

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

15 NOVEMBER 2018

DAY 24

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PROCEEDINGS HELD ON 15 NOVEMBER 2018

CHAIRPERSON: Yes Ms Mhlape?

MS MAHLAPE: Thank you. Thank you Chair.

CHAIRPERSON: Thank you.

MS MAHLAPE: Chair, I address you in respect of Ms Menthu's evidence or completion of her evidence. The Chair will recall that according to the programme Ms Menthu is scheduled to appear before you tomorrow, Friday, at which she is expected to conclude her evidence-in-chief and to be handed over cross-examination.

As things stand right now Ms Menthu is available and is willing to appear before you today or tomorrow. There are certain facts we would like to place before you, however, before you take a decision on the direction of her evidence, and they are as follows.

After Ms Menthu had testified, we as the Commission initiated certain investigations arising from her testimony. Since then we have been receiving results of these investigations, in certain instances some of these investigations, some of the results have prompted further investigations. We have about three critical investigations that are incomplete, that the results of which are very important, both for the Commission and the evidence of Ms Menthu.

We are of the firm view that it is only fair and appropriate that Ms Menthu be given an opportunity to deal with the results of all investigations, whether the results contradict her evidence or whether they corroborate what she has stated, but she must be able to deal with them prior to being cross-examined and prior to being excused.

We also think that it is in the best interests of the commission to address issues in this fashion because if we do not the following is likely to happen. Ms Menthu may come in tomorrow, complete and then have to be recalled to deal with the results

of the investigations, which results themselves may potentially prompt further applications for cross-examination based on the results, because the results of the investigations are shared with the implicated persons as well.

We consider that to be slightly a tardy approach and we would request for a better approach subject to what the Chair says, which is to allow the investigations to run their course, to get all the results or at least to get in most of the results and then call Ms Menthu to testify. At current planning we anticipate that at the most the results should be in within two weeks, which results then to the extent necessary, which results will form part of the next bundle of Ms Menthu, and to the extent necessary will be shared ahead of time with the implicated persons who have been granted right for cross-examination.

For the Chair's information we have communicated to those who have been granted right of cross-examination, that we will be applying or requesting the Chair to consider deferring Ms Menthu's evidence to a later date. We have invited them to be present today when we make this request, an up to this point there has been opposition to that state of affairs. So as far as their potential prejudice is concerned, we submit that we do not see any basis on which they may claim prejudice.

With your leave then Chair, we would request that Ms Menthu's evidence be deferred to the next available date, which on the programme is the 30th of November, at which she will complete her outstanding chief and then she will be handed over for cross-examination. If the Chair will recall there are three applicants to cross-examine her, all of whom have been granted the right to cross-examine but on very limited issues, and we do not anticipate that anything new will arise that will interest the implicated persons from the investigations. What will arise is more to the benefit of the Commission and the Chair himself.

CHAIRPERSON: From what you say it appears that the deferment that you are asking for is aimed at making sure that before she, that is Ms Menthu, she resumes giving evidence. She has had an opportunity to be – to consider the results of any investigations of various aspects relating to her evidence. And I guess also that that might also be fairness to implicated persons in the sense that if that investigation results in certain issues that she has dealt with, being seen maybe to support their version, it is all in the interests of everybody that we get to the bottom of the issues.

MS MAHLAPE: Indeed Chair.

CHAIRPERSON: And I think it is important to ensure that issues that arise from her evidence be properly investigated because if her evidence is ultimately found to be true by this Commission, it could have very serious implications for implicated persons, or at least some of them, and if her evidence is not true it could have – there could be serious consequences also because her evidence is really very pertinent to some of the issues we are investigating. So it is very important that the investigation of the issues arising from her evidence be properly looked into. So I am inclined to grant the deferment. She has been consulted on the issue I understand.

MS MAHLAPE: Yes Chair, I confirm, she has been consulted.

CHAIRPERSON: Yes.

MS MAHLAPE: As the Chair is aware Ms Menthu is not based in Johannesburg, she is in Johannesburg as we speak right now.

