

COMMISSION OF INQUIRY INTO STATE CAPTURE
HELD AT
CITY OF JOHANNESBURG OLD COUNCIL CHAMBER
158 CIVIC BOULEVARD, BRAAMFONTEIN

19 NOVEMBER 2020

DAY 309



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DATE OF HEARING:

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 19 NOVEMBER 2020

CHAIRPERSON: Good morning Mr Pretorius, good morning everybody.

After hearing argument on Monday I indicated that I would give my ruling on Tuesday but we had to extend or postpone until this morning. I am now ready to give the ruling.

The actual full typed ruling/judgment will be available later today because there are some further
10 corrections to be made. But this is the ruling.

R U L I N G

This is an application brought by Mr Jacob Gedleyihlekisa Zuma for my recusal as Chairperson of this commission or for my recusal from hearing any evidence that may be given by him or any member of family in this commission.

Mr Zuma to whom I shall I refer in this ruling/judgment as the Applicant is a former President of the Republic of South Africa.

20 On 22 October 2020 the Applicant was served with a summons issued and signed by the Secretary of the Commission requiring or compelling him to appear before the commission at ten o'clock on 16 – 20 November 2020 for the purpose of giving evidence and being questioned by an evidence leader in the commission.

The scope of his evidence was to cover about 35 affidavits or so of certain witnesses who have already testified before the commission.

On Wednesday 11 November 2020 the application lodged with the commission an application for my recusal. The application was set down for hearing before me. It was opposed by the server of the commission who delivered an answering it – an answering affidavit during the weekend of the 14 November 2020.

10 A replying affidavit by the Applicant was delivered in the evening on Sunday the 15 November 2020. Under circumstances that will be apparent from this judgment or ruling later I read a certain statement into the record at the commencement of the proceedings on Monday 16 November 2020.

A copy thereof was given to the Applicant's attorneys as well as the commission's legal team. Subsequently the Applicant delivered another affidavit on Wednesday 18 November 2020.

20 I have heard oral argument from Counsel for the Applicant Mr Skihakhane SC who was assisted by Mr T Masuku SC as well as argument from Mr P J Pretorius SC the head of the commission's legal team.

Before I proceed it is necessary to set out the background to this application. It is not necessary to set

out that background in any great detail because the establishment of this commission is well-known.

It suffices to point out that in accordance with its name this commission was established to investigate and report on allegations of state capture, corruption and fraud in the public sector including organs of state.

It was established by the Applicant in January 2018 when he was still the President of the country. He did so pursuant to an order of the High Court Pretoria which gave
10 effect to the then Public Protector's Remedial Action.

In accordance with the Public Protector's Remedial Action and the order of the High Court Pretoria I was selected by the Chief Justice and appointed by the Applicant as the then President of the Republic as the Judge who would chair this commission.

My appointment was announced by the Applicant in January 2018. I am the sole member of the commission. The commission has a secretary who heads the secretariat of the commission. It also has its legal team as well as the
20 investigation team.

The legal team consists of a number of practicing attorneys and advocates. The investigation team consists of various investigators.

Part of the Terms of Reference of this commission which were approved by the Applicant when he was still

President include apart from the Provision that the commission must investigate allegations of state capture, corruption and fraud in the public sector including organs of state. They include that the commission must investigate and report on whether and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive [including Deputy Ministers, Office Bearers and of Functionaries employed by or Office

10 Bearers of any state institution or organ of state or directors of the boards of SOE's].

In particular the commission must investigate the veracity of allegations that former Deputy Minister of Finance Mr Ncebisi Jonas and Ms Mentoer were offered Cabinet positions by the Gupta family.

1.2 Whether the President had any role in the alleged offers of Cabinet positions to Mr Ncebisi Jonas and Ms Mentoer by the Gupta family as alleged.

1.3 Whether the appointment of any member of the

20 National Executive Functionary and or Officer Bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and or announced and if so whether the President or any member of the National Executive is responsible for such conduct.

1.4 Whether the President or any member of the President or previous members of his National Executive [including Deputy Ministers or public official or employee of any state owned entity] breached or violated the constitution or any relevant at the [00:08:37] or legislation by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state.

