

**COMMISSION OF INQUIRY INTO STATE CAPTURE**

**HELD AT**

**PARKTOWN, JOHANNESBURG**

10

**08 APRIL 2019**

**DAY 80**

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**PROCEEDINGS HELD ON 8 APRIL 2019**

**CHAIRPERSON:** Good morning Mr Pretorius, good morning everybody.

**ADV PAUL JOSEPH PRETORIUS SC:** Morning DCJ. DCJ as you are aware there is a necessity which arisen for an application for condonation and postponement of the evidence of two witnesses. May I firstly uplift of the copy of the application before you and replace it with this copy? This is the original which has been duly attested.

**CHAIRPERSON:** Yes okay. Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Chair after the evidence of the last few weeks involving matters relevant to the Free State Province and Bosasa we now moving to a  
10 new phase of the evidence to be presented before you and that is evidence relating to Law Enforcement Agencies. The original plan was that Mr McBride would give evidence today and General Booyen would give evidence on Thursday. The necessity for the postponement to Thursday and Monday respectively of the two witnesses has been occasioned by the failure of the legal team to ensure – to ensure that 3.3 notices that is notices to implicated persons to enable them to consider evidence and apply to cross-examine have not been issued. There was a decision or a proposal at least that in order to reduce formalities the need for formal application such as the present could be obviated but it has now been determined in consultation with yourself Chair that this particular application is necessary despite that intention to reassure the public and to  
20 reassure interested parties that despite the logistical and capacity challenges that the commission is facing it does regard compliance with its rules as a serious matter. And in going through the rules it may be that those rules need to be changed in one form or another to facilitate the continuous giving of evidence before the commission. So I will take some time for that reason to explain not for your purposes but for the benefit of implicated parties who may be witness to this particular application and for the public at

large to understand the rules and how they operate. Chair Rule 3.3 of the quite comprehensive set of rules that govern the operations of this commission states quite clearly that:

“If the commission’s legal team intends to present to the commission a witness whose evidence implicates or may implicate another person it must through the secretary of the commission notify that person in writing within a reasonable time before the witness gives evidence.”

And that notification involves a number of steps and a number of series of pieces of information that must be provided to that witness. But essentially the notice serves two purposes. The first it allows a person to make arrangement to attend and hear the evidence of the person who is the witness. And secondly to enable that person a period of fourteen days – two weeks says the Rule to consider his or her position as an implicated person to obtain legal advice if necessary to then apply to you Chair for the leave to cross-examine. So that is essentially the two-fold purpose of a notice in terms of Rule 3.3. Rule 3.3.6 says that:

“If an implicated person wishes to give evidence to call any witness to give evidence on his or her behalf of wished to cross-examine the witness he must – he or she must within two weeks from the date of the 3.3. Notice apply in writing for – to the commission for leave to do so.”

And then the provision is that you Chair will decide the application. Rule 3.4 states that:

“The application to cross-examine or to give evidence or to call another witness to give evidence must be made within fourteen

days from the date of the notice referred to in 3.3.”

And 3.5 then provides that:

“If any implicated person believes that he or she has received inadequate notice then he or she may apply to the commission for such order as will ensure that he or she is not seriously prejudiced.”

Now Chair in summary a witness is to be called, notices given to an implicated person of the nature and extent of that evidence. That then person then has fourteen days to make application to give evidence, to call a witness or to cross-examine the witness  
10 concerned. And that implicated person has fourteen calendar days to do so. That is the scheme of Rule 3.3 to 3.4 and of course if a person who is implicated believes he or she has been prejudiced there is provision for relief to be granted. That is the scheme of the rules. But Chair importantly that scheme was predicated on the assumption that a witness would be called, due notice having given and a two week period preceding the evidence having been provided for and in that period all the applications for cross-examination would be heard. The implicated person would be given an opportunity to respond thereto so that a witness could come and give evidence and them immediately be cross-examined. That was the idea. That has proved unworkable for a number of reasons. Firstly Chair if the legal team and the commission secretariat does not know  
20 how long a witness is to give evidence for and for how long and by how many people that witness will be cross-examined for what periods of time it is impossible to plan in the medium to long term for a continuous stream of evidence. So what has happened is a matter of practicality is that evidence in chief has been planned, given and we can therefore ensure reasonable continuous presentation of evidence without gaps in between occasioned by uncertainties. The other problem that has occurred in practice

is that coordinating the dates and availability of various legal teams all to be available at a particular pre-planned date without notice to those legal teams for cross-examination has in our experience not been possible. So the solution that has been implemented by the legal team and the commission in consultation with yourself Chair is that witnesses come, they give evidence in chief, and then there is a postponement for the purposes of cross-examination. So where a witness' evidence is postponed for cross-examination there is no prejudice in one respect at least to implicated person because they have a long period then to consider their position to make application and then dates can be arranged with the various legal teams for cross-examination to the

