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CHAIRPERSON: Good morning Everybody. Maybe let me first start by asking Mr Erwin to confirm that he still tells the truth.

MR ERWIN: I do Sir.

5 CHAIRPERSON: Thank you. Advocate Skinner.

ADV SKINNER: Thank you Mr Chair. We had adjourned yesterday at the stage where my learned friend representing Messrs Feinstein, Holden, Van Vuuren was about to cross-examine and there were two aspects that have arisen, one in
10 relation to the Affordability Report and the second in relation to the contracts. I have been advised that the Affordability Report has been classified and accordingly that difficulty should now fall away.

The position regarding the contracts is, however,
15 somewhat more complex and if I may just take a little time in that my understanding of the contracts is that they have not been marked as classified Secret or Top Secret, most of them, however, do contain a separate document which says for example:

20 *"It's hereby recorded that despite lack of classification marking on each page of the document the document is in fact classified 'Confidential' in accordance with security regulations of the Department of Defence and*
25 *ARMSCOR and must be handled accordingly".*

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The umbrella agreements for each of the parties also contains a provision which in essence is the same in the various agreements but says:

5 *“Subject to the provisions in relation to confidentiality and/or secrecy in the Supply Terms”.*

Now the Supply Terms is not what is envisaged will be put up at this stage, what we were wishing to place before the Commission were the umbrella agreements and the NIP agreements which is an annexure to the umbrella agreement,
10 but the provision then says:

*“Subject to those provisions in the Supply Terms any information obtained by any party shall be treated as confidential by the parties and shall not be divulged or permitted to be divulged to any
15 person not being a party to the agreement without the prior written consent of the other parties”.*

Save that the relevant provision seems to be that there is a clause which says:

20 *“The South African Government shall not be precluded from disclosing any information it deems to be in the public interest, save that it shall not be entitled to disclose proprietary information or information of a commercial nature and which is confidential without the written agreement of the
25 seller”.*

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Mr Chairman and Commissioner Musi, the Terms of Reference of this Commission as published do contain a provision which says:

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“Documents which by law are protected from public disclosure will remain so protected”.

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Now there is a definition in the umbrella agreement of the parties which in the example I was looking at stipulated that it would be ARMSCOR, the seller, and the South African Government acting through its relevant governmental department or ministry as applicable. It seems to me that this is a different situation from where two individuals agree that the contract between them shall be confidential, that can clearly be overwritten by a court of law or in this instance by the Commission.

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The circumstances here are somewhat different where the South African Government is a party and where there is a provision which says that it shall be confidential but the Government shall not be precluded from disclosing any information it deems to be in the public interest. My submission is that that seems to indicate that the decision as to whether the contents of these umbrella agreements and NIP agreements, NIP terms can be disclosed rests with the Government and not with the Commission.

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I am informed that numerous efforts have been made to get this resolved but that the approach of the various

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persons seems to be that all the obligors must be informed and all of them must consent, that has been the sticking point that certain obligors have consented, others have simply not responded and that in the absence of the consent of all the obligors the governmental authority seem to be reluctant to say
5 that they will under the provision I referred the Commission to, grant leave for the information to be disclosed.

So, in a nutshell the position then is that the contracts seem to be confidential and it would require
10 governmental authority for the provisions to be disclosed. I raise that because as I understand it my learned friend wishes to cross-examine on, *inter alia* on the contracts and clearly she has a difficulty because at the moment the contracts have not been made available to her.

15 CHAIRPERSON: Maybe let me first go to Advocate Solomon, if they (indistinct).

ADV SOLOMON: Commissioner, ARMSCOR's position is as follows, we obviously consider ourselves bound by the confidentiality that is to be found in the agreement. ARMSCOR
20 was a signatory to the various umbrella agreements but other interested parties and government departments. ARMSCOR had engaged insofar as the GFC contract umbrella agreement is concerned which relates to the frigates, ARMSCOR has been engaging with members of the German Frigate Consortium to
25 get (indistinct) sent to waive the confidentiality provisions that

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pertain to the agreement. That process is still ongoing, unfortunately the constituent members of that body are no longer in one homogeneous position because they have since left the consortium, but those senior members that we are aware of we have been in contact with.

ARMSCOR per se has no objection to the production of these documents subject to the counterparties, the obligors agreeing to waive the confidentiality provisions. It does strike us though that these umbrella agreements really reside under the custody of the Government and Cabinet who were partners to the agreement and in fact the Government was a signatory to the clause. There seems to be some suggestion that ARMSCOR was the custodian of these agreements and whilst we obviously retained copies of these agreements we don't see ourselves as really being the custodian of the agreements for the purposes of making the decision as to whether they should be disclosed or not but we are willing to participate in any process that allows these agreements to be placed before the Commission, we are not (indistinct) in that regard, we are just fulfilling our contractual obligations to the counterparties and the obligors that were the contracting parties with whom we contracted.