10 1.5 The nature and extent of corruption if any in the awarding of contracts tenders to companies, business entities, organisations by public entities listed under Schedule 2 of the Public Finance Management Act Number 1 of 1999 as amended.

1.6 Whether there were any irregularities undue enrichment, corruption and undue influence in the awarding of contracts, mining licences, government advertising in the New Age newspaper and any other government services in the business dealings of the Gupta family with
20 government departments and SOE's.

1.7 Whether any member of the National Executive and including Deputy Ministers unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies.

1.8 Whether any advice as in the Ministry of Finance were

appointed without proper procedures in particular and as alleged in the complaint to Public Protector where there are two senior advisors who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures.

1.9 The nature and extent of corruption if any in the awarding of contracts and tenders to companies, business entities or organisations by government departments, agencies and entities in particular whether any member of
10 the National Executive including the [President, public official, functionary of any organ of state influence the awarding to tenders to benefit themselves, their families or entities in which they held a personal interest].

Paragraph 3 of the Terms of Reference reads and I quote:

“All organs of state will be required to cooperate fully with the commission.”

7. There are two ways in which a person may be compelled to appear before the commission for purposes of
20 giving evidence. The one is the issuing of a summons against such a person in terms of Section 3 of the Commission's Act 1947. The other is by the issuing of a directive by the Chairperson in terms of Regulation 10.6 of the Regulations of the Commission.

In terms of Regulation 10.6 the Chairperson also

has the power to issue a directive to anybody to depose to an affidavit or affirmed declaration for the purposes of the investigations of the commission.

I have already said that the Applicant was served with a summons to appear before the commission this week. I have previously also issued two directives in terms of Regulation 10.6 against the Applicant to furnish the commission with affidavits dealing with certain matters.

10 I will have reason to revisit this subject later in this ruling.

8. The commission has been hearing oral evidence since August 2018 except for certain breaks that it has taken. I understand that it has heard about 257 witnesses.

By way of an order of the High Court Pretoria the commission's lifespan has been extended to the end of March 2021. Pursuant to an invitation extended to the Applicant to appear before the commission from 15 to 20 July 2019 the Applicant appeared before the commission from two and half days or so.

20 He gave evidence and was given an opportunity to present his side of the story and was questioned. However while the Applicant was being questioned he objected to further questioning on the basis that he was being cross-examined. As a result of that objection a discussion ensued in terms of which an agreement was reached

between the Applicants legal team and the commission's legal team aimed at addressing the Applicants concerns regarding how he was questioned.

I announced the Terms of the Agreement at the hearing. Three of the terms were that the commission's legal team would by 30 July 2019 furnish the Applicants team with a document that identified areas of interest in each affidavit in regard to which the Applicant was required to provide his version.

10 Another term was that the two teams would seek to agree the date by which the Applicant would deliver his affidavits but that if the two teams did not reach agreement the matter would be brought to my attention and I would after hearing both sides determine the period within which the Applicant would deliver his affidavits.

Prior to the commission's legal team reaching agreement with the – with the Applicants legal team the Applicant informed the commission through his legal team that he had decided to terminate his participation in the
20 commission due to his dissatisfaction with how he had been questioned.

However the agreement that was reached included an undertaking by the Applicant that he would continue to participate in the commission and would therefore return on a later date to continue his testimony.

Subsequent to the Applicants appearance before the commission in July 2019 the commission's legal team furnished the Applicants legal team with a document identifying "areas of interest in various affidavit" in respect of which the Applicant was required to provide affidavits containing his versions.

In other words the commission's legal team complied with his obligations under the agreement of July 2019. The Applicant failed to agree with the commission's
10 legal team a period within which he would furnish the affidavits he had undertaken to furnish the commission.

Ultimately I fixed a date by which the Applicant would deliver his affidavits. Nevertheless the Applicant failed to deliver those affidavits.

Between July 2019 and mid-December 2019 the commission set aside various weeks for the Applicant's appearance before the commission but the attempts were unsuccessful.

