

5 AUGUST 2013

PHASE 1

CHAIRPERSON: Good morning everybody. Firstly let me introduce myself, my name is Willie Legoabe Seriti, I'm the chief chairperson of the commission and on my right hand side is Judge President Musi who is assisting me. I think before we start I want to deal with one or two issues.

Firstly you will recall on the 4<sup>th</sup> of November 2011 the President announced the setting up of the Commission called the Commission which is supposed to enquire into Allegations of Fraud, Corruption, Impropriety or Irregularity in a Strategic Defence Procurement Package ("the SDPP").

The Terms of Reference thereof were published on the 4<sup>th</sup> of November 2011 and again during the same month and again on the of 8<sup>th</sup> of February 2012 regulations regulating the conduct of this inquiry were published by the President and the regulations basically to a very great extent deals with issues relating to how the information should operate people who are here before the Commission, is expected from them.

After the Commission was established and regulations put in place three people were nominated or appointed by the President as commissioners, I was appointed as the chairperson and in terms of the applicable procedures two people were appointed to assist me, that is Judge JP Musi who is sitting on my right hand side and Judge Legodi.

After a lot of work had been done and after our Evidence Leaders flogged through volumes and volumes of documentation and after they consulted with various witnesses a media statement was issued which media statement announced that we will start with our public hearings on the 4<sup>th</sup> of March but unfortunately as time went on we then realised that, or the Evidence Leaders realised that they are not as ready as they should be.

They then addressed a memorandum to the Commissioners asking that the Commissioners should agree to the adjournment or the deferment of the starting of the proceedings. After I considered that memorandum together with my two co-commissioners we agreed that it would be much better if starting with the proceedings of this Commission are deferred until the 5<sup>th</sup> of August 2013.

During that period until sometime yesterday evening we have been in touch with the Evidence Leaders, we have pushing them very hard making sure that come the 5<sup>th</sup> of August they are all ready to lead the witnesses that have been allocated to them.

Two, three weeks ago we were assured by the evidence leaders that they have consulted all the evidence, all the witnesses that they had to consult which they think that are necessary to start work, particularly those witnesses whose evidence deals with the rationale of the entire

procurement package.

A list of witnesses was drawn up by the Evidence Leaders after they have consulted with top aciculum of the South African Defence Force. South African Defence Force gave the Evidence Leaders a long list of people who might possibly be in a position to assist the Commission to carry out its mandate. Our Evidence Leaders looked at that list, looked at other names of people that they always had in mind and went through the papers as possible witnesses.

The Evidence Leaders then consulted to the names of people that they have been given by the Department of Defence and the people whose names, or people who in our Evidence Leaders' view will be in a position to assist the Commission to carry out its mandate, were also consulted.

After that consultation Evidence Leaders then drew up a list of 10 people ..., of 11 people from the Defence Force. Another list was drawn of witnesses from the Department of Trade and Industry and another list of people from National Treasury officials.

On the 15<sup>th</sup> of July we issued the media statement wherein they indicated that the Commission is going to start on the 5<sup>th</sup> of August and they also indicated the names of people who the Commission feels that will be in a position to assist the Commission to carry out its mandate. I think I

5 AUGUST 2013

PHASE 1

should emphasise that prior to releasing this list, our Evidence Leaders consulted with all those witnesses and they gave us the names of those witnesses as potential witnesses because the Evidence Leaders were satisfied that these people will be

5 in a position to help the commission to carry out its mandate and I think it's important for me to emphasise this point because trying to make sure that there's no confusion that which might be caused by the fact that some of these government departments have now engaged their own private

10 legal practitioners, we know that the Department of Defence has got several legal practitioners from outside and Department of Trade and Industry, we were made to understand that they also have engaged several legal practitioners from outside and I think the same also by the

15 applies to DTI.

I think I need to make it very clear at the beginning that the witnesses that were subpoenaed, those are the witnesses for the commission that are going to be led by the court ..., by the Evidence Leaders, the role that their legal

20 representatives are going to play is going to be to assist their witnesses and not to lead them during the public hearings.

If I understand the Regulations very well the role that the private legal practitioners of various witnesses might play is assisting if possible, and it also re-

25 examine if there is a need to, but those witnesses are

5 AUGUST 2013

PHASE 1

witnesses identified by the Evidence Leaders and they are duty bound to come to give evidence once we have, we have given them the subpoenas.

