

STATE CAPTURE INQUIRY
PARKTOWN, JOHANNESBURG

10

20 SEPTEMBER 2018

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Session 1

CHAIRPERSON: Good morning Mr Pretorius, good morning everybody.

ADV PAUL PRETORIUS SC: Good morning Chair. Chair you have before you an application brought on behalf of Ms Lynne Brown. It will be dealt with by Advocate Mokwena.

CHAIRPERSON: Yes, Mr Labala?

ADV SIMMY LABALA SC: Chairperson.

CHAIRPERSON: Well we did deal with this application for a certain time last time, but I didn't think we had finished. And then a few days ago I was told that there would be no
10 further papers filed in it and that I could decide the matter. That was strange to me because I thought argument had not been finalised. I don't know whether you have the same impression, or whether you thought argument had been finalised. 'And then I said, okay, let's deal with it today.

ADV SIMMY LABALA SC: Chairperson, we take the liberty to thank you for inviting us back, and we know that you are exercising your undoubted fairness instincts and we are beholden to you and the evidence leaders. We want to stress the following, Chairperson, that we do not regard Ms Brown's application to cross-examine Mr Jonas as being imperious and superior to any other, but we can't be impervious to the issues that the words mentioned and the name of her being associated with those words tend to signify,
20 the sound bite it created, but more significantly, the context, Chairperson, the context.

Now in debating this issue with you, can we just set out the clause and themes on how we will deal with it? In actual fact Chair, I wish ideally I could go to the conclusion, but I have to navigate-

CHAIRPERSON: You are free to do so.

ADV SIMMY LABALA SC: I wish to navigate some aspects actually. I intend timing myself. I was saying this to my colleague Mr Lusenga that I would like to be done in 15 minutes.

CHAIRPERSON: Well it's not far from what I think it should take to deal with this matter.

ADV SIMMY LABALA SC: Thank you Chairperson and we assure you that probably just to condescend and patronise you, if we are allowed to cross-examine Mr Jonas, it will be on a specific point. We may not even ask him two questions, ironically, and be advised Chair, that as we are sitting here, myself and my colleague Mr Lusenga, we hustled and
10 bustled and asked ourselves the question, do we have to do it? And we took instructions and lo and behold, listen to what our client says. I don't want this attention at this stage, it's not necessary. And we assure you, as we assured her, that this is not the idea. But permit us just to give you the clause and you will appreciate why we are here, Chairperson, and the theme on how we want to deal with this issue.

We are going to refer you to the written statement and the transcript and we are going to refer you to context, context, context Chair. And then we will bring the little dung that we have already put before the Commission to fertilise the debate on cross-examination, just one or two principles and then we will conclude. That might be eleven minutes or so
Chair.

20 Chair, let's start with the written statement of Mr Jonas. And just to expedite our submissions, I am going to refer to the relevant part. Unfortunately I do not know whether this has been indexed or paginated, but it's part of the documentation that are standing before the Commission. And with your permission, I would like to read certain portions of his written statement.

I would like to take you to Page 2 of the written statement, starting at Paragraph 3 thereof. And the theme helped there is just to lay a foundation for context Chair that we will be debating with you. Paragraph 3, if I take the liberty to read to you, says the following

“On approximately 27th and 28th of August 2015, when I was in Luanda, at an African caucus of finance ministers, I recall being contacted by Mr Fana Hlongwane whom I knew relatively well, telling me that Mr Duduzane Zuma would like to speak to me, to invite me-

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CHAIRPERSON: I'm sorry, whose evidence is that now, Mr Jonas?

ADV SIMMY LABALA SC: Chairperson, we have mentioned that this is a written statement of Mr Jonas.