Towards the end of 2019 the dates of 26 to 31
20 January 2020 were set aside for the Applicant's appearance before the commission and the Applicant was notified.

In December 2019 the commission's legal served the Applicant with an application for an order to be made by me authorising the issuing on a summons to compel the

Applicant to appear before the commission on specified dates in January 2020 – that is 26 to 31 January 2020.

The Applicant delivered opposing affidavits. The application was set down for hearing. On the date when the application was to be heard it was adjourned on the basis that another date would be allocated for argument. The application was adjourned because it appeared that owing to medical reasons the Applicant was not going to be available to appear before the commission until after March
10 2020.

Also the commission's legal team needed time to prepare a replying affidavit to the Applicant's answering affidavit in that application. The replying affidavit was delivered by the commission's legal team in due course.

Before the application could be set down for hearing the state of national disaster was declared and a national lockdown was instituted with effect from 26 March 2020 to deal with Covid-19.

From that time to 28 June 2020 the commission did
20 not have hearings. It resumed its hearings during the week of 29 June 2020.

By the last week of August 2020 the Applicant had not furnished the commission with the affidavits it had – he had undertaken in July 2019 to furnish to the commission.

By the beginning of the national lockdown there was

a great number of witnesses who had testified before the commission in respect of whose evidence the Applicant had been served with Rule 3.3 Notices in terms of Rules of the Commission.

These are notices which are served on a person who is either implicated or who may be said to be implicated in a witness' statement.

During August 2020 the Applicant was notified that 21 to 25 September 2020 had been set down as the dates
10 for the Applicant to appear before the commission.

On 27 August 2020 I signed the first ever Regulation 10.6 Directive against the Applicant which was issued soon thereafter and later served on the Applicant.

Through the Regulation 10.6 Directive I sought to compel the Applicant to deliver an affidavit or affidavits giving his version in response to the affidavits of Mr Popo Molefe in regard to the commission's investigations into certain matters at PRASA.

Around 11 September 2020 I signed another
20 Regulation 10.6 Directive seeking to compel the Applicant to furnish the commission with an affidavit giving his version to the affidavits of Mr Zola Tsotsi and Mr Nick Linnell with regard to a meeting that is alleged to have been held in the President's official residence in Durban on 8 March 2015.

On 1 September 2020 the Applicant's attorneys wrote to the acting Secretary of the commission and said that the Applicant would not be able to appear before the commission on 21 to 25 September 2020.

The reasons advanced were that:

- a. The Applicant's attorneys of record had been recently appointed as the Applicant's attorneys and needed more time in order to familiarise themselves with all the documentation which the Applicant had been served – with which the Applicant had been served by the commission since the establishment of the commission.
- b. The Applicant was "preparing for his much anticipated criminal trial the importance of which cannot be over-emphasised". The letter continued and said that it was "rather unfair to expect the Applicant to simultaneously consider evidence and affidavits of more than thirty witnesses in order to make himself ready to appear before the commission on 21 to 25 September 2020."
- c. The Applicant was of advanced age and given Covid-19 he had been advised to limit his movements.
- d. The Applicant had raised a concern regarding the recent amendments of certain regulations of the commission relating to the sharing of information with

Law Enforcement Agencies and was seeking legal advice “on the implications thereof on his further participation.”

e. The Applicant was also engaged in several other cases which required his full attention.

In that letter the Applicant’s attorneys also noted that Notice had been given of the intention of the commission’s legal team to proceed with the application for the authorisation of a summons to be issued against the
10 Applicant to compel him to appear before the commission.

The Applicant’s attorneys then said and I quote:

“It should follow that we must await the outcome of that application before we can discuss the possible appearance of the Applicant at the commission. We trust that the commission will engage with us regarding dates for the hearing of the application.”

The Applicant’s attorneys emphasised that dates
20 should have been discussed with them as the Applicant’s new legal team. And they requested that future dates be discussed with them.

On the 21 September 2020 which had been meant to be the first day of the Applicant’s appearance before the commission that week I made an announcement at the

commencement of the proceedings of the commission.