5 Yesterday evening at about 20h00, 21h00, 22h00 I was at home and the head of the Legal Research phoned me and said to me that there is an urgent application which most likely be pending against the Commission. I was sent a draft of an application which was supposed to be brought in the North Gauteng High Court Pretoria. That  
10 application was an anticipated application, there are going to be possibly two applicants, the Minister of Defence, the Minister of military veterans who was going to be the second applicant, and the Chairperson of the Commission, that is myself or the 1<sup>st</sup> Respondent, Musi JP on my right hand side  
15 was the 2<sup>nd</sup> Respondent and President of the Republic of South Africa was going to be the 3<sup>rd</sup> Respondent.

I went through the application together with the accompanying letter and it came out that the issues that the parties were raising in this document are issues that  
20 we have already considered. One of the issues that the applicants in their papers were going to raise was the question of the status of this Commission in the light of the resignation of Judge Legodi.

The applicant's in this application or in the  
25 internal application correctly says that once we remain only

5 AUGUST 2013

PHASE 1

two we are not quorum and therefore we cannot proceed or not going to proceed with this inquiry. And the third point that they raised was that possibly for us to be in a position to proceed, the President must make up his mind one way or the other, either by I think it's called a Presidential Minute, it is clear that we can only proceed being three, or if he so wishes, he must add the third person.

The honourable Evidence Leaders sent me a letter late in the evening and incidentally the same issues that were raised were the issues that I had discussed with the JP the day before but then you were spot-on when you said that we would have a legal difficulty caused by the fact that one of the commissioners resigned.

The powers that be or the President, I was made to understand in the process of attending to that difficulty, was also aware of it, apparently the President is going to deal with it by way of a Presidential Minute and I was made to understand that that difficulty can be dealt with even before attending this, so I think I must say to the legal representative of the Department of Defence that there is no need for me to bring the urgent application against me because we argued that.

What I was made to understand that the President could not, you know needs a bit of time in order to deal with the issue of whether there must be two or three

5 AUGUST 2013

PHASE 1

people more if it is always three and that timeframe, I was made to understand that it will be two to four days and I hope that by the end of this week that would have been dealt with.

Now the other issue that I want to deal with is a question of the level of the preparedness of our Evidence Leaders to proceed with this matter if Judge Legodi did not time resign at the time at which he did. Now the question that I'm going to ask to the Evidence Leaders is whether were they start leading the witnesses of DOD that we have already subpoenaed? Remember that we have subpoenaed witnesses from DOD, DTI and Treasury, and before I do that maybe let me ask Advocate Aboobaker to introduce his team.

ADV ABOOBAKER: Thank you Mr Chairman. I think it's probably at this stage that I place on record that I represent the team of Evidence Leaders and my name is Tayob Aboobaker and I am a senior counsel from Durban. To the right of me, and I will introduce people to the right first and then to the left. Mr Barry Skinner SC from Germany, next to him is Mr Tshepo Sibeko from Johannesburg, and next to him is Sello Mahlape from Johannesburg. Then next to her is Carol Sibiya and next to her is Ms Sbusiso Zondi from Pietermaritzburg.

On my left is Advocate Phumlani Ngobese from Tshwane, then next to him is Ms Ramagaga who is also from Tshwane. Next to him is Mr Moss Mphaga SC from

5 AUGUST 2013

PHASE 1

Tshwane and next to him is Mr Simmy Lebala.

Mr Chairman we have heard the input made and we are in full agreement that there are technical difficulties that have arisen which impact upon the hearing today. We can assure you that we are in a total state of preparedness to start with hearing of the Commission and perhaps it is appropriate if Mr Chairman, if you hear from the person representing the DOD team, the Department of Defence team Mr Sebile Bala as to that state of readiness. Thank you.

10 CHAIRPERSON: Advocate Lebala, very briefly.

ADV LEBALA: Chairperson Judge Seriti, Co-Commissioner Judge Musi, Colleagues, fellow Evidence Leaders, members of the profession, distinguished colleagues representing different teams, members of the media and all interested parties, on behalf of my distinguished colleagues which is kept on a team that is representing a team that is to lead the DOD team in as far as the first applicable relevant terms of reference of the Commissions are concerned, we need to address the question whether are we going to proceed.

20 Are we ready to proceed to lead evidence, and I think this question is a question whether the current developments affect our state of readiness. Permit me to say this with my head held high on the part of our team, we are ready, more than ready, in actual fact we would be more than  
25 happy after the current developments that have assisted us in

being more enthusiastic and more focused.

