Now I am asking for your view, would this add to, if it is
10 correct, the view reflected here, and I do not know that it is, but if it is correct, would this not detract from the TRC amnesty process?

DR MADUNA: Absolutely, absolutely.

COMMISSIONER GABRIEL: Okay. Why do you say so?

DR MADUNA: I say so because, you see, this would provide a new avenue for people to avoid the consequences of their good or bad deeds, because they could always say, oh, no, no, no, sorry, post TRC, this is what was allowed.

COMMISSIONER GABRIEL: Okay.

DR MADUNA: You must remember, we have, commissioners, been
20 through this exercise earlier on, where the insistence of full disclosure was canvassed. Now, we would not, certainly not while I was still loitering around in the corridors of power, we could not and we would not allow anything to interfere with a process that was actually established by the Mandela-led GNU where the ANC led. We would be contradicting ourselves. What had changed to warrant any

change of that sort?

COMMISSIONER GABRIEL: Okay, you have made yourself quite clear, thank you. Mr Varney, back to you.

ADV VARNEY: Thank you, commissioner. Dr Maduna, if we can turn to the subject of the moratorium on the TRC cases, and you made reference to this at paragraph 6 of your statement, and I will just read it into the record so that we are all on the same page:

10 "As I understand it, the moratorium that is alleged to have been put in place against the prosecution of TRC cases was not an official documented moratorium, but a practical stance adopted until such time the prosecution policy amendment was finalised."

Now, we just want to put to you the facts as we understand them, as to how this alleged moratorium came about. And if you look at paragraph 33.1, we note that:

20 "On 11 November 2004 the NPA's Priority Crimes Litigation Unit wish to arraign (in other words, arrest and have appeared in Court) three former security branch officers who were accused of the 1989 attempted murder of Reverend Frank Chikane."

And according to the evidence of various prosecutors, including Adv Anton Ackerman and the then acting NDPP, Dr Silas Ramaita SC, he confirms that he was telephoned by the then

Minister of Justice, Bridget Mabandla, who directed him not to proceed with the case, and to suspend the prosecution of TRC cases pending the development of guidelines to manage the handling of those cases.

So our question to you is, in those circumstances, is that simply a practical step that was taken, or did it not in fact amount to interference with the constitutional and statutory responsibilities of the NPA?

DR MADUNA: You know, I have actually told the chief...

10 COMMISSIONER KGOMO: Evidence leader.

DR MADUNA: Evidence leader that I am not aware of any moratorium personally, that is a starting point for me. But secondly, I would not have listened to anybody with a moratorium, because, you see, that violates the basic elements of section 179 of the Constitution, as well as the NPA Act immediately you see a violation of this, do not prosecute until, right.

So I have never seen that moratorium in writing, so I cannot help the Commission on this. This is my own personal view, that, you know, you would be verging, is that the right thing, closer, sailing
20 closer to the wind if you said do not prosecute in these areas until there is a change of policy.

For God's sake, you cannot do that, the law is the law. You get prosecuted under the law as it stands, whether it is bad law or not. If it has changed, thanks to the will of those who make laws, then you get prosecuted under a different law. You had, and you still

have the NPA Act and the Constitution, you could not do better than that. Unless, of course, there were political pressures and motives to do things in a different way.

I read somewhere that Reverend Frank Chikane, whom I hold in the highest esteem, was asked a question, "Would you mind if we prosecute or do not prosecute those who poisoned you?", and he said, no, go ahead. As a Christian, he had already forgiven them, but go ahead, do your job, in other words, right.

10 I cannot remember the man who shot a Pope and nearly killed the Pope. The Pope forgave him, but the system did not forgive the man, he went to jail for shooting a human being, attempted murder, right. So in other words, you can pray their sins out if you think you have that authority, but the prosecution, the police and whatever, must do their job.

ADV VARNEY: Thanks, Dr Maduna. If I can just read to you a paragraph from the affidavit of former acting NDPP Silas Ramaite, it is on page 99 of the bundle, paragraph 50.

DR MADUNA: Yes.

ADV VARNEY: It reads as follows:

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

Would you agree with that statement?

DR MADUNA: I would find it very, very difficult to accept that you would listen to any politician who says do not do your work, because the prosecution of crime vests neatly in the hands of the NPA, NDPP, and the entire NPA. So, but again, this is my view, people may have better views, right, about the propriety, or otherwise, of a politically imposed moratorium. I would not, I would have cautioned against it.