Since the Applicants attorneys had made it clear that the Applicant was not going to appear before the commission during the week of 21 to 25 September 2020 the commission made alternative arrangements in order to ensure that that week was not wasted.

The announcement that I made was that:

- a. The application for the authorisation of summons against the Applicant was set down for hearing on 9
10 October 2020.
- b. If the Applicant or his lawyers did not appear on the 9 October 2020 and did not provide good reasons why they – there was no appearance the matter would proceed with or without them.
- c. The dates 16 to 20 November 2020 had been determined as the dates for the next appearance of the Applicant before the commission. The Applicant was to subsequently say that I have called a media conference and made this announcement at a media
20 conference. That was not true as I had made the announcement at the commencement of the days' proceedings in the commission.

On the 28 September 2020 the Applicant's attorneys wrote a letter addressed to me in which for the first time the Applicant said that he would be seeking my recusal as

the Chairperson of the commission.

The Applicant's attorneys said that that they had been instructed to seek my recusal:

"On the ground that the Applicant reasonably apprehends that you have already adopted a biased disposition towards him and cannot bring an impartial mind to the issues and evidence that relate to him."

The Applicant's attorneys went on to say that the
10 Applicant's conclusion that I was no longer capable of exercising an independent and impartial mind was fortified by what he viewed:

"As the unwarranted public statements made by the Chairperson at the said media briefing."

The Applicant's attorneys went on to say that the Applicant has:

"Always expressed his willingness to cooperate with the commission."

20 They confirmed:

"This is in spite of his reservations about the legality of the commission and in particular about your suitability as Chairperson given your personal relations with him. However the conduct of the

Chairperson towards has left the Applicant with no choice but to take this step in order to defend his rights as a citizen. The Applicant believes that the Chairperson's conduct has stripped this commission of its much required and founded legitimacy."

The Applicant's attorneys also stated in the letter:

10 "Viewed in the context of previous media statements the conduct of the Chairperson and treatment of the Applicant by the commission the Chairperson's utterances have left the Applicant with distinct – with a distinct impression that the Chairperson seeks to target him for special treatment and public humiliation."

In paragraph 9 of that letter the Applicant's attorneys said:

20 "The Applicant believes that the source of the Chairperson's bias against him stems from the fact that the Applicant and the Chairperson have historical personal family and professional relations that ought to have been publicly disclosed by the Chairperson before accepting his appointment."

This sentence in the Applicant's attorney's letter of 28 September 2020 makes it clear that at least as at that time the Applicant believed that the source of my alleged bias against him stem from:

10 "The fact that the Applicant and Chairperson – the Chairperson have historical personal family and professional relations that ought to have been disclosed publicly disclosed by the Chairperson before accepting his appointment."

In paragraph 10.3 of the letter the Applicant's attorneys wrote:

"The Applicant is of the firm view that the Chairperson's bias against is a result of personal and strained relations that the Chairperson ought to have disclosed right at the beginning of the inquiry."

20 In the letter of 28 September 2020 the Applicant's attorneys also listed what they said where some of the other reasons to be set out in greater detail in the affidavit relating to the recusal application. These were given as:

"10.1 The Chairperson's election to reserve media conferences for the Applicant attests to the fact that he seeks to portray him as uncooperative and belligerent in the eyes of

the public. No other witness has been subjected to such public rebuke through the media.

“10.2 It has become common place for the commission to parade a particular narrative through witnesses and to treat certain witnesses particularly those who implicate the Applicant with difference. It is apparent to the Applicant that the commission to seek to entrench a narrative that portrays him as guilty at all costs. The Applicant is of the firm view that the Chairperson’s bias against him is a result of personal matters and strained relations that the Chairperson ought to have disclosed right at the beginning of the inquiry. The Chairperson in its engagements with witnesses testifying before him, has already prejudged the very issues he is tasked to investigate.

10

In particular, he has already made prejudicial statements about the Applicant while addressing some witnesses who had made no reference to the Applicant.