CHAIRPERSON: Yes okay, maybe to just go straight to the real issue in this matter, shouldn't we look at the affidavit of your client Ms Brown? As I see the statement, I have just had a quick look now, there are two bases on which she says she wants to be granted leave to cross-examine Mr Jonas. The one is what Mr Jonas said Mr Ajay Gupta said about your client, namely that there are people that they worked with, and then she also says Mr Jonas is expected to come back with names at some stage of who in the cabinet may have been hostile to Treasury or to the Ministry of Finance in regard to certain matters. So I think we must just deal with those and the first one really is what is going to be the purpose of cross-examining Mr Jonas in regard to the first one? He is not the one who says the Guptas worked with, among others, Ms Brown? He is simply

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saying, Mr Ajay Gupta, that is what Mr Ajay Gupta said. So what are you going to ask him?

ADV SIMMY LABALA SC: Chairperson, you have asked me several questions, but let me be specific with what I sense is your concern. Perhaps before I even do that, the reason why we wanted to start where we started, we wanted to lay a foundation to demonstrate to you that what was said was said. The words are not the issue. There are several names that have been mentioned, but let me give you an example. If the name of the security guard at the Guptas' compound was mentioned, it is neither here nor there,=. That's not the issue. We wanted to start where we started to show you context. What is
10 pertinent is context. It's not only the mere mention of the word, but just to respond to your specific question-

CHAIRPERSON: Yes that last one.

ADV SIMMY LABALA SC: The test is not whether it is true or not. The test is not whether it's hearsay or not. This Commission, in discharging its very important function, will have to accept hearsay. The witnesses that you listen to Chair are not the clients of this Commission, they are also our witnesses. We have to join issue with them to fulfil this important test of assisting the Commission to discharge its important function. Is it in the interest of the Commission for us to cross-examine Mr Jonas on a very specific point and we will demonstrate to you how.

20 **CHAIRPERSON:** But am I right to say this is the point?

ADV SIMMY LABALA SC: It is.

CHAIRPERSON: Yes, so my question is, what are you going to say to him? Are you going to say, well do you confirm that you said Mr Ajay Gupta said he worked with, among others, my client? And let me assume he says yes, I confirm. And then you are

not going to ask him whether what Ajay Gupta told him is true? Isn't your remedy this, that to the extent that your client might not want to leave this kind of evidence unchallenged, or maybe unchallenged is the wrong word, would it not be enough simply that it be told and it goes on record and it is said publically, simply that, to Mr Jonas, that your client, if that is her version, your client says I have never worked with Mr Ajay Gupta or any of the Gupta people. So if that's what he said, that is not true and what I would like to do is to get an opportunity, at some stage, to take the witness stand and tell the Commission that if that is what was told to him, it is not true and that's all. It might be different if we were to have Mr Ajay Gupta here in the witness stand and he says yes, we
10 worked with Ms Brown on these things, then that's different. But Mr Jonas might just say, that is what I was told, I don't know if it's true or it's not true and actually it doesn't really mean anything, I was just saying what I was told. If you say you didn't work with him, I am not in a position to dispute or admit that, I am just saying that is what I was told, that's all.

ADV SIMMY LABALA SC: Chairperson I wish it was as easy as that. In actual fact the principles of cross-examination unfortunately ridicule that approach. And we will demonstrate, we will be brief on that point, we can't ignore-

CHAIRPERSON: What is your client's version on this allegation? Because I don't seem to find it in the affidavit. I may have missed it.

ADV SIMMY LABALA SC: Chairperson, if the Commission says we should disclose that
20 which we want to ask Mr Jonas, it's one thing. But if the Commission says that assist us to discharge our function in the context, Chairperson, not the words, in the context in which Mr Jonas said Mr Gupta said that they work with Ms Brown, then we will assist the CommissionCommission, and we-

CHAIRPERSON: We may come to that, we may come to that. Remember that one of the requirements, if you apply for leave to cross-examine, is that you must put up your version., What is your client's version to the allegation that she wants to cross-examine about?

ADV SIMMY LABALA SC: Let's go to her statement Chairperson. Chairperson, ideally I would have wished to arrive at this point having demonstrated context to you and I kept saying I wish-

CHAIRPERSON: Okay, let me give you time to give me the context. You did say you won't take long, maybe 15 minutes, so it won't take long. So give me the context and then
10 give me your submissions as you wish to give them.