The price for us is very simple, we have a mandate to deliver and given the fact that we are the first to fire the salvo, we had no option but to be ready all the time. Now of significance for all in sundry to appreciate the state of our readiness is to also appreciate that which we had to do, we just had a practical task to do and that practical task is we had to deal with the clear bound very practical Terms of Reference that underpin that Commission and let me simplify them in line with the qualification of the state of our readiness.

The first term of reference of this Commission is that the rationale. Now if you look at the rationale as a main river I appreciate that there tributaries that flow into it and the first tributary is what is the origins, what is that which cultivated our government, the Department of Deference to purchase this Strategic Defence Procurement Packages and for now on Chairperson permit me to qualify them as SDP packages. What was the origin that was motivated our government Department of Defence to pursue the SDP package.

Second to that first tributary is another tributary as to what was the reason why we pursue the SDP packages. Following on that tributary is whether was the process legitimate, was it lawful, was it justified, was it rational in relating to a very important role in as far as the

SDP packages are concerned.

I assure you Chairperson that with this practical analogy, be better informed that we are ready, more than ready. What simplifies the process also was not the material that we gather but it was what we mentioned, consultation with the witnesses and I would like to extend our hart warm and generous gesture we received from the Department of Defence in providing us with witnesses that we identified.

The Department of Defence provided us with 10 witnesses and what excited us is the genuineness on their part to the demonstrate that they want a lasting solution to the cloud that is hanging over the subject of the SDP packages is the type of witness and the disposition of these witnesses that they provided us.

Chairperson, they provided us admirals in as far as the name is concerned, but the identification of those we would not know and the highest designation of the Defence Force in as far as the name is concerned is admirals, I think that speaks for itself that we were provided with admirals, decision makers.

In as far as the Air Force is concerned they provided us with generals as per strategic Defence Force is concerned on the side of the Air Force the top Anglings are generals. More significant let me recapitulate we managed to

even consult with the Chief of the SANDF General Shoke who has been of so much assistance in laying the foundation in the process of our consultations.

Now this mirrors into a lot of factors that we need to put on record in as far as our preparation is concerned. We did not consult in the abstract, we consulted with witnesses which are better qualified to simplify the process of the documentation that you have and who were better qualified to make us understand the origins, to make us appreciate the reasons, more significantly to make us appreciate the processes of the SDP packages.

Now at this stage I would be less tempted to mention a lot of witnesses in precession we consulted with but initially we were provided with 10 witnesses. Now under leading their testimony Chairperson is to positively address the processes as to where we started with the SDP packages and we have done, and underpinning their testimony is to address the utilisation and the use of this equipment that we acquired through the SPD packages, but at this stage Chair I'm going to clarify and bring fresh awareness about the importance of our task at this stage.

You would appreciate it better if, the subject of the rationale is looked at this in context and content. After acquiring these arms and equipment through the SDP package the real nub why we are here is to address the

5 AUGUST 2013

PHASE 1

following question, are we utilising them for the purpose for which they were acquired, and that would be the second Term of Reference which these 10 witnesses identified will be dealing with, the arms and equipment, this capabilities that we acquired through the SDP packages, are they being utilised or underutilised for their purpose for which they were acquired. Chair, these witnesses we consulted with gave it to us, let me ...

CHAIRPERSON: Advocate Lebala, if I understand you are raising that you consulted with those witnesses and you are certain that they will assist the Commission of Inquiry, is that correct?

ADV LEBALA: I can't address it more positively than what you said, but permit me to close by saying the following to you Chair; there has been some developments and having consulted amongst the other witnesses who remain I would like you to appreciate how we operate, we deal with ships, submarines, coverts that are part of this SDP package, but as is the saying by a famous person who is called Larry Jürgen and Jürgen says:

*"A ship that change its direction by 1° alters its course by a 100 miles".*

We are on course Chair, and nothing will change our direction we are ready. I thank you.

CHAIRPERSON: Thank you Advocate Lebala. Now I think

5 AUGUST 2013

PHASE 1

this brings me to another issue which I think you know we need to resolve today and the issue relates to the first 11 witnesses that we subpoenaed, those will be five from the Navy and six from the Air Force because the terms of the subpoenas were supposed to appear today. I'm told that if they don't appear today and nothing happens today because we are not ready, the summonses might lapse. If the summonses lapse, if the summonses lapsed it means we must start all over again to issue subpoenas again, to issue subpoenas to ascertain those 11 officials.

