

OPENING STATEMENT

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1.

Commissioners the presentation of this opening statement means that the hearings of this Commission are officially off the ground. The subject matter of these hearings is the Strategic Defence Procurement Package or “SDPP” for short. That this Commission of Enquiry itself has been initiated is the product of a long and arduous process in which the individuals responsible for bringing it about have spent considerable time, energy and expense in bringing about its realisation. The SDPP has been mired in controversy ever since its inception. The validity of the process which resulted in its implementation; the reasons why it was necessary and the benefits if any it has brought to our Country has been the subject of much media and public speculation. These murmurings have increased over a period of time. Public confidence in those members of the Executive responsible for binding the nation to the Strategic Defence Procurement Package and the functionaries upon whom they relied when making their decisions have taken a severe battering.

2.

Whether such speculation is true or not and whether there is any proper factual foundation upon which such speculation is based is part and parcel of what these proceedings are all about. It is a process in which those responsible for the SDPP and those who participated in its finalisation are called to account for their actions. It is not a process by which they are brought to book.

3.

That is part of a separate process in which the National Prosecuting Authority (“NPA”) will, depending upon the recommendations of this Commission, be called upon to take such action as it considers appropriate. That process could well result in criminal prosecution against those individuals whom the NPA, in its wisdom, finds that a proper case has been made out for such a prosecution.

4.

Our mandate as the team of evidence leaders is to present all relevant information at our disposal in as detailed a manner as the circumstances require. We do not take sides in the extensive debates arising out of the Terms of Reference. Our function is to place the evidence before the Commission in as clear and concise a manner as possible to enable the Commissioners to make their findings within the framework of the Terms of Reference by which they are enjoined to discharge their duties.

5.

This Commission has come under extensive criticism from the media and members of the public. That is as it should be. The weight of public pressure has assisted in refining the work of the Commission and reinforcing its resolve to ensure that there is total transparency and accountability in its workings and that the public has confidence in the final report produced by it.

6.

However, in saying so, it must be borne in mind that the Commission was faced with a mammoth task. Putting a Commission together of this dimension is a learning curve even for those who are trained and skilled in management processes. The Commissioners, we make bold to say, have a greater aptitude for analysing the law and making judicial pronouncements rather than managing a huge Commission requiring very substantial and well-honed management skills. That management process and those skills are being refined and reinforced with each passing day. The quest for perfection goes on within the constraints of the financial and human resources available to the Commission.

7.

Our functions as evidence leaders is to present all the available evidence without fear or favour and in as fair a manner as possible. We are all attorneys or advocates in private practice and our services are retained on a daily basis during those days when we are involved in the work of the Commission. We have become engaged in the work of the Commission at great personal sacrifice to our practices and in some cases at the expense of our family life and home comforts. We are driven by one goal and one goal only that is the burning desire and passion to ensure that the truth which the public is calling for finally emerges. It is this quest for truth which is the driving force behind the energy and time which we have committed to this process.

8.

The challenges that we have are many; the time available limited; the way forward not entirely clear. The public nature and transparency of this process is absolutely critical to its success. Under scrutiny is *inter alia* the conduct of the Executive responsible for the Strategic Defence Procurement Package. It is that very Executive and its functionaries that have the documents which are vital for a proper understanding of this process. Our plea to the Executive is to make sure that all the documents which the Commission requires in order to make its findings are available for use by the Commission and for public scrutiny. What may have been regarded as confidential and classified many years ago may not deserve that classification today.

9.

It is only the most sensitive of documents which impact upon the relationships between Nations and documents which affect the security of the state that can justify non-disclosure. Of necessity some of the hearings of this Commission must be held in camera. These should be kept to the bare minimum. We urge the Members of the Executive and indeed those responsible for initiating this Commission to do everything in their power to bring their influence to bear upon the custodians of these documents to ensure that the process in which we are engaged is open to public scrutiny. We also plead to those legal teams present today to bring the weight of their considerable talents to bear upon their clients so

that they too can show that they have nothing to hide to a nation and to a world which is calling out for answers.

10.

We should indicate at this stage that the lifespan of this Commission is a period of two years. That period expires on the 30th of November 2013. These hearings will therefore only proceed until that date. However, we have no doubt that those vested with the powers will take the necessary steps to extend the life of the Commission to a more realistic date. The timetable for the calling of witnesses has been drafted on the basis that the proceedings of this Commission will resume on the 14th of January 2014. The current timetable makes provision for the hearings to continue until the 31st of January 2014.