COMMISSIONER GABRIEL: Sorry. Does it make a difference that the moratorium was not permanent, it was in for a limited amount of
10 time?

DR MADUNA: I do not know, but let me tell you something, the moratorium would be interference in the work of this institution ...[intervenes]

COMMISSIONER GABRIEL: And this would form...

DR MADUNA: And it was a political, if it existed at all, it was a political moratorium. Some politicians sit somewhere around a campfire when it is cold and decide we impose a moratorium, do not prosecute until we come back with a new policy. I have never seen that moratorium personally, but if I were asked for a review, I would
20 have said, no, do not do that.

COMMISSIONER GABRIEL: So it falls in your category of "roadblock"?

DR MADUNA: Yes.

COMMISSIONER GABRIEL: Okay, thank you, Dr Maduna.

ADV VARNEY: Thank you, commissioner. Let us move on,

Dr Maduna. Now, at paragraph 7 of your statement, I am at the bottom of page 14, turning to 15 of the application, you mentioned that you had met with both Adv Pikoli and Ngcuka to prepare for this commission of inquiry, and they both confirmed that you never interfered in the work of the TRC cases.

Now, I want to put to you what Adv Pikoli has said about the interference, and you will recall our earlier discussion, when Pikoli had objected to the inclusion of that two-stage process.

DR MADUNA: Yes.

10 ADV VARNEY: And I then mentioned that later in the process, once the task team had been set up and they were looking at cases, including the Frank Chikane case, Commissioner Selebi insisted in writing that this two-stage process be introduced, that the NPA wait for a recommendation, not just from the task team, but also the Directors General.

And Adv Pikoli objected to that vociferously, and I will put to you what he wrote to the Minister of Justice at the time, and that is at paragraph 39 on page 16. He wrote a secret internal memorandum, it is at page 134. It is a long memorandum, we do not have time to go
20 through it, but I am going to it.

ADV MOROKA: Chair, may we object? It is not a secret internal memorandum; it is a memorandum marked "secret", and there is a distinction. My learned friend keeps calling them "secret memorandums". It is memorandums that are marked for purposes of this secret.

CHAIRPERSON: Yes.

DR MADUNA: But by the way, in fact, Adv Moroka is right, government documents are always marked "secret", "confidential", and they use all sorts of words. But there is an old provision in our own law, especially the law of evidence, that once a document has been filed in court, it is a public document.

You cannot say, no, no, no, no, no, do not touch the public document, which is a secret document, but there is the tendency to misread the word "secret". During my days, at least, we had an
10 obligation to protect the secrets of government, right, obviously because all states do it.

You do not want anybody to walk around with government documents and step into the offices of the CIA in Pretoria and smile and collect a check because they have delivered government documents. That is why it is a crime to do those things, right, but more than that, nothing turns on the word "secret", et cetera, nothing turns on it, right.

ADV VARNEY: Chairperson, I think we should turn to page 134 to see the document itself.

20 DR MADUNA: 134?

ADV VARNEY: 134.

DR MADUNA: 134.... The red 134?

ADV VARNEY: Red 134, exactly.

DR MADUNA: That is it.

ADV VARNEY: And in the table just under the NPA emblem, what

does it read there?

DR MADUNA: "Secret Internal Memorandum".

ADV VARNEY: Yes, so that is actually what we are quoting, we are quoting from the document itself.

DR MADUNA: Yes.

ADV VARNEY: All right, I will move on, and I assume it was titled "Secret Internal", because it was for the eyes of the Minister personally.

DR MADUNA: I think so, yes.

10 ADV VARNEY: Yes, in any event, Adv Pikoli writes, and this is on page 144, and it is also reflected in paragraph 39 of the application at page 16.

20 "I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/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 and oath of office that I took does not allow that."

Do you have any reason to dispute the views expressed by Adv Pikoli?

DR MADUNA: No, no. I would actually take a similar stance. The

work is governed neatly so by section 179 of the Constitution and the NPA Act. Now, if you want any deviation from that, then there is a problem. You know, in the Public Finance Management Act there is a very interesting clause. You can defy a whole minister when the minister wants you to do anything wrong.