10 convenience of all. The problem however is that the notice serves another purpose and that is to arrange to be present to testify and for that reason at least some notice is required if not fourteen days to enable lawyers or implicated parties to be present to hear evidence. That prejudice is alleviated somewhat by the fact that if someone is not present physically to hear evidence; evidence is televised; it is available on record; written statements and bundles are available or are provided to implicated persons and so that prejudice is somewhat alleviated by the circumstances which prevail here at this venue with the televising of witnesses and their availability electronically of a record. One of the amendments to the rules that may be considered is that the reasonable time should be given to witnesses rather to implicated parties' before cross-examination

20 rather than before the witness gives evidence provided that there is sufficient notice to the implicated parties to enable that party to attend which may not be a formal Rule 3.3 Notice but another form of notice. But Chair the legal team is considering the position and may make representations regarding a different order of things for the future because after the break in April the pressure on the commission will be enormous and much greater than the pressure that the commission is presently experienced. The

application is – has also been necessitated by the fact that matters were not attended to by the legal team. The legal team takes full responsibility for that. Nevertheless having said that there are logistical challenges which we need not deal with in public. Capacity and legal challenges which are being dealt with at present and are referred to in the application. So Chair that by way of background provided a witness gives evidence in circumstances where an implicated party has notice of the fact that that person is giving evidence and provided an implicated party has ample time at least two weeks and in this case it will be more to consider his or her position brief counsel or seek assistance from the commission itself to prepare an application for cross-

10 examination or to lead evidence either personally or through other people any prejudice involved can be avoided. And our submission is that on the facts of this particular application prejudice; serious prejudice can be avoided or remedied if any particular party wants to come before you. That by way of background Chair if I may then address the particular circumstances of the case? With Mr McBride of course the Chair is aware that he was here in February. Some 30 to 50 notices have been considered since then and quite frankly although the work could have been done it was not done owing to the fact that those responsible and ultimately myself Chair for the issuing of the notices were otherwise engaged. Notices have been prepared and they going out today. In that circumstance parties will have notice that Mr McBride is intended if you

20 grant the application to give evidence on Thursday. That should provide sufficient time in our view for a party to make arrangements to hear the evidence either through television or get a record or be present. The time for cross-examination will be far in excess. The time to make application for cross-examination will be in excess of fourteen days so there is no prejudice there.

**CHAIRPERSON:** Well the time within which to make an application for leave to cross-

examine remains the same. It is specified in the rules.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes it is two weeks.

**CHAIRPERSON:** So – so an impression must not be created that if I grant a postponement people have more time than fourteen days to file an application for leave to cross-examine.

**ADV PAUL JOSEPH PRETORIUS SC:** That is a very good point and I should be castigated for trying to guild the lily. Chair it is – you are quite correct Chair the fourteen days remains the fourteen days and that – that is indeed correct. So the full fourteen days afforded by the rules remains intact. In relation to General Booyen his  
10 evidence was planned for Thursday and will be postponed until Monday or soon thereafter as he may be heard because it is not clear how long Mr McBride's evidence will take. We are estimating and will attempt to complete it within two days. His evidence was due to be heard on Thursday and if it can be heard on Monday. The position is that people can make arrangements to hear or be present to hear the evidence and then the fourteen day period will run from today or tomorrow. I must say that logistically the administrative team in the commission's office is dealing with approximately 100 hundred notices for both witnesses and so the backlog is perhaps inevitable. In order to reassure the public Chair you are obviously aware of the planned increase in capacity both on the attorney assistance side and on the administrative side  
20 which barring any hurdles should be in place within the next few weeks. So we hope to avoid the situation in future.

**CHAIRPERSON:** Well the bottom line is that we are in this situation where once again an application is made for the postponement of Mr McBride's evidence because despite the fact that a postponement was granted on the 18<sup>th</sup> February precisely for the point – for the purpose that Rule 3.3 Notices should be served on implicated persons. The