11.

If the first phase of the hearings are not completed by the 31st of January 2014 the hearings will continue until the first phase is completed. Thereafter the Commission will adjourn to enable the Commissioners to present an interim report to the President and to finalise preparations and investigations for the second phase of the hearings. We will, as we have done during the first phase, give indicative dates when evidence of various individuals or entities will be led in the second phase.

12.

In order to simplify the process of understanding the issues which arise in this enquiry we will raise certain relevant questions and then attempt to answer them.

- a) What are the background events which gave rise to this enquiry?
- b) What evidence is to be placed before this Commission in the first phase of the hearings?
- c) What is the nature of the evidence to be placed before the Commission in the second phase of the hearings?

13.

We do not propose to deal with any of these matters in any detail. We consider it appropriate at this stage to give all those who have an interest in the deliberations of this enquiry only a glimpse into what is to happen and what the future holds. It will merely be a template with which to work to understand the process as it unfolds. Time does not permit the luxury of an in-depth analysis of the evidence to be presented before the Commission. My learned colleagues Mrs Ramagaga will however provide more detail of the evidence which will be led in the first phase immediately after this address has been completed.

14.

It is therefore necessary to deal with each of the questions which have been posed and hopefully to provide some guidance.

15.

The genesis of both the SDPP and this Commission has been a very long and complex process – what follows does not attempt to summarise all the events but serves as background. Allegations of corruption associated with the Strategic Defence Procurement Package were raised even before the SDPP agreements was signed. Patricia De Lille who was a member of Parliament at the time presented to Parliament a document which has subsequently come to be known as the “De Lille dossier” in which wide ranging allegations of corruption associated with the SDPP were raised.

16.

The first investigation to be conducted into the allegations relating to the impropriety that accompanied the acquisition of the SDPP was conducted by the Auditor-General, between 1999 and 2000. On 15 September 2000 the Special Review by the Auditor General of the Selection Process of Strategic Defence Procurement Packages for the Acquisition of Armaments at the Department of Defence was tabled in Parliament. On 2 October 2000 the Review was referred to Parliament’s Standing Committee on Public Accounts (“SCOPA”) for consideration.

17.

In his Report the Auditor General recorded that there had been material deviations from generally accepted procurement practices and that the explanation provided by the Department Of Defence for these deviations did not appear to be satisfactory.

18.

During 2000, SCOPA became actively involved in pursuing an investigation of the strategic arms acquisition process. Pursuant to investigations carried out by SCOPA and a hearing conducted on 11 October 2000, SCOPA presented its 14th Report on the Auditor General's Review of the Strategic Defence Package on 30 October 2000.

19.

On 2 November 2000, the National Assembly adopted SCOPA's 14th Report. Subsequent to the adoption of the Report, the Heath Special Investigating Unit required a Presidential proclamation to conduct the investigation as part of the multiagency investigation. On 19 January 2001, the President announced that it had been decided not to issue the proclamation authorizing the Heath Special Investigating Unit's participation in the joint investigation.

20.

As a result of this exclusion, the joint investigation into the SDPP, was constituted only by the Public Protector, the Auditor-General and the National Director of Public Prosecutions. These agencies which collectively came to be referred to as the Joint Investigation Team hereinafter referred to as "JIT". The JIT Report was submitted to Parliament during November 2001.

21.

The key findings of the JIT Report were, *inter alia*, that no evidence was found of any improper or unlawful conduct by the Government and that due to the sanctions imposed on the acquisition of arms prior to 1994, an adequate acquisition policy to accommodate the procurement of armaments for the South African Defence Force from the international market did not exist.

22.

The JIT report was released on 14 November 2001. The report was discussed with six Parliamentary committees including SCOPA. SCOPA met on 11 December 2001 and adopted the JIT Final Report on the strategic arms acquisition.

23.

On 6th of November 2000 the Investigating Directorate: Serious Economic Offences or DSO for short initiated a preparatory investigation in terms of Section 28(13) of the NPA Act 31 of 1998, into allegations of corruption and/or fraud in connection with the SDPP acquisition.

24.