And look, you do not come out screaming at ministers and people. That is crude and rude. But you would actually, the law requires, that law requires that you should tell the minister to put their views succinctly and in writing. This is why this must be done. So
10 that you are able, as a DG or as a public servant to say this indeed, this is the posture I took. I asked the minister to put the views in writing and indeed these are the minister's views in writing, right. And the law protects you. That is not the only act.

I immediately remember the PFMA, because it has been mentioned on many occasions of late, but there are similar provisions anyway. You could not hide behind the order, even though you know that the order is unlawful. You cannot hide behind it. And it is just as well that in the civilised world, whatever you mean by civilisation; that is what people say. You cannot say I took an unlawful order, right.

20 ADV VARNEY: Thank you, Doctor. I just want to wrap up with a few questions arising from your evidence-in-chief and this was in response to questions that Commissioner Gabriel put to you; and you raised that there was a problem that appeared between the NPA and SAPS. I am just going to quote to you a short extract.

And much later, I am not going to bother the commission with

the detail, but let me give you a bit of the detail. When we realised that there was a problem, Steve Tshwete took Bulelani Ngcuka and Jackie Selebi to one of your fancy hotels in Sandton to try and work things out between them. I stood between them when they nearly came to blows. Now, my question to you is; are you able to assist us with the background or the genesis of the animosity between Selebi and Ngcuka and the NPA more generally?

DR MADUNA: Sadly, it turned out that this might have been the beginning, if not the continuation of wrong relationships. The story
10 starts in a very funny way. Jackie Selebi – may his soul rest, whatever; tells Tshwete and me that he and other people, whose names I am not going to mention, are in possession of sensitive information about Bulelani, namely that Bulelani impregnated an underage child in the Transkei, right?

Immediately, you talk about an underage person, you are talking about statutory rape in God's word. So there was nothing, there was no way I could sit back and say hey man, you did it with an underage girl. Hey man, hey, you are lucky, because the suggestion was that the NDPP had committed a statutory rape, and that is very
20 serious.

So, I speak to the late Tshwete who told me this and I said you know, in fact, let us get the two gentlemen in a room somewhere and I arranged for us to get a room from the... what is that hotel which was owned by Douw Steyn, the late?

ADV VARNEY: Dr Maduna, sorry to interrupt. I am very sorry to

interrupt. I do not think we need to go into that kind of detail here, but I want to put to you a version that we think might explain the animosity, which is quite close to the question of the TRC cases and why they did not go ahead. And that was because we were aware that amnesty had ultimately been denied to the ANC 37, which included Selebi himself.

And then around this time, with the creation of the Priority Crimes Litigation Unit, and they were looking at all cases against the former apartheid regime, but also cases against the ANC as well.

10 And the ANC 37 cases were at that time on the books. A decision had not yet been made. Was that not a factor, that since Selebi was aware that the PCLU was investigating such a case in which he was a potential suspect; that that gave rise to these suspicions and tensions?

DR MADUNA: I can imagine. Pikoli told you that thanks to Selebi's activities; and there are court judgments on those funny relationships with the Agliottis and whatever. So in other words, you are not just dealing with one element protecting 36 people who you are party to. There were complex issues that had to be dealt with, right?

20 You know, thanks to the fact that a whole lot of us did not take stern action against crazy relationships which were embarrassing where we are now as the ANC, where people hold meetings on the farm belonging to a thug, right. So in other words, it was not just one simple thing. We do not want us to, we do not want to be protected, so we protect those who harmed and caused a lot of anguish to our

people in the townships, *et cetera*.

So I would not confine myself to one thing. There was real enmity which became apparent, right, which was not just about institutional problems, right? It was not. And I remember saying hey, if you have the evidence, lay charges with the police themselves against Bulelani. So I thought that thing was dead. One day I am sitting in a hotel room in Paris. Bulelani calls in tears. There was a long story about him having been spy number 452, right, and he was fighting over this 'Bulelani, a spy'.

10 So I come back to the country. I sit with Bulelani and I say: Bulelani, I am happy that you have given me an opportunity to deal with this situation. I had a man called Labuschagne, Oom Lappies, at the department. I said to him; you know what, while I still have all the old intelligence files, just get me RS452. He brought it to my office. You will not believe it. It was not Bulelani Ngcuka. It was a woman lawyer called Vanessa Brereton and there was a number on which Oom Lappies could call her to confirm that this was not Bulelani.