20 The Chairperson refused to believe that the Applicant’s failure to appear before the Commissions earlier this year was due to struggle to seek medical treatment. Again, publicly or portraying him as a liar.”

And 10.6:

“The Chairperson has joined the narrative that seeks

to present the Applicant as the cause of all the corruption he is tasked to investigate.”

Before I proceed, I need to deal immediately with 10.5 which I have just read, where it is said that:

“The Chairperson refused to believe that the Applicant’s failure to appear before the Commission earlier this year was due to his trouble to seek medical treatment. Again, publicly portraying him as a liar.”

I want to indicate that there is absolutely no evidence in the
10 papers supporting this allegation against the Chairperson.

10.9:

“The Applicant’s attorneys also pointed out that until the Applicant’s recusal application had been determined, the Applicant would not take part in the Commission, recusal application.

In his founding affidavit, the Applicant provides what he refers to as the synopsis of the grounds upon which he seeks my recusal.”

He says that those grounds maybe summarised as
20 follows.

“1. given our personal relations, the background of which is set out fully below. Deputy Chief Justice Zondo ought to have declined to chair the Commission whose Terms of Reference indicated that I was to be the main implicated person.

2. In my absence the Chairperson has made several comments whose effect is the suggestion that I am already guilty of state capture.

Many of these comments carried with him a miscellanea on insinuations about my involvement in the unlawful capture of our state while I was President.

10 I am advised that it is not uncommon for judges to hear testimonies that may well them but they remain composed in order to create a safe forum even for the accused.

In this regard, they are guarded in the comments they make while hearing testimonies.

3. The Chairperson has singled me out for public announcements relating to me through the media. I am the only witness in respect of whom so many pre-statements have been issued by the Chairperson.

20 4. The Chairperson clearly doubts my bona fide. On two occasions he questioned or doubted my statement that I had trouble to seek medical attention.

5. the Commission has tendered to call only those witnesses particularly members of my cabinet that implicate me in some way or are disgruntled

that at some point I may have removed them from the cabinet posts.”

The law:

Counsel for the Applicant submitted that the Applicants case for my recusal is that the Applicant has a reasonable apprehension that I will not bring an impartial mind to the issues involving the Applicant. He made it clear, however, that's the Applicant's case was not based on actual bias.

In *The President of the Republic of South Africa and Others*, 1992(2) BCLR 725 (CC), the Constitutional Court had this to say about the importance of impartial adjudication of disputes and I quote:

“A cornerstone of any fair and just legal system is the impartial adjudication of disputes which comes before the courts and other tribunals.

This applies, of course, to both criminal and civil cases as well as to ad judicial and administrative proceedings.

Nothing is more likely to impair confidence in proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the officials who have the power to adjudicate on disputes.”

The test for the determination of a reasonable apprehension of bias was set out in these terms by the

Constitutional Court in SARFU and I quote.

“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case.

That is a mind open to persuasion by the evidence and submissions of counsel.

10 The reasonableness of the apprehension must be assessed in the light of the Oath of Office taken by the judges to administer justice without fear or favour and the ability to carry out that oath by reason of their training and experience.

It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions.

They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.

20 At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer for whatever reasons was not

or will not be impartial.”

It is important to highlight that the person contemplated in the test must be reasonable, objective and informed. The apprehension must be reasonable and that the question is not whether a reasonable, objective and informed person might on the correct facts apprehend but it is whether such a person would on the correct facts reasonable apprehend.

Furthermore, reasonable apprehension is not that the judge may not bring an impartial mind to bear on the
10 adjudication of the case but it is whether the reasonable apprehension is that the judge has not or will not bring an impartial mind to bear on the adjudication of the case. That is a mind open to persuasion by the evidence and the submissions of counsel.

The reasonableness of the apprehension must be assessed in the light of the Oath of Office taken by judges to administer justice without fear, favour or prejudice. Furthermore, the onus to establish the case is upon the Applicant.

20 In SARFU the court made it clear that an unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for an application for recusal and that the apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application.

Courts are hesitant to make a finding of bias or to conclude that there is a reasonable apprehension of bias in the absence of convincing evidence to that effect.