The DSO investigation continued, notwithstanding the submission by JIT of its report to Parliament and the subsequent adoption of the final Report.

25 .

When the DSO was disbanded in 2008 and replaced with the Directorate for Priority Crime Investigation, the investigations referred to above were inherited by this newly formed investigative body. The investigations of corruption and/or

fraud in connection with the SDPP acquisition were discontinued in November 2010.

26.

Criticisms have been raised in various quarters that there has been interference in the findings and final report of the joint investigation team. Numerous persons and bodies over the years have called for a Commission of enquiry. Proceedings were brought in the Constitutional Court for a Commission of enquiry to be appointed. The application was opposed by the President and the Government (who were cited as respondents). Shortly before the matter was due to be heard however a settlement was reached between the parties pursuant to which the President issued the proclamation which brought into existence the present Commission.

27.

On 4 November 2011 the President established the present Commission to inquire into, make findings, report on and make recommendations concerning the following matters:

- 27.1. The rationale for the SDPP.
- 27.2. Whether the arms and equipment acquired in terms of the SDPP are underutilised or not utilised at all.
- 27.3. Whether job opportunities anticipated to flow from the SDPP have materialised at all, and:
 - 27.3.1. if they have, the extent to which they have materialised; and
 - 27.3.2. if they have not, the steps that ought to be taken to realize them.
- 27.4. Whether off-sets anticipated to flow from the SDPP have materialised at all and:
 - 27.4.1. if they have, the extent to which they have materialised; and
 - 27.4.2. if they have not, the steps that ought to be taken to realize them.
- 27.5. Whether any person/s, within and/or outside the Government of South Africa, improperly influenced the award or conclusion of any of the contracts awarded and concluded in the SDPP procurement process and, if so:
 - 27.5.1. Whether legal proceedings should be instituted against such persons, and the nature of such legal proceedings; and

27.5.2. Whether, in particular, there is any basis to pursue such persons for the recovery of any losses that the State might have suffered as a result of their conduct.

27.6. Whether any contract concluded pursuant to the SDPP procurement process is tainted by any fraud or corruption capable of proof, such as to justify its cancellation, and the ramifications of such cancellation.

28.

The Terms of Reference define the scope of this Commission and determine its ambit. Any matter falling outside the scope of the Terms of Reference has no relevance at all and should not be entertained. The Terms of Reference are a product of legislation and the enquiry which this Commission is mandated to carry out is determined by its terms.

29.

After all the evidence has been heard and before this enquiry terminates the Commissioners may call upon the team of evidence leaders and indeed all the other legal teams present to make submissions as to what the appropriate recommendations of this Commission should be. Those submissions are determined by an analysis of the evidence presented to the Commission and based

upon facts and inferences arising from the evidence. It is at that point in time that it would be appropriate for the team of evidence leaders to submit what their views are on the evidence which has been led. At this stage one can merely speculate as to what such findings would be.

30.

The evidence proposed to be adduced will be presented to the Commission in phases. The first phase deals with the following terms of reference:

- a) Rationale for the SDPP
- b) Utilization of the arms and equipment acquired
- c) Flow of job opportunities from the SDPP; and
- d) Offsets

31.

During the first part of this phase, the various government departments, entities and the Cabinet Sub-Committee which were involved in the acquisition of the SDPP will be called upon to adduce before the Commission which will shed light on the issues listed above. These departments and entities include the Department of Defence, Armscor, Department of Trade and Industry and the National Treasury.

32.

In this Phase evidence will be presented to the Commission setting out:

- a) A history of the state of the forces as they were before the decision was taken to acquire armaments;
- b) The process followed by government to determine the needs of the Defence Force and its ability to discharge its constitutional mandate;
- c) The origins of the Strategic Defence Procurement Package;
- d) The reasons for the purchase ie the rationale
- e) The Cabinet decision to acquire and
- f) The procurement process applicable at the time.

33.

At the conclusion of the first part of this phase, the Commission will hear evidence from those members of the public who have made written submissions to the Commission pursuant to the Call for Submissions issued by the Commission on 09 May 2012, and such other witnesses as may be subpoenaed.

34.