20 But let me tell you the juicy part of the story, juicy part. No, no, no, there is a juicy part. Vanessa Brereton, a limping woman from the Eastern Cape, had actually joined us, joined a NADEL delegation to see us in Stockholm on [indistinct]. And she took, she was pushing herself around, touching me to take photos. My photos were in that file.

So I then said to Bulelani, we will do two things. We will tell Vusi Mona, whose paper the City Press published this rubbish, that

this is the real RS452. Please publish it, right? Secondly, I said I am going to go to the president, right? And get him to appoint a commission of inquiry, which was headed by Judge Jos Hefer, former judge of the Supreme Court of Appeal, Head of the Supreme Court of Appeal. So I went all the way down to Bloemfontein to deal with that. And lo and behold, I did not know that I was also suspected to be a spy. In November 1998, Patricia de Lille, who is a minister now ...[intervenes]

ADV VARNEY: Doctor, I am very sorry to ...[intervenes]

10 DR MADUNA: No, no, no, let me ...[intervenes]

ADV VARNEY: To interrupt.

COMMISSIONER KGOMO: The juicy part is coming.

DR MADUNA: No, this is the juicier part. Patricia de Lille said I will name them, I will name them, and she started with my name. In parliament, you can check, Hansard, the rubbish is there.

So we said to Jos Hefer; check also whether there is any evidence that this minister was a spy. The evidence leader was none other than Kessie Naidoo SC from Durban. You know what happened? Patricia de Lille said: I have no evidence that will help
20 Jos Hefer. And much later, I will not name a name, Patricia de Lille told a public meeting that she was given the list by ANC leaders.

So we have been through these things. Bulelani, Steve Tshwete and others took the Scorpions to Quantico, Virginia, where the FBI trains its specialists. We said subject these people, including Shadrack Sibiya, to your most rigorous training, which they did. The

Scorpions were some of the finest people, right?

CHAIRPERSON: Dr Maduna, I think we have heard you.

COMMISSIONER KGOMO: Even the juicier part.

CHAIRPERSON: Yes.

DR MADUNA: So we come back. Bulelani and I are spies of the CIA. I mean, it is laughable.

COMMISSIONER GABRIEL: It is laughable, but can I bring you back to what you said at the beginning?

DR MADUNA: Yes.

- 10 COMMISSIONER GABRIEL: You said it was a case of bad relationships between Ngcuka and Selebi. Now my question is; bad relationships or not, did that suspend the obligations that each one had under the Constitution?

DR MADUNA: Bulelani wanted to go ahead and prosecute. The whole NPA was going ahead to prosecute. Did not matter who was, who did not have or who had been denied amnesty. Bulelani was never going to say hey, let us save X, because this was once our comrade. That was a big problem in some circles in the ANC.

- 20 COMMISSIONER GABRIEL: And did it exonerate the Minister of Police or the National Commissioner or the police at that time because of this bad relationship from investigating these cases?

DR MADUNA: Ordinarily, you would expect law enforcement, the police, *et cetera*, to go out and catch criminals, build dockets, surrender them to the NPA so that prosecutions are mounted, ordinarily. But if you have got police who owe allegiance more to

criminals than to this kind, you have got a problem. The stuff that is coming out before Madlanga tells you that we have had a long and an old problem, right, where even ministers, it turns out, would go to the farm, Msibi's farm, right?

COMMISSIONER GABRIEL: So these bad relationships, in your view, they should not suspend constitutional obligations?

DR MADUNA: No, they should not. A policeman with a baton and handcuffs must do their work.

COMMISSIONER GABRIEL: Okay. Thank you.

10 DR MADUNA: That is what you expect. Not a policeman who owes allegiance elsewhere. Those will not do it.

COMMISSIONER GABRIEL: Right, understood. Mr Varney?

ADV VARNEY: Thank you, Commissioner.

COMMISSIONER GABRIEL: Thank you, Dr Maduna.

ADV VARNEY: And just following up on Commissioner Gabriel's question; she posed a similar associated question when you first appeared. And by way of context, there is evidence before this Commission that between 2003 and 2010, the NPA struggled to get cases investigated and very few were investigated. The ones that
20 went ahead, the few that went ahead were ones that had been previously investigated.