I was also told that the Department of Defence have got legal representation and I wonder whether we can hear from the legal representatives of the Department of Defence whether they will be prepared to waive the fact that the subpoenas will lapse if the Commission is not carried today.

If we find that legal representatives of the Department of Defence are prepared to waive that requirement, then that might make it possible for us to postpone until next week, next week Monday which is the 12<sup>th</sup> of August, but if they say that they have legal difficulties or technical difficulties we should be ready to deal with it in the next couple of days. Our desire as commissioners here is we should be in a position to adjourn this matter to the 12<sup>th</sup> of August because a much longer delay in our view, it will not be

5 AUGUST 2013

PHASE 1

to the good of the Commission.

Advocate Aboobaker, are the only legal representatives from the Department of Defence who can deal with the two issues that I've raised?

5 ADV ABOOBAKER: Yes Mr Chairman. Advocate Cooper from the Department of Defence I think can speak to that.

ADV COOPER: If I may place on record, I'm representing the Department of Defence, my surname is Cooper, initial M, I appear today together with my learned friend Ms Kayne, and  
10 we are instructed by Ms Iris Carter, the director of the firm Bowman and Gilfillen. Mr Chairman if I may address some of the matters that you had raised and that Advocate Lebala has raised, in regard to the question of the quoracy of the Commission of this time it was believed necessary from our  
15 point of view and to the benefit of the Commission chairman and the commissioner to consider the point of view. Of course I understand you would have done so in any event but that was the focus of sending through the application to which you have referred and which as you know is a draft application.

20 It was a draft Mr Chair because we required a final authority from the Minister to have moved any court application and the Minister having considered the matter has directed us to make it clear that she has complete confidence in you Chair and the co-commissioner to address  
25 the matter on your own initiative and that it would be

unnecessary therefore to pursue any court application and of course I am happy to be able to say that following your own remarks Chair the matter will be addressed in the ordinary course and will not require any other form of intervention.

5                   Because that is the Minister's attitude Mr Chairman we can also assure you that there would be no objection in regard to summonses which have been issued to witnesses, we would regard them as remaining in force and the question of quoracy as far as we are concerned would have  
10 any effect on them.

                  So Mr Chair, the decision of the Department of Defence is to support the course of action which you Chair have pointed out. I may add that there is no confusion on the side of the legal team representing the  
15 department as to the primary role of the Evidence Leaders and the exclusive role as the Evidence Leaders in the preparation of witness statements and in the leading of witnesses.

                  You can indeed have no fear Mr Chair that we will trespass upon their jurisdiction, we will support them,  
20 we will attempt to assist them so far as we can but we recognise absolutely that particular jurisdiction and I may go further to say that we have today complete confidence in my learned friend, Mr Leballo's work and preparation together with his team led by Mr Aboobaker.

25                   There is, however, one matter on which we

5 AUGUST 2013

PHASE 1

are not completely in accord with our learned friends which I wish to raise Mr Chair to you and your co-commissioner's consideration regarding the suggestion that the matter stand until approximately a week, that was to enable quoracy to be re-established, but there remain two matters which the department anxious should be addressed in consultation with the evidence leading team.

There are two matters, one of which I want to address here, one which I want no more than to mention. The matter which I want no more than to mention is to enable the department to satisfy itself and to satisfy the legal team that the aspects of natural justice had been met in regard to the witnesses to be called. Now I don't want you to develop that side of it Mr Chairman to you in this gathering now, it's a matter which I'm sure we can resolve with the legal team, but the matter that I do want to raise both with the legal team but the matter we do want to raise with you Mr Chair and your co-commissioner is the question of documentation.

You will know that there are considerable difficulties which attach to the production of documentation for the purpose of the Commission, those difficulties arise from the legislation which is in place in regard the classification of documents and the various forms and quotations of security documents.

In that regard it is essential that some

5 AUGUST 2013

PHASE 1

format be arranged which will allow the evidence leading team to produce with competence and without objection the train of documentation that being regards as necessary for the ventilation of the issues in this matter.