Both Mr Sikhakhane SC, who together with Mr Masuku SC appeared for the Applicant and Mr PJ Pretorius SC, the Head of the Legal Commission Legal Team, who agreed that the test as set out above is the test for a reasonable apprehension of bias but they differed on the application of the test.

10 No benefit will be derived from referring to other cases because I am satisfied that the application of the test to the facts of this case does not present any problem in deciding this application.

The first ground upon which the application relied in support of my recusal was that the Applicant and I are friends and have been friends for many years.

In this regard, he said that when the Chief Justice gave him my name as the judge whom the Chief Justice had selected to chair this Commission he was concerned that
20 because of that friendship I could be disqualified.

He admits that he did not raise his concerns with the Chief Justice. He says that the reason why he did not raise his concerns about me with the Chief Justice was that he feared that if he raised his concerns he could be seen as seeking to influence the selection of the judge who was

going to chair the Commission when the Public Protector revised remedial action had made it clear that the judge chair the Commission should be selected by the Chief Justice.

After becoming aware that this was one of the grounds relied upon by the Applicant, I followed the President of the Constitutional Court in SARFU and read into the record a statement which set out the facts relating to my relationship with the Applicant. This was on Monday, 16 November 2020.

10 Yesterday morning, the Applicant furnished the Commission with an affidavit responding to my statement. In my statement I stated that although the Applicant and I have known each other since the 1990's and we have a cordial relationship, we are not friends. The Applicant maintains that our relationship was that of friends.

What is important however, is that the Applicant does not dispute the various matters listed in paragraph 7 of the statement I read into the record except paragraph 7(e).

20 With regard to paragraph 7(e), the Applicant points out that it is not accurate because I did meet with him for a briefing at his official residence after the Chief Justice had given him my name as the judge he had selected to chair this Commission.

The Applicant is correct that such a meeting took place but insofar as he suggested that such a meeting should have

been mentioned in paragraph 7(e). Paragraph 7(e) appears under the heading Personal Relationship between myself and Mr Zuma. That topic excludes official meetings.

The meeting I had with the Applicant, after the Chief Justice had given my name, was an official meeting. I was not paying him a personal visit.

Indeed I was informed by the Chief Justice that the Applicant had asked that whichever judge the Chief Justice selected should come and see him. Furthermore, in
10 paragraph 7(e) I had in the mind the Pretoria official residence of the President. Hence the reference to the presidential office in that paragraph.

In the light of the fact that the Applicant does not dispute most of the facts set out in paragraph 7 of my statement, I am of the opinion that on the undisputed facts, there was not the kind of relationship between myself and the Applicant, such as would disqualify me from chairing this Commission, nor is it a proper ground for me to recuse myself.

20 In any event, I am of the opinion that if the Applicant was of the opinion that I should not chair this Commission when the Chief Justice gave him my name, he should have raised the matter with the Chief Justice.

The view he expressed that he would have been seen to be interfering with the selection of the judge to chair the

Commission is not sound. If the Chief Justice had given him the name of a judge about whom he, that is the Applicant, had reports of corruption which he was he planning to pass on to the Chief Justice, would he have kept quiet? I do not think so.

After all, the Chief Justice would not have been bound by the Applicant's opinion. He would have applied his mind to the disclosure and either stood by the name of the judge had chosen or selected another judge. In my view, there
10 was no sound reason why the Applicant only raised the issue of a personal relationship between myself and himself close to three years after my appointment to chair this Commission. The Applicant cannot be allowed to raise this issue so late in the day.

The Applicant also contended that the manner in which the Commissions holds its witnesses at the beginning, gave rise to a reasonable apprehension of bias because many of them appeared to be persons who had an axe to grind against him. In this regard, he referred to some of the
20 ministers who testified before this Commission. There is no merit on this point.

The Commission was free to use whatever witnesses were available, as long as in the end, the Applicant was himself afforded a fair opportunity to come before the Commission and deal with whatever evidence such witnesses

may have given.

The Applicant also contended that after he had come before the Commission and testified last year, the Commission ignored the matters that he had raised during his evidence.