So Commissioner Gabriel said; so who was then going to assist the NPA with the investigation in TRC cases? And your response is; well, ordinarily, the police would have to do their work. Find Penuell Maduna in whatever hovel he is or snake pit, or

whatever. Just find him. And then you then added as to whether there should be a discussion around a policy for these cases; and your answer was it did not need a policy. Police had to do their work. It did not need any new policy. You are a police person. Maybe that is politically right. Yes, you are a police person. Do your job for which you are paid. It is as simple as that. And from the perspective of the families, we would agree completely.

DR MADUNA: And I have repeated the same sentiment now a short while ago; that police must do their job. For God's sake, they are
10 employed to do their job, go arrest.

ADV VARNEY: And then in the next line you give an example.

“You know, in fact, I am so happy in my old age
that eventually Joe Mamasela has been caught,
because he is one of the people who did not
bother to apply for amnesty at all.”

And you correctly pointed out that a month previously in fact was in June; that he was in fact appeared before Court and is facing murder charges, but that is June of 2026.

DR MADUNA: Yes.

20 ADV VARNEY: I am representing some families in which Joe Mamasela is implicated; for example, the PEBCO 3 case, the murder of Richard and Irene Motasi. Other matters where I am not involved, such as Fabian and Florence Ribeiro.

DR MADUNA: I nearly mentioned the couple.

ADV VARNEY: Yes.

DR MADUNA: The doctor and the nurse.

ADV VARNEY: I asked my team to count with a tally as to how many murders he is linked to. It is 21 and we do not think that is a full figure. And as you point out, he never applied for amnesty. These were crimes that took place mostly in the mid to late 1980s. And here as we stand today, until June of this year, he was never charged. Would I be correct in saying that the post-apartheid state, they have failed the families of Richard and Irene Motasi? They failed the families of the PEBCO 3. They failed the families of the
10 Ribeiros, the victims in the Zero Zero hand grenade attacks and others.

DR MADUNA: Are you done?

ADV VARNEY: Yes.

DR MADUNA: Let me put it this way. I always try and avoid being judgmental, because I do not know why people do not do their simple work. You know, Joe Mamasela, there was a whole long story a couple of years back, killed his landlord who had gone to collect rent from him. Just shot him dead. I will not pay rent, right? So you see, why are the police? Why do not they arrest him?

20 Now, there is a book. It is instructive to acquire and read, pages 493 to 495, the authorised biography of Bantu Holomisa. He says something startling, this Mamasela; that some of our foremost leaders were regulars at Vlakplaas working with Dirk Coetzee, *et cetera*. Now, that is part of this history.

So he does not bother to apply for amnesty because he has

got to tell that full truth. X, Y, Z landed on a helicopter from some border for debriefing and briefing at Vlakplaas. That book says so. It mentions names, and Bantu Holomisa says he told Mandela about what this Mamasela said. And Mandela said [speaking in vernacular]. Come on, take it easy, man. You get the point, because the ANC had its own internal problems.

When George Fivaz produced the list of the real spies in the ANC, which excluded Bulelani Ngcuka and me, George Bizos, Vincent Maliga and this chap who used to be an MEC, who was
10 struck off the roll eventually for soliciting money from whatever, certain time, landed in Bloemfontein to prevent the disclosure of the list of the real Spies, not spices, Spies, the real spies. We had it. I still have it, right?

We suggested to Jos Hefer that George Fivaz must just be called to confirm that he prepared a list; that this is the list; three, that the list does not have the following names. They were opposed even to that. I actually spoke to George Bizos, may his soul rest in peace. I said George, these people have the information you and I have always wanted to see, right?

20 Is it possible that the ANC is saddled with that problem today of leaders who rock up. In Xhosa they say [speaking in vernacular]. You emerge like grass, but the agenda is totally different. Is that possible? So, you sit with that kind of situation; and when you ask questions, people start sticking labels – CIA spy. Fortunately, I am in the right company. Thuli Madonsela was a CIA spy when she asked

questions. So, it is in the right place, the right space. I am happy, the right company.