These critiques will inter alia contend:

- a) That South Africa was not at the time when SDPP was concluded faced with any short to medium term military threats;

- b) That priorities such as housing, electricity and job creation should have been the focus and delivery priorities of those who governed us;
- c) That the greatest threat to South Africa's security at the time was poverty and unemployment;
- d) That the arms and equipment acquired in terms of the SDPP were underutilised or not utilised at all;
- e) That the economic benefits to the country by way of offsets flowing from the SDPP process have not materialised to the extent contemplated at the time when the Strategic Defence Procurement Packages was mooted;
- f) That the country could not afford the financial burden imposed upon the country by the Strategic Defence Procurement package;

35.

As would be apparent from the analysis set out hereinbefore the first phase of the Commission therefore deals with executive justification for the Strategic Defence Procurement Package and the second phase deals *inter alia* with the attack by the critiques of this justification; whether these arms were in fact necessary and whether the job opportunities and offsets contemplated had any real benefits for our country, whether such benefits had been overstated and whether the true costs of the SDPP outweighed the limited benefits flowing therefrom. It is the interplay between the participants in that debate which will unfold during the first and second phase of the hearings.

36.

Mrs Ramagaga who will address you immediately after I have finished will provide you with more details of evidence to be led in the first phase.

37.

The second phase of the hearings which will be scheduled after the 31st of January 2014 will deal therefore with evidence of the critiques which will, for the large part, be at variance with the evidence given by the functionaries of the Executive in the first phase. Included amongst the persons due to give evidence in the second phase are Patricia De Lille, David Maynier, Gavin Woods, Raenette Taljaard, Hennie Van Vuuren, Andrew Feinstein, Paul Holden, Terry-Crawford-Browne, Richard Young.

38.

The scope of the second phase of the hearings is potentially much wider than the issues arising in the first phase. The witnesses who will be called will give evidence inter alia to the effect:

- a) That there were serious irregularities in the procurement process;
- b) That there were a number of individuals who influenced the outcome of the bid adjudication process;

- c) That the bid adjudication process may have been manipulated to ensure that contracts were awarded to specific bidders;
- d) That three of the four primary contracts forming part of the SDPP and at least four of the sub-contract have been subject to manipulations by officials overseeing the process.

39.

During this phase, the Commission will also deal with the question of whether any basis exists for the State to recover losses that may have been suffered resulting from the conduct of any person improperly influencing the conclusion of any contracts awarded in the SDPP procurement process. The Commission will also be seized of the issue as to whether the contracts concluded are tainted by fraud or corruption such as to warrant the cancellation of these contracts and the ramifications of such cancellation. These aspects are relevant to paragraphs 1.5.1, 1.5.2 and 1.6 of the Terms of Reference.

40.

Whether the remedy of cancellation is available in relation to a particular contract will be a matter which will be carefully considered as well as all other possible remedies available upon an analysis of all the evidence in this regard.

41.

During the second phase of the hearings those persons who have been implicated of wrongdoing will also be given an opportunity to place their version before the commission.

42.

It is not appropriate to release the names of the implicated persons at this stage even though the identity of some of these individuals is a matter of public knowledge. The Commission has considered it fit that before such persons or entities are named they should have the benefit of a notice from the Commission informing them that they will be implicated as persons who have made submissions to the Commission. These notices to implicated persons will be given before the second phase of the hearing commences.

43.

Finally and before I hand over to Mrs Ramagaga we wish to raise a few further matters. Firstly we wish to urge those legal teams present here and those that will no doubt emerge in the future to assist the Commission in discharging its mandate effectively and efficiently. Fourteen years have elapsed since the De Lille Dossier was presented to Parliament. Any further extended period of delay impacts on the credibility of the Commission and may relegate to irrelevance its findings. The South African public is crying out for answers and we would urge all legal teams

to assist in making this process as smooth as possible and not to place unnecessary obstacles in the way.

44.

Finally we wish to say that the Commission should not be judged on speculation but on the results it achieves as it sets out to fulfil its task and when it finally completes its work. Give those who have been implicated the opportunity to demonstrate whether the finger of suspicion has been correctly placed at their door. Give us space to carry out the work which we are enjoined to do. The findings of the Commission have the potential to regenerate our nation and to give renewed faith to our people in the validity of the legal processes and in the Rule of Law. Give it the backing and support it deserves.

45.

I now call upon Mrs Ramagaga to deal with more specifically with matters to be raised in the first phase of these hearings.