ADV SIMMY LABALA SC: I am not trying to act like a bulldog, Chairperson.

CHAIRPERSON: No I want to give you a fair hearing. You know exactly what issues are in my mind.

ADV SIMMY LABALA SC: Chairperson, permit us to start with, and I am going to gloss through the written statement just to give you the themes of the context. In the written statement, the build-up was-

CHAIRPERSON: The portions you want to read in the written statement, are they covered in your client's affidavit applying for leave to cross-examine? Do they fall within that? Are they covered?

20 **ADV SIMMY LABALA SC**: Indeed, they come by reflection. She reflects on that. I will demonstrate that, Chair.

CHAIRPERSON: Well tell me first where they are covered before you go to them so that I can see if they are covered.

ADV SIMMY LABALA SC: Chairperson I am looking for a file that contains the statement of Ms Brown. Chairperson if you look at the indexed papers in as far as Ms Brown's statement is concerned, I would like to draw your attention to Page 165 of the paginated papers, headed Motivation, Paragraph 10 thereof, And may I take the liberty to read it to you?

CHAIRPERSON: Yes thank you.

ADV SIMMY LABALA SC: Now for you to appreciate the context, already in Paragraph 8 and 9 she lays the foundation that she has not been served with the notice in terms of Rule 3. She mentions in Paragraph 8, that-

10 **CHAIRPERSON**: As you read, you may just take it that while we were here, I have read that portion twice, and I can't find where Ms Brown tells us what her version is in regard to the allegation allegedly made by Mr Ajay Gupta that they protected certain people, including her, or they worked with them. I can't see where she puts up her version.

ADV SIMMY LABALA SC: Chairperson, context. And permit us just to take you through this aspect and we will respond to your concern.

CHAIRPERSON: Okay.

ADV SIMMY LABALA SC: If you look at Paragraph 9, which lays a foundation to Paragraph 10, I would like to read from Line Number 5 and may I read it to you?

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"I have not received any notification advising me that I was going to be implicated by Mr Jonas or any other witness' testimony. Mr Jonas further testified that Mr Gupta allegedly told him that I and Brian Molefe are protected by them and

nothing would happen to him if he agreed to accept appointment as Minister of Finance in the place of Mr Nhlanhla Nene, should I agree to work with them subsequent to my appointment.”

Let's go to Motivation, Paragraph 10

“As it turned out, the evidence of Mr Jonas on the 24th [and this is wrong, because we know it's the 23rd of October 2015] mentioned my name.”

Let's start with that journey there Chair and hence we keep on saying we will go to
10 context. Let's go to Page 166 of her statement, Paragraph 11. He testified that during the
alleged meeting of the 23rd of October 2015 at Saxonworld in the presence of Duduzane
Zuma and Fana Hlongwane, Mr Gupta exalted to him that presumably the Guptas and
cohorts are people they work with and Lynne Brown, listen to what she says in Paragraph
12, the utterances implicate me. At face value, they come across as innocuous hearsay
utterances by a third party. Let's pause there to remind you Chair that it doesn't matter
whether it's true or false, it doesn't matter whether it's hearsay, hence we say, Chair, if
you appreciate context-

CHAIRPERSON: Where is her version? You see, if you can't answer that question,
whatever you say is not really going to help. If anybody wants leave to cross-examine,
20 the least they must do is put up their version in regard to those allegations. So you can
say whatever context you want to say, if that requirement is not there, you are going to
have serious problems getting me to grant you your client leave to cross-examine.

ADV SIMMY LABALA SC: Chairperson, please find by way of deduction and appreciate
in context the version of Ms Brown starting in the following paragraphs-

CHAIRPERSON: But before there is a context, there must be a response to the allegation. How is there going to be a context to her version when there is no version?

ADV SIMMY LABALA SC: Chairperson, if you read Paragraph 13, then we will deal with your concern.

CHAIRPERSON: Let's say, for argument's sake, let us say that I am with you that she is implicated, okay. But the question still stands, where is her version?

ADV SIMMY LABALA SC: Chairperson may I read Paragraph 13?