ADV VARNEY: Thank you, Doctor. Now, in your evidence-in-chief, you also made reference to the Cradock Four. You said they know who killed Matthew Goniwe, Fort Calata, *et cetera*. They knew them. Why did they not just go and do their work, pick them up? We know we have evidence that you participated in the commission of this crime. Why do you have to be backed, persuaded, cajoled and whatever? You do your work.

10 Now, in relation to the Cradock Four case and another matter I am busy with, we know that in the 1990s, six of the culprits applied for amnesty and were denied amnesty. But here, as we sit in 2026, nobody has been charged. The reopened inquest is actually happening this year. Yes. In the PEBCO 3 matter, nobody has been... well, people were charged, but that case collapsed for reasons I will not go into; and the reopened inquest is only happening in October. In the Motasis we are waiting for a decision after a very long time.

20 Now, what the families want to put to you is that the failure to investigate these cases was not just a question of them slipping through the cracks. It was not just a coincidence that almost every single last TRC case was not attended to. It was not a question of simply a lack of resources. We did not have enough staff members and the like.

 The families want to put it to you that it was as a result of the

interventions which we put more bluntly as political interference that we have discussed already. I am not going to repeat what I put to you and your responses. But the failure to provide investigators, especially during the 2000s, was not a coincidence, but was connected to the political interference and the function of a decision. And that is why the families say that the post-apartheid state has failed them. Would you agree?

DR MADUNA: Well, as an ordinary South African who spends most of his time smoking his long pipe under trees, playing with
10 grandchildren, I have certain expectations, namely that the policemen, policewomen, would do their work. They have the resources.

Someone jumps over my wall fence, breaks into my house and fingerprints are found and they arrest that person. They have done their job, right, and we are all happy. And that is our expectation; to be safe in our houses, on our roads, on our streets and whatever. Those are our expectations. Otherwise, we do not need a police force. We need ADT and bodies like that, right?

So I fully agree with you that there is a state failure
20 somewhere, a state failure somewhere. The expectations of ordinary South Africans are that they must be safe in their houses, on their streets, whether they are women or men. I do not want to imagine that as I walk out of this building somebody would fire at me or stab me. I do not. And if anything of that sort happens, the police must do their work, collect forensic evidence and whatever. If they do not do

that, they do not deserve to be called the police. They do not.

Now, the question I have always asked myself is; where is the political intervention to ensure that police do their work, because there is no prosecution that is not a sequel to a proper investigation. Someone must walk out, charge the streets, looking for the criminal, find the criminal, arrest the criminal, prepare dockets, file them with the prosecutors who shall prosecute without fear, favour or prejudice. That is the system we had and we structured under the constitution. We were there. We drafted it. We wanted it that way because we
10 were exposed to the violence of people who did not owe us any duty. No duty whatsoever.

You know, I have said to my grandchildren; when I was young, I feared some police officers in Soweto so much. One of them was the infamous Shubi and others. I feared them. You will not believe it, because if I was not carrying my pass, I was in trouble. And no white man ever asked me to produce my pass in the townships. So it was some people who are known. They were infamous scoundrels, right, who enforced the evil white man's laws in townships, right.

20 Now, so you are dealing with that and it is possible that some of those tendencies continued. Some of those tendencies continued and maybe they even got worse, where people do not fear the police. And I am not saying people must fear the police, the police do their work. If you have not committed any crime, why should you fear them, right? I remember one day I ran from Emaweleni ...[intervenes]

COMMISSIONER KGOMO: Dr Maduna, should we not just say you agree with Adv Varney that the police failed his clients?

DR MADUNA: No, I have already said so, Judge Kgomo, Commissioner Kgomo.

COMMISSIONER GABRIEL: You described it as a state failure of some kind.

DR MADUNA: Yes. I have said there is a visible element of failure on the part of the police themselves and on the part of the political leaders. How do you lead people who do not do their work, right?

10 They have a big budget for policing and they do not do their work. Every year they get bonuses and every year they get... what do you call this, all this...

ADV VARNEY: Thank you, Doctor. I have a final question for you. In paragraph 1.4 of the Terms of Reference of this Commission, it sets out a requirement that this body has to look into and that paragraph says:

20 “The Commission must consider whether in law
 and in fairness amounts of constitutional
 damages should be awarded to victims and their
 families.”

I am not going to ask you a legal question, but I am going to ask on the question of fairness, given the fact that the bulk of these cases have not gone ahead. Would you suggest to this Commission that they recommend that the families and victims be awarded constitutional damages?