The fact of the matter is that the Applicant had not completed his evidence when he left the Commission in July 2019. It was agreed that he would come back to continue his evidence.

10 Since then, it is now more than a year and the Commission has been trying to get the Applicant to come back to the Commission to continue his evidence but the Applicant has had to be compelled by way of a summons to appear before the Commission.

Indeed, the Commission has served the Applicant with two directives in terms of Regulation 10(6) of its regulations, compelling him to furnish the Commission with affidavits but the Applicant has not complied with his directives.

20 Indeed, the Applicant has to date not furnished the Commission with affidavits he undertook in July last year, he would provide to the Commission. In these circumstances, it cannot lay in the Applicant's mouth to say the Commission has ignored the matters he raised in his evidence.

Counsel for the Applicant contended that I made various comments when certain witnesses gave evidence which

suggested that I thought that the Applicant was guilty of State Capture. I have read all the comments quoted in the founding affidavit. I do not propose to refer to anyone of them. I am satisfied that the Applicant's contention has no merit.

As Mr Pretorius SC submitted. I am entitled and sometimes actually obliged to ask witnesses questions and to seek clarification on their evidence because the Commission seeks to establish the truth on the matters that
10 it is investigating. Even in a judge in a court of law is entitled to ask questions and seek clarification in a trial.

The main difference between the Applicant's approach to the comments I make and my approach, indeed in Mr Pretorius' approach, is that the Applicant appears to expect me to be very passive when witnesses give evidence. I do not agree. I believe that, provided I keep an open mind and act fairly, there is no difficulty in me seeking clarification from witnesses and testing their evidence.

What is important is to strike the right balance. I am of
20 the view that that balance has been correctly struck in regard to most if not all the comments about which the Applicant complains.

In the end, I conclude having had regard to all the points that had been raised by the Applicant including the points relating to press statements and media conference that he

has referred to in his affidavit, I conclude that the Applicant has failed to meet the test for a reasonable apprehension of bias.

RULING
(APPLICATION FOR RECUSAL)

Accordingly, I conclude that the application for my recusal falls to be dismissed and it is accordingly dismissed.

10

CHAIRPERSON: Yes, Mr Pretorius.

ADV PRETORIUS SC: Chair, during the course of the week we have had various discussions both in chambers and during the course of address before you that indicated that the Applicant and his legal team would react in one way or another and perhaps we should find out what their attitude is.

We, as the legal team, do have in possession and we
20 have prepared an argument on the eventuality of the result that has occurred but perhaps that should wait and we should hear my learned friend.

CHAIRPERSON: Okay alright. Mr Sikhakhane.

ADV SIKHAKHANE SC: Chair, I am not entirely sure what Mr Pretorius is saying. He says he will argue after me. I am

not entirely sure. I have noted the judgement.

CHAIRPERSON: Yes.

ADV SIKHAKHANE SC: I really do not know what he says I must say before he argues something. I am truly not – I am a bit baffled about what he says we must argue.

CHAIRPERSON: Yes.

ADV SIKHAKHANE SC: I really do not know what he wants me to do.

CHAIRPERSON: Yes. Well, I guess he should

10 ...[intervenes]

ADV SIKHAKHANE SC: He wants to hear what I ...[intervenes]

CHAIRPERSON: He should carry on with his plans.

ADV SIKHAKHANE SC: I think he must carry on with his plans.

CHAIRPERSON: Yes.

ADV SIKHAKHANE SC: And I will say if his plans do not – are not aligned with mine.

CHAIRPERSON: Ja.

20 **ADV SIKHAKHANE SC:** Thank you.

CHAIRPERSON: Okay alright.

ADV PRETORIUS SC: It seems that any attempt at [speaker not clear] is not well-accepted. Our position is, the summons still stands and the Applicant, Mr Zuma, must now answer questions. If that position is opposed, I will present

argument to you on that basis.

ADV SIKHAKHANE SC: Thank you, Chair. I am clearer now about what it is we are debating.

CHAIRPERSON: Yes.