5                   It will be most unfortunate if there is disagreement between the department or indeed any state department and the team as to whether particular documents are capable of production without various cautionary matters taken and indeed whether they are capable of production at all  
10 in the absence of declassification or in the light of the status of particular documents. That interchange between the departments and the legal team has not yet resulted in a resolution which will permit the optimal use of the Commission's time once evidence is led and permit the  
15 department and it's legal advisors to have shown themselves that they are not party to infringement of statutory requirements.

                  I have no doubt such a resolution can be reached but it seems to me unlikely that we can reach it within  
20 the area of one week, it involves Mr Chairman not only a *modus vivendi* in regard to the production of documents, it involves the question of the true classification of documents which is a process that has not yet been completed and so  
Chair I would ask the, I would ask you and your co-  
25 commissioner to consider at our request not one, but two

5 AUGUST 2013

PHASE 1

weeks. Thank you.

CHAIRPERSON: I suppose Counsels are having diaries in front of them there, I was trying to look for a date here. I'm a bit torn assuming that the 19th. I think this question of declassification of documents has always been denied, together with our Evidence Leaders who spent a lot of time looking at that question and I'm not quite sure people have resolved it, even in our own minds. I have just spoken to my co-commissioner here and we believe that if at all the legal representatives from the Department of Defence requires a period of two weeks within which to try and deal with the question of declassification of documents, it might be a very helpful suggestion.

I suspect that it will even stop the question of us calling a witness out after every fifteen minutes, asking members of the public to go out so that we can deal with that question and you might be supported by my co-commissioner who do not think that an adjournment of a period of two weeks is unreasonable and I think we will agree to adjourn the public hearings until the 19<sup>th</sup> of August, but then that is subject to parties understanding that at the moment we are not ready. We cannot postpone this matter or adjourn this proceedings to the 19<sup>th</sup> because we are not quorate.

Then what I'm telling you now is that a wish to adjourn the proceedings until the 19<sup>th</sup>, as we are not

5 AUGUST 2013

PHASE 1

quorate and I will issue that kind of order that the matter is postponed until the 19<sup>th</sup> of August and I think I should also thank the team of legal advisors from the Department of Defence for the attitude that they seem to have displayed up to now and I think with proper cooperation between the two legal teams and the witnesses it will definitely make it much easier for the Commission to get out its mandate.

I think for present purposes we will adjourn the proceedings and I hope that you know on the 19<sup>th</sup> we will be quorate and we will be in a position to start with the first witness. I'm going to make a suggestion that seeing our Evidence Leaders knows already who are the legal teams of the various parties you can start looking at it within the time period of two weeks and just make sure that all those small things are sifted and attend to the issues so that come the 19<sup>th</sup> then you know all those small issues cannot stand in our way.

ADV ABOOBAKER: Mr Chair, we have no doubt that Mr Cooper and his team will fully cooperate with the team of Evidence Leaders. We are quite satisfied after talking this morning of their full cooperation from the Department of Defence. What Mr Cooper has not done though is address the question of the subpoenas and perhaps we can give you Mr Chairman an assurance.

CHAIRPERSON: Advocate Aboobaker if I'm not wrong I think I heard him loud and clear when he made that point. I

5 AUGUST 2013

PHASE 1

made a big point on my notepad because that was one of the things that was worrying, he has given that undertaking. Let me not talk for him, if I'm wrong, he will say so.

ADV COOPER: You are quite right Mr Chairman.

5 CHAIRPERSON: Thank you.

ADV ABOOBAKER: Chair there is one more thing that I would like to place on record and that there be a short meeting in the next three minutes in the boardroom where the Evidence Leaders will meet with the legal teams to find out what the future will hold, that is not the pre-trial conference that we had in mind, but simply to iron out housekeeping matters, so please if every legal team here could make their way in three minutes' time to the boardroom.

10  
15 CHAIRPERSON: I suppose the same thing will apply to the legal teams of DTI and, Trade and Industry, because save ... I'm sorry, DTI and Treasury. Because I know that they have legal teams and the legal teams also came in a bit late into the picture, probably they can also attend that meeting, it will make all our lives much easier, then otherwise when and how do you meet, we leave that to your discretion.

20 ADV ABOOBAKER: Yes Mr Chair, with what was intended, all legal teams, all legal teams to attend that meeting.

CHAIRPERSON: All legal teams should attend then. Thank you. Then we adjourn to the 19<sup>th</sup> of August this year, and the hearing will take place again at the same venue. Thank you.

25

**(COMMISSION ADJOURNS)**