DR MADUNA: I will go beyond that. There is an old principle of our law, vicarious responsibility. It is an old principle. If my employee has caused you harm in the performance of their duties, the state owes you reparations or whatever you call them.

So for me, that is not a question at all. That is not a legitimate question at all. We have certain expectations and I know that we are confining ourselves to the direct victims of police violence and the victims of the violence of the proxies of apartheid's security forces. But I am saying there are larger fundamental principles of our law.

10 You cannot occasion me harm as your employee and then you say no, no, no, no, no. I was not there when they did the following to you.

So I would agree that the state must be sensitive to these questions. I fortunately still have relatives in the townships and I unfortunately still have to help them here and there, those who are on wheelchairs and whatever. I have those relatives. I would want one day to see them being helped by the state.

In conclusion of this answer, there is an old principle of international law, the question of state succession. When we, in 1994, stepped into the stinking boots and dirty boots of the apartheid

20 state, we assumed even the responsibilities. State succession is that. We assumed even the responsibilities of the Gideon Nieuwoudts and all such evil people. And so, I am saying this, because I also have relatives with expectations that the state would one day step forward and help them.

I worked with young comrades who cannot find jobs today

because they cannot work. They are on wheelchairs. They were shot as part of uMkhonto we Sizwe, the real uMkhonto, right, the real uMkhonto we Sizwe. They were shot; some in their spines, but survived. They have no homes. They have no food, *et cetera*, and I do not know what to say to those comrades.

ADV VARNEY: Thank you very much, Dr Maduna. We appreciate your testimony. No further questions, Chairperson.

COMMISSIONER GABRIEL: Dr Maduna, you have spoken very passionately about your days as an activist and you spoke about your
10 concerns overlooking in the eyes of the widows and the dread of having to say to them we cannot do anything.

DR MADUNA: Yes.

COMMISSIONER GABRIEL: Now, with these TRC cases, which you fought very hard for, the passage of the Promotion of National Unity and Reconciliation Act, we made a pact with South Africans, would you agree, that they would give up their right to sue in exchange for this process of amnesty; and the *quid pro quo* was that there would be a full disclosure. That was the AZAPO case.

DR MADUNA: Yes, the AZAPO case, which came before the
20 Constitutional Court.

COMMISSIONER GABRIEL: Yes, I remember. I was there then.

DR MADUNA: Yes. Now, if I still had a role to play in that space, I would say by the way, we asked people to compromise for the good of this country, right? They gave up their own rights for the good of this country. You know, I have heard myself saying to younger

people do not talk to me about reconciliation. There has never been any reconciliation in this country.

COMMISSIONER GABRIEL: Right, but we know that through your efforts and others, we enacted the TRC Act. We went through the amnesty process. And in your words, the overthrow of apartheid was a victory for all South Africans.

DR MADUNA: Precisely.

COMMISSIONER GABRIEL: Now, what do we say to South Africans? I am going to ask you as an activist. What do you say to
10 our citizens of South Africa after two and a half decades, where those widows and the families of the victims are still waiting for justice?

DR MADUNA: You know, my grandmother always said; never tell a lie. There is only one truth and not more than one truth about anything. My true feeling is; we have not yet attended to many questions in this country. I mean, how do you explain that as a tiny minority, thanks to history, own the bulk of agricultural land?

COMMISSIONER KGOMO: But focus your answer on the TRC Act.

DR MADUNA: I am coming to that.

COMMISSIONER GABRIEL: Okay.

20 DR MADUNA: I am saying, in other words, there are many things we have yet to pay attention to. It is very unfortunate. You see, here is a person in your neighbourhood, especially because I have them in my neighbourhood, right, in your old neighbourhood who says: we listened to you and followed you. Look where we are today, right? You feel like running away from them. You recruited us. You

encouraged us to fight the system of apartheid, right? I know there are people who say 16 June just happened and there was a lot of groundwork done. I am not going to say by the ANC to the exclusion of whatever. No, that is not my point. My point is; we all went out, whatever our organisational stripes, and persuaded people to resist and fight apartheid.

COMMISSIONER GABRIEL: But we also made a promise to our citizens that justice would follow. Now, what do we do when it is, let us say two decades after the report of the TRC and so many people
10 are still waiting for justice?