CHAIRPERSON: Will Paragraph 13 give me her version?

ADV SIMMY LABALA SC: Actually it gives you her basis of her version.

10 **CHAIRPERSON**: Okay.

ADV SIMMY LABALA SC:

"I however opine differently. This, for me, may be the seminar seat upon which further insinuations and allegations against me may be built. This anxiety is amplified by the fact that Mr Jonas has further testified that Cabinet was hostile to Treasury. Consequent upon that, the chairperson has asked him to reflect on this and return with the fuller details, which I presume will include individuals' names, possibly including my name as well."

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Let's go to Paragraph 14, Chairperson.

CHAIRPERSON: Well, let's start with 13. You said 13 would give her version. What is her version to the allegation that Mr Jonas said Mr Ajay Gupta made, that they worked with her and protected her? Does she admit that they worked with her? Does she deny that? Does she admit that she was protected by them? Does she deny that?

ADV SIMMY LABALA SC: Chairperson, if the basis of the request for the version was for Ms Brown to say the following, I will cross-examine Mr Jonas on the following points to demonstrate-

10 **CHAIRPERSON**: No. No, the requirement is that if you want to... If, in a statement or in evidence, a witness makes allegations that implicate you, you want to cross-examine that witness on those allegations that implicate you. If that's what you want, you must up your version, because I am not going to allow you to cross-examine if you actually admit the allegations. Now, you are standing there on her behalf asking that she be granted leave to cross-examine and she is not telling me in the affidavit and you are not telling me whether she admits or denies the allegation. Why must I grant her leave to cross-examine if she admits the allegation?

ADV SIMMY LABALA SC: Chairperson here is your response. If you are going to appreciate the context and the position of Ms Brown, and may I-

20 **CHAIRPERSON**: No Mr Labala, I give you now only 5 minutes to show me if, in her affidavit, she has put up a version to these allegations. And if she hasn't, as far as I am concerned I am ready to decide the matter.

ADV SIMMY LABALA SC: Chairperson, nowhere in specific terms does Ms Brown say the following, I deny what Mr Jonas said. Nowhere in specific terms, Ms Brown says the following, I will demonstrate that what Mr Jonas said the Guptas said cannot be true. But we say the following, and this is an argument that we wanted to build on, hence we want

to go to the context, Chairperson, and we are halted in our foot-tracks because we can't go past you.

CHAIRPERSON: I won't allow you now to give me the context, now that you have given me the answer to this question.

ADV SIMMY LABALA SC: But permit us to say the following Chair. Perhaps we do not even have to tribulate about this aspect, we need to pack it. It will come out in the wash as the proceedings go on. But permit us to conclude by saying the following Chairperson. Perhaps your remedy assists us and we need not bother, because of the following. If she is not implicated, let it be so, but in the ultimate answer, Chairperson, I am not even looking at the evidence leaders, the capable team of the evidence leaders. I'm looking at any other interested party who would come and say the following. A version was put before the Commission saying Mr Ajay Gupta mentioned to Mr Jonas that they worked with Ms Brown. It was not contested now. We take this remedy and welcome it because it simply means any other person, when you go to the closing submissions, wants to raise this issue, this Commission will assist us to say it can't be. And here is the difficulty Chair. The difficulty is just here and may I just refer to one aspect where I want to be the sidekick of Mr Hellens-

CHAIRPERSON: Well I don't know what difficulty you want to refer to Mr Labala. The simple point is if you want to cross-examine, you want leave to cross-examine a witness, because the witness has made allegations or has given evidence that implicates you, you must, in your application to me, put up your version. And she hasn't put up her version, and I see no reason why, therefore, her application should not fail.