ADV SIKHAKHANE SC: Well, I have no position to put for us to debate.

CHAIRPERSON: H'm.

ADV SIKHAKHANE SC: One is that, before we excuse ourselves from the proceedings, I think I have a duty to tell
10 the Chair why we will excuse ourselves so that it not cause a walk out or defiance but we will excuse ourselves right now.

CHAIRPERSON: H'm, h'm.

ADV SIKHAKHANE SC: The facts is this. Is that the instruction is to review your decision that you have just of when you finally give us a copy and we will take it from there.

CHAIRPERSON: H'm.

ADV SIKHAKHANE SC: The next Chair is that. You will realise – maybe I did not say this enough. Is that you have
20 become a judge in the dispute that involves yourself, in that, in determining disputes that arise in matters that include you.

And Chair, I know you have quoted Arthur Chaskalson, the CJ but you may not have noted that the issues in Arthur Chaskalson and Louis Luyt were common cause and the

issues here are not common cause.

And for that reason Chair we want to excuse ourselves from these proceedings so that we consider your ruling. And insofar as the issue of you becoming a judge in your own matter, which on its own is a ground that we have mentioned, that Mr Zuma mentioned.

I want to say that we have also been instructed to bring an application – not an application – to lodge a complaint about you in that regard to the Judicial Service Commission
10 in respect of the issue about which you have made yourself a witness and a judge.

And therefore Chair, I have no other instruction today or anywhere in the future until we have considered the review except that we would like to be excused from these proceedings. Thank you.

CHAIRPERSON: Okay. Mr Pretorius.

ADV PRETORIUS SC: Chair, we have prepared argument in writing to place before you. The effect of that argument is that, notwithstanding an intention to review your decision, in
20 short, the proceedings must continue.

And if, as my learned friend puts it, they are excusing themselves from the proceedings. They are, in fact, acting... Well, not they, the Applicant would be acting in defiance of the summons and unlawfully.

It is up to you Chair to decide whether or not the

proceedings will continue or whether they will be adjourned or stayed, in effect, pending any application for review or any referral of any complaint Chair.

So the position is simply this. The summons stands. It is not, with respect to my learned friend, open to the Applicant simply to “excuse himself”.

The proper application of the law that demands that you make a decision about the continuance of proceedings. And in that regard, we have prepared argument.

10 But in the face of a unilateral decision, I am not sure that it is going to be productive to take up time, presenting that argument to you. So perhaps we should take a short adjournment and you can rule on the proceedings after the adjournment.

CHAIRPERSON: Well, let us take the tea adjournment and then we will resume after 15-minutes.

ADV PRETORIUS SC: Thank you, Chair.

CHAIRPERSON: We adjourn.

INQUIRY ADJOURNS

20 **INQUIRY RESUMES**

CHAIRPERSON: We took a tea adjournment which has ended up taking quite long. We return to the hearing in circumstances where Mr Zuma has left, I have been told. Mr Zuma had been issued with a summons to be here from Monday to tomorrow unless he was excused by me. On

Tuesday his lawyers asked me to excuse him for yesterday because he wanted to attend a funeral. I excused him from attending. He has left today without asking me to be excused.

This is a serious matter but in terms of the plans of the Commission for this week he was going to be, if I dismissed his application that I should recuse myself, as I have done, he was going to be asked to take the witness stand and be questioned about various matters relating to
10 matters that we are investigating as a Commission. It is a pity that he has elected to leave without asking for permission.

There is no point for the Commission to sit for the rest of the day because it has convened to deal with his evidence, there is no point in coming tomorrow because he is not coming back.

So we are going to adjourn and the Commission will reflect on the matters that it needs to reflect on but it is going to continue with its work. I think I am going to end
20 there. I do not know if there is anything you want to say Mr Pretorius?

ADV PRETORIUS SC: No, Chair.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: Your address is noted.

CHAIRPERSON: Yes. Okay so we are going to adjourn,

there will be no hearing tomorrow but next week there are witnesses who will come and we will continue next week on Monday. We adjourn.

INQUIRY ADJOURNS TO 23 NOVEMBER 2020