DR MADUNA: You know, one of my grandchildren is a naughty girl. She says: *Umkhulu*, do you really believe in a better life for all? And I say, you know, you are asking me a difficult question, because we live here in Bryanston. Bryanston is not a better life for all, because from Bryanston, you go down the N1, there is Alexandra to your left. Bryanston is not representative of a better life for all. That is true, right, but how do you address it, is the question.

COMMISSIONER GABRIEL: Is it forgivable?

DR MADUNA: No, it is not. It is not, because there are things we
20 can do. Edward Kieswetter, as part of his swan song, when he was retiring from SARS, brags that he had collected over three trillion rand. Now, with that kind of money, you would actually deal with a lot of these problems. But public servants were actually using their calculators on their cell phones already, calculating the increases they must get. The state pays over 60 percent of their budgets to

public servants. Now, you ask: what do they do? Johannesburg is full of potholes. Helen Zille swims in some of them, but we have to pay these people and pay them increases and whatever.

COMMISSIONER GABRIEL: I suppose my simple question is; in democratic South Africa, through an emerging process where we asked people to give up their rights in exchange for the truth and justice.

DR MADUNA: And the peace dividend.

COMMISSIONER GABRIEL: And the peace dividend. Have we, as
10 a democratic society, kept our end of the bargain?

DR MADUNA: No, we have not. Ordinary people in the townships tell stories about us. Where is the democracy and peace dividend, right, when I cannot put bread on the table for my family to eat, right? Anyone who is actually bothered to pay attention to sociology, especially, will tell you that criminology and sociology talk about how people respond to their conditions. If they see a BMW driving into my yard, I am going to be targeted for robbery, *et cetera*, because what else are they going to live on? I am not justifying violence.

I am saying you have got people who have nothing, right?
20 And a Ugandan friend of mine, a fellow, once said to me at a meeting: what you are saying is; because the poor cannot sleep, the rich will not sleep. Because the poor cannot sleep, the rich will not sleep. And indeed, we do not sleep. We cover behind tall perimeter walls. A dog barks in the middle of the night, you jump. And maybe if you have got a gun, you grab it quickly, because you think that there

is a person who is around here who may have to be popped, boop, boop. That is the life we are leading.

COMMISSIONER GABRIEL: Thank you, Dr Maduna.

COMMISSIONER KGOMO: Mr Varney, can I basically address myself to you? This emanates from a question that Commissioner Gabriel asked you about the statement by the late Mr de Klerk. Now, this is not evidence, but I asked Google to tell us the following. I asked: was President de Klerk alive when his statement of 5 July 2021 was read? Google tells us, and this is not evidence, as I say;
10 yes, former President FW de Klerk was alive on 5 July 2021. He passed away later that year on 11 November 2021.

And then if you are thinking of the prominent message released after his death, you might be remembering his posthumous video message. That final video message was released by the FW de Klerk Foundation on the day he died, 11 November 2021, rather than in July of that year. So, as I say, this is not evidence. If you want to make of it what you make of it, it may not even be important. But I just thought, because I made some remarks, that I leave it at that.

20 ADV VARNEY: Thank you, Commissioner and thanks for bringing our attention to the video that was released on the day he died. I do not recall seeing that video, but we will seek it out and take a look. And if there is anything relevant in that video, we will bring it to the attention of the Commission.

COMMISSIONER KGOMO: Thank you.

CHAIRPERSON: Mr Semenya?

ADV SEMENYA: Chair, we have no re-examination of the witness.

CHAIRPERSON: Thank you. Dr Maduna, thank you very much for coming to give this enriching evidence before this Commission with a view of assisting it to discharge its mandate. We are really grateful for your time. You are now excused as a witness. We thank you.

NO FURTHER QUESTIONS

DR MADUNA: Are there any witness fees?

COMMISSIONER GABRIEL: [Indistinct] live in Bryanston.

- 10 CHAIRPERSON: Mr Semenya will sort you out with regard to your R2.50 witness fees. Dear friends and colleagues, we are adjourned until tomorrow at 10 o'clock.

INQUIRY ADJOURNS UNTIL 9 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

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TRANSCRIBER'S NOTE:

- Where no information provided, names transcribed phonetically.
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