ADV SIMMY LABALA SC: Chair, before you even go that route, please bear the following on your mind, and there is a point that I wanted to approach the Commission on

about the difficulty. We contend that Ms Brown is not the be all and end all of this Commission; she is not even superior to any other witness. But please bear the following about what makes her unique. In line with her affidavit, she simply says: Some of the terms of reference, if you look at what is mentioned in her statement, some of the terms of reference refer me as the member of the national executives, some of the terms of reference mention the SOE's that was under my auspices as a minister. That point alone wanted to bring the context in which we wanted to persuade you Chair, that you cannot elbow her out. Now if you appreciate what we are saying Chair, then your fairness instincts would say you should permit her to cross-examine Mr Jonas; to explain that

10 important term of reference which was a part of this session. Where it is not mentioned in her statement Chairperson about her version, do not dilute that aspect. Already, Chairperson, context has already brought her before this Commission. Now we wanted to demonstrate to you that we may have not mentioned the following in her statement. She will deny that what Mr Jonas said about Mr Gupta is not true., We don't mention that she will demonstrate that it cannot be that she worked with the Guptas. Simply put, and we kept on harping and feeding on this issue, even in our earlier submissions, that Chair, look at her holistically, she is standing before you Chair if you look at all the terms of reference.

CHAIRPERSON: I am going to give you two minutes to round off your submissions.

20 **ADV SIMMY LABALA SC**: Chairperson these two minutes I would like to address you with the difficulties that we face because of this. And this may come out at a later stage when we have to make closing submissions. And please, Chairperson, appreciate this submission in this context. Mr Jonas is not only the witness of the evidence leaders, he is also our witness. We wanted to assist this Commission by cross-examining him and permit me just to read these following principles, Chair.

CHAIRPERSON: What would be very helpful is for her to give us her version. That is what would be helpful if she wants to assist us.

ADV SIMMY LABALA SC: Chairperson let me take you into our confidence openly. Ms Brown's functions are set out in Section 85 of the Constitution; to initiate legislation, to direct policy, to guide executive functions. If it is-

CHAIRPERSON: Yes Mr Labala, but how is that relevant here?

ADV SIMMY LABALA SC: Here is the relevance, Chairperson. If someone says that the Guptas mentioned that they worked with her and it becomes a free floating statement, no context given to it, nowhere is it said that the following, the following is mentioned: The
10 Guptas work with her when she discharges her executive functions; the Guptas work with her when she initiates legislation;;the Guptas work with her when she gave directions to the SOE's.

CHAIRPERSON: She may be able to give that if she says, I want to be given a chance to give evidence and deal with this.

ADV SIMMY LABALA SC: That's on record, Chairperson But here comes the difficulty Chairperson, and I wanted to take you through that. Here is the real difficulty that the Commission is going to face. If a party, Chairperson, wishes to lead evidence to contradict, let's say Ms Brown comes before the Commission, here is the difficulty-

CHAIRPERSON: You are left with one minute.

20 **ADV SIMMY LABALA SC**: May be I just exhaust this one minute Chairperson by referring you to this authority? If a party wishes to lead evidence to contradict an opposing witness, take the position of Ms Brown, he or she should first cross-examine the witness upon the facts which he or she intends to prove in contradiction. Take away the

fact that she may not have specified her version in affidavit; take away the fact that she does not say, I deny. But we wanted to demonstrate to you that by reflection, this is what she says, given the terms of reference. But may I conclude by referring you to this authority Chairperson, which is in our submission. It is grossly unfair to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. This is going to happen if, and we are forced to give if, Chairperson. If Ms Brown comes before this Commission and she wants to cross-examine or she wants to give her version, and in that version she says that which you say she ought to have put in her statement to apply to cross-examine Mr Jonas, this is what might happen
10 Chairperson and these are the basic principles of cross-examination, the leading of evidence.

Now in closing Chairperson, that is where our difficulty is. All that we wanted to say to you Chairperson, is if you had appreciated the context, Chairperson, may I just exhaust these few seconds to say the following.

CHAIRPERSON: If you have a few seconds, yes, what's the last point you want to make?

ADV SIMMY LABALA SC: If you had appreciated the context, the build-up, Chairperson, towards what was said, that Mr Jonas said that Mr Gupta mentioned that they work with her, appreciating the terms of reference, appreciating what she said in her statement to cross-examine Mr Jonas, the answer would have been there Chairperson. This has been
20 subtracted by the fact that-

CHAIRPERSON: Your time is up.