CHAIRPERSON: Yes, yes.

MS MAHLAPE: And would have availed herself any moment from now if she were instructed to appear.

CHAIRPERSON: Yes.

MS MAHLAPE: So she is available and ready to appear.

CHAIRPERSON: Yes, so that that is fine. The date of 30, that has also been canvassed with implicated persons, lawyers or not really?

MS MAHLAPE: The date itself, of the 30th, if I may just confer with the attorney very quickly.

CHAIRPERSON: Ja.

MS MAHLAPE: Chair thank you, Mr Mabunda confirms that the proposed date of 30 November has been put to the implicated persons, yes, and it has also been canvassed with Ms Menthu, and it would, for now suit her.

CHAIRPERSON: Ja okay. No, that is alright. In the interests of ensuring that there is a proper investigation of issues relating to the evidence presented by Ms Menthu before his Commission so far, I conclude that her evidence, the hearing of her evidence be deferred, and it will be deferred to 30 November 2018.

MS MAHLAPE: As the Chair pleases.

CHAIRPERSON: Thank you.

MS MAHLAPE: Thank you.

MALE SPEAKER: Thank you Chair, the next matter for your consideration if an application for postponement by the legal representatives of Mr Nene, Adv Adila Hassim will address you.

CHAIRPERSON: Thank you.

MS ADILA HASSIM: Thank you Chair, I appear together with my colleague Ms Rajah, for former minister of finance Mr Nene. Chair, if I may begin with the summary. This is an application for postponement for a hearing that was due to take place today. The facts are set out in the application that is before you, in the affidavit of Mr Nene, and it appears from the facts that the summons is dated 22 October 2018. However, it was at first sent to the wrong attorneys, not the attorneys, instructing attorneys of

Minister Nene. It subsequently was then sent to the State Attorney, the correct attorney for Minister Nene, but then suffered the fate of the dysfunctional e-mail system in the State Attorney's office. It eventually then made its way to National Treasury and the former chief of staff for Mr Nene, communicated to him that the subpoena had arrived but he only then, as he says in his affidavit, got news of it on the 8th of November.

It was at that point we were then advised of his inability to appear as requested on the date in the summons, and he has instructed us to bring this application on his behalf. The reasons for the postponement, the reason for the postponement is due to medical reasons, due to an injury that he sustained to his left ankle, and that is set out in paragraphs 9 and 10 of his affidavit. He has been required by his doctor to remain – to limit his movement, as he states in his affidavit. We have attached a medical certificate which is Annexure E, page 16 of the application, from his attending physician who says in that medical certificate that he is unable to resume duty until the 1st of January 2019. Chair, if I may, this morning we received a more detailed letter from the doctor and I beg leave to hand it up. You will see that the letter is dated 15 November 2018, it is signed by the same doctor who signed the medical certificate at page 16 of the application.

CHAIRPERSON: Yes.

MS ADILA HASSIM: And perhaps the most important sentence is the last paragraph where he states that it is recommended that he does not travel, that is Mr Nene, does not travel, fly or travel due to the risk of a DVT. He also needs to elevate and rest the leg in order for the fracture to heal.

Mr Nene also wished to stress to the Commission, his willingness to cooperate, and that he will make himself available as soon as he is physically able to

do so, and on any day after the 1st of January, and hopefully in agreement with the Commission's legal team.

CHAIRPERSON: Yes.

MS ADILA HASSIM: I therefore submit Chair, that these reasons as set out in the affidavit constitute good cause as we understand it from our common law and affirmed in the Constitutional Court in Chilobana. In any event we submit that it is in the interests of the efficient and effective procuring of evidence from Mr Nene that when he provides evidence he is able to do so on the basis of being apprised of what evidence he will be required to provide to the Commission. I am also advised that the matter is not opposed.

CHAIRPERSON: Yes. No, no, it is quite clear that he is injured and is – cannot travel or should not travel, and therefore he should be allowed to come at another time when he has recovered. He has been very cooperative to the Commission. He has been very helpful so there is really no reason why the request cannot be accommodated. I take it that at this stage no date has been arranged yet, or is there?