legal team failed to make sure over more than – over a period of around what six weeks to make sure that the notices were sent to implicated persons. That is not acceptable. When Mr McBride’s statement was available last time I take it that it was complete with all annexures and all that remained was that copies be made and be sent out. And now we have to postpone his evidence again. You have indicated that the legal team takes full responsibility for this. I appreciate that the legal team and everybody are working extremely hard and that they are very busy but there simply can be no excuse for this not having been done. I am sure that this experience will result in measures being put in place to make sure that there is no repeat of this kind of mistake. The commission  
10 does not have a lot time left before it finishes its work within the time prescribed to it. Therefore we need every hour – we need to use every hour and every minute that we have to do the work and to hear witnesses. So that it is unacceptable should be made quite clear and unequivocally. Fortunately the rules of the commission do seek to make provision that would eliminate as far as possible any serious prejudice to implicated persons. We have maintained from the inception of this commission that the rights of implicated persons are important. That everyone must be treated fairly and that includes all implicated persons. They will be treated fairly in this commission and we will do all we can to respect their rights. Where mistakes have happened it is important that responsibility be taken and that steps be taken to make sure that there is no repeat  
20 or that prospects of a repeat are seriously reduced. I am prepared to grant the adjournment as requested in the hope that we will not have a repeat of this. Of course we must not overlook any inconvenience to the witnesses themselves who keep on making themselves available and find that there must be an adjournment that is important. It is important that we make known that we also have regard to their convenience as well. I will therefore grant an adjournment of Mr McBride’s of the

hearing of Mr McBride's evidence from today to Thursday this week and that of General Booyesen from Thursday to Monday – from Thursday this week to Monday next week. His evidence being subject to when Mr McBride's completes his own evidence. So therefore the evidence of those two witnesses, the hearing of the evidence of those two witnesses is adjourned as I have indicated. The implication of that is of course that therefore there will be no hearing of any evidence this week until Thursday morning. On Thursday Mr Pretorius should we not start earlier than normal seeing that we are losing time?

**ADV PAUL JOSEPH PRETORIUS SC:** We can Chair but apart from Mr McBride and  
10 General Booyesen there are no witnesses from Law Enforcement Agencies planned for this week and next week and then the interposition of evidence regarding Transnet is planned. But happy to start earlier say 09:30 would be convenient because one needs to prepare as well. There is a lot of work still to be done.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** There will be an opening statement.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Before Mr McBride gives evidence.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** And there may be a need for an application  
20 which I will discuss with you in chambers.

**CHAIRPERSON:** Yes. How long is the opening statement likely to take because that may be relevant to the question of when we should start and when he is...

**ADV PAUL JOSEPH PRETORIUS SC:** Between one and two hours.

**CHAIRPERSON:** When he is likely to finish his evidence because from what you have said we should try and aim at making sure that he finishes his evidence on Friday. So –

you say the opening statement might be three hours?

**ADV PAUL JOSEPH PRETORIUS SC:** No between one and two hours.

**CHAIRPERSON:** Between one and two hours?

**ADV PAUL JOSEPH PRETORIUS SC:** I can try and restrict it to one hour.

**CHAIRPERSON:** And what is your own estimate of how many hours his evidence is likely to be even though it might be difficult to say...

**ADV PAUL JOSEPH PRETORIUS SC:** Yes.

**CHAIRPERSON:** But what is your estimate?

**ADV PAUL JOSEPH PRETORIUS SC:** Chair if all goes according to plan and there  
10 are questions of limited nature and there is no need for lengthy explanations to explain evidence we should be complete within two days.

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** But one must make provision at least in theory for time for matters to be placed in context.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** And collateral evidence to be given in order to...

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Clarify what is being said by the witness.

20 **CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** And my fear is that that may take us over Friday.

**CHAIRPERSON:** So we might have to then start early on Friday and add some time after four o'clock as well.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes Chair.

**CHAIRPERSON:** Certainly on Thursday and maybe Friday we might need to start early as well?

**ADV PAUL JOSEPH PRETORIUS SC:** Yes Chair.

**CHAIRPERSON:** Well they – we are going to have today, tomorrow and Wednesday which obviously will be used for a lot of other work that always needs the attention of the legal team as well as myself and everybody. But why should we not start at nine on Thursday? That gives you that one hour which might be enough for the opening statement but maybe you need another one? But if you have things to attend to we could start at half past nine and just add more time after four?

10 **ADV PAUL JOSEPH PRETORIUS SC:** I would prefer the latter.

**CHAIRPERSON:** Half past nine.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes please.

**CHAIRPERSON:** Okay then we will start at half past nine and then we will not – we will not finish at four we will go at least up to five and then on Friday start early. You will just have remind me on Thursday to indicate what time we would start on Friday. We might have to start a little earlier but also it will depend on progress that we will have made on – by end of the day on Thursday. We are going to adjourn the proceedings then until half past nine on Thursday for the hearing of Mr McBride's evidence. We adjourn.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair.

**REGISTRAR:** All rise.

**INQUIRY ADJOURNS TO 11 APRIL 2019**