ADV SIMMY LABALA SC: Thank you Chairperson.

CHAIRPERSON: Thank you. Ms Lynne Brown's application is dismissed. She has not put up her version and I am not, at this stage, prepared to grant her leave to cross-

examine. She is free to later on renew the application if she meets the requirements, she is able to meet the requirements. So the final decision is her application at this stage is dismissed. Obviously I did need to hear Mr Mokwena, thank you.

ADV SIMMY LABALA SC: Thank you Chairperson.

CHAIRPERSON: Mr Pretorius.

ADV PAUL PRETORIUS SC: Thank you Chair. It was envisaged yesterday that we would put before you a programme for the next few weeks and give some explanation of why we are in the position that we are today. There are no hearings planned for tomorrow, so we will not be sitting, by your leave, tomorrow Chair. The Commission will
10 be requested by the legal team to hear an application, we don't deem it appropriate to give details at this stage, on Thursday the 27th and Friday the 28th of September. Minister Nene will testify on the 3rd of October, Minister Gordhan on the 10th of October and Barbara Hogan on the 15th of October, by your leave.

The difficulty that the legal team has had in planning for witnesses to testify this week and next week is that both Mr Jonas and Ms Mentor are out of the country and that has given some difficulties in programming in relation to their availability. But as soon as their availability has been secured, they will give evidence on intervening days, but we cannot determine those days at this stage.

Mr Chair, Phase One that was mentioned in the opening statement, is nearing
20 completion, but certain matters relevant to Phase One and the terms of reference included in Phase One, have been held over, pending further investigations and cooperating with the investigators. Dependent upon their work and their assistance to the legal team, we will call further evidence in Phase One. But we are unable to determine fixed dates at this stage and it is perhaps not appropriate at this stage to name witnesses.

In relation to term of reference 1.8, you will recall that is the term of reference that deals with the appointment of advisors in the Ministry of Treasury in relation to the appointment in December 2015 of Minister Des van Rooyen. That matter is almost ready. Certain investigations need completion, statements are ready and the relevant witnesses will be called in the concluding parts of Phase One. Certain other witnesses Chair have expressed a willingness to testify sooner rather than later, and again, those with the assistance of the investigators and the legal team, statements will be prepared and put before you also in the latter stages of Phase One. So there is a lot of work still to be done before we move to Phase Two.

- 10 Phase Two, Chair, as you will understand, involves intensive work on the part of the investigation team assisted by the legal team and as soon as we have clarity on the products of that investigation, which at this stage we don't have, we will put forward a further programme for Phase Two beginning later in the year.

CHAIRPERSON: Thank you very much Mr Pretorius. Just to confirm then, the Commission will not be sitting tomorrow. And next week, it will only resume sitting on Thursday. And on Thursday it will hear a certain application, details of which it is not considered appropriate to disclose to the public at this stage and that might take Thursday and Friday next week. Minister Nene, the Minister of Finance will give his evidence on the 3rd of October and Minister Gordhan will give his evidence on the 10th of
20 October and former Minister Barbara Hogan will give her evidence on the 15th of October. And in the meantime, in between, there might be other witnesses that you might bring in, I understand the position relating to Phase One, either in between or much later.

ADV PAUL PRETORIUS SC: In the intervening dates, perhaps on short notice, there may be other witnesses who become available, given international travels and other considerations.

CHAIRPERSON: Yes, and that includes the issues of cross-examination or not really? When Mr Jonas would give his evidence, and then will finalise and then be available for cross-examination.

ADV PAUL PRETORIUS SC: Yes similarly Ms Mentor and then arrangements will be made with the legal team as well.

CHAIRPERSON: Yes and so far, other than applicants whose application for leave to
10 cross-examine have been refused, no one has applied for leave to cross-examine Mr
Maseko?

ADV PAUL PRETORIUS SC: Yes no one has applied.

CHAIRPERSON: Okay thank you very much, we will then stop at this stage. The proceedings are therefore adjourned until Thursday next week.