MS ADILA HASSIM: No date has been arranged yet.

CHAIRPERSON: No date has been arranged so ... [intervenes].

MS ADILA HASSIM: But Mr Nene has offered his availability from the 1st of January.

CHAIRPERSON: Anytime from – in January and beyond.

MS ADILA HASSIM: Yes.

CHAIRPERSON: Ja. Okay, alright. I thin what we will, I think Mr Pretorius might want to say something, thank you very much.

MS ADILA HASSIM: I am indebted Chair, thank you.

CHAIRPERSON: Thank you.

MR PAUL PRETORIUS: Thank you Chair. As a formality quite obviously the

application is supported by the legal team. I might just add that although the application did not cite any other interested parties, the attorney for the Commission, Mr Mabunda has notified all those parties richly implicated and who were issued with notices in terms of Rule 3(3). We might just add that there are no persons who have sought advantages in terms of Rule 3(4), nevertheless everyone is away, and there is no opposition to the application.

CHAIRPERSON: Okay.

MR PAUL PRETORIUS: If I may just clarify one, two matters, firstly Mr Nene had been issued with a summons to appear today, and perhaps as a formality Chair, you should excuse him from compliance with the summons but that is inherent in your order anyway.

CHAIRPERSON: Yes.

MR PAUL PRETORIUS: But the second point is there is an allegation ... [intervenes].

CHAIRPERSON: Should that summons have been issued ... [intervenes].

MR PAUL PRETORIUS: I am sorry Chair?

CHAIRPERSON: Should that summons have been issued.

MR PAUL PRETORIUS: Yes.

CHAIRPERSON: Should it have been issued, that summons?

MR PAUL PRETORIUS: That is a matter that the legal team decided to do in respect of all witnesses, and it is a practice that has been applied thus far. It is always open to reconsideration, and may be discussed with you outside of these proceedings.

CHAIRPERSON: Ja.

MR PAUL PRETORIUS: But as far as summons is concerned there was a policy decision taken to avoid difficulties in programming, as a friendly summons should be issued and all witnesses should be treated the same way.

CHAIRPERSON: I will just set aside the summons and – so the summons that was issued in respect of Mr Nene is set aside. The hearing of his evidence is not to proceed today, it is deferred to a date to be arranged between the Commission's legal team and his legal team.

MR PAUL PRETORIUS: Yes, may I just raise one other matter very briefly Chair, in paragraph 5 or 6 rather, of the papers, and in her address to you it was stated that originally summons was served on the wrong attorney. May I just clarify? I have asked the attorney Mr Mabunda to clarify that and he instructs me that at some stage Mr Max Bakwana was in fact the attorney of record and there was never a formal notification to us that that situation had changed, and that gave rise to the original service on Mr Bakwana.

CHAIRPERSON: Oh, but had the current – had his current attorneys had communication with the legal team?

MR PAUL PRETORIUS: I am not clear on that issue but all I can say is that given historical facts, Mr Mabunda was, at the time, under the impression that Mr Bakwana remained the attorney for Mr Nene.

CHAIRPERSON: Okay, alright.

MR PAUL PRETORIUS: I am not seeking to lay blame anywhere, merely to clarify.

CHAIRPERSON: Ja.

MR PAUL PRETORIUS: From Mr Mabunda.

CHAIRPERSON: Okay no, that is alright, thank you.

MR PAUL PRETORIUS: Thank you Chair. I do not know whether counsel for Mr Nene, looks like she wants to say something or no. Okay, alright, okay. Thank you, we are done. We have – I have made orders in regard to Mr Nene's application so we are done with that.

MR PAUL PRETORIUS: Thank you Chair.

CHAIRPERSON: Ja, is that all for this morning?

MR PAUL PRETORIUS: We resume on Monday then, with the evidence of Minister Gordhan.

CHAIRPERSON: Okay we are going to adjourn these proceedings until Monday when Minister Gordhan will give evidence, and there are other witnesses who will give evidence next week. The proceedings are adjourned.

COMMISSION ADJOURNS