So, to sum up we have no personal objection from ARMSCOR's point of view to the production but we don't believe it falls within our province to produce the documents. It should also be pointed out that the particular industrial

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participation clauses which form part of an appendix or annexure to the agreement is not something that is within ARMSCOR's particular personal knowledge, that related to DTI and I believe that the department was indeed a signatory to the umbrella agreements in order for it to have certain rights and obviously it had the corresponding obligations and terms of those agreements within agreements that pertain to the industrial participation, the NIP.

So, we don't believe it really falls within ARMSCOR's purview to declassify or to allow that part of the agreement to be produced because it's not something that directly affects ARMSCOR. As I've said to you we are insofar as it does directly affect our witness Mr Nortjé who is going to give evidence about the frigates and the combat suite, we have been trying to get particularly that GFC contract, umbrella agreement, I'm using the term loosely, declassified. I don't know if that classifies it to you Chair, Commissioner Musi.

CHAIRPERSON: Thank you. Advocate Moerane, do you want to add anything to what they have said now?

ADV MOERANE: Chair, it's obvious that our interest really is with the witness that is presently before the Commission who is a former minister of the Department of Trade and Industry and later Department of Public Enterprise, he's no longer in Government since 2008, and he has come to assist the Commission to give evidence with regard to the Terms of

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Reference insofar as they relate to the period when he was a member of Government and he has been doing that to the best of his ability, I believe the Affordability Report which was one of the reasons why my learned colleague couldn't proceed with her cross-examination yesterday is, or has been declassified, so that is no problem, I think questions can be directed at Mr Erwin with regard to that Affordability Report and he's prepared to answer questions to the best of his ability.

With regard to the contracts themselves really I do not see how that has a bearing on Mr Erwin's cross-examination. I'm not aware that there are any disputes with regard to his evidence and the evidence of the DTI and I believe the methodology of the Commission has been to deal with various aspects and at this stage the Commission has been dealing with the DTI and its witnesses and Mr Erwin is the last of those witnesses and subject to what my learned friend will say I think the evidence should proceed, he should be cross-examined if my learned colleagues have any cross-examination to direct at Mr Erwin. Thank you.

CHAIRPERSON: Maybe before I then go to DTI the evidence of Mr Erwin and the statement that he has given us, does it have any reference to the contracts or does his evidence make any reference to the contracts?

ADV MOERANE: Chair no, it doesn't, it doesn't deal with the contents of the contracts.

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CHAIRPERSON: It doesn't deal with the contents of the contracts?

ADV MOERANE: No, no Chair.

CHAIRPERSON: (Indistinct).

5 SPEAKER: Thank you Mr Chairperson, Commissioner Musi our instructions in as far as the contracts are concerned is that the DTI doesn't have particular problems in releasing the documents either as the contract Mr Skinner have said that all parties need to give their consent before those contracts
10 can be (indistinct), so without the consent of all the parties (indistinct) DTI we cannot on our own bring those contracts (indistinct). And one other issue Mr Chairperson which I want just to touch on is through my information it has been made clear that (indistinct) especially for instance (indistinct) the
15 issue of the credit (indistinct) not in dispute, all parties would have to commonly agree what those issues are and if one really has to know whether what those contracts say, what are the (indistinct) it is very clear on the contract that there is no dispute, so I would reiterate what the Commission have said
20 that there seems to be no issue in dispute in those facts which were raised by the DTI's witnesses and we would like to (indistinct) on what the Commission (indistinct) our submissions Chairperson.

CHAIRPERSON: Advocate De Vos I'm sure you have heard
25 what your colleagues have been saying and I'm (indistinct)

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trying to understand why the contracts are necessary for the purpose of (indistinct).

ADV DE VOS: Chairperson, Commissioner Musi, the interesting comment made by my colleague previously that
5 there are certain terms of the agreement that is not in dispute, it's interesting because we have not seen any of those terms of the specific agreement, it's precisely because they want to see the terms that they are asking for the contracts. We are submitting that the contracts are not only relevant for the
10 purposes of this particular witness but for many other witnesses still to come. It's very difficult to imagine the Commission from complying with the terms of the Commission without actually having regard to the contracts that is the "middelpunt" of this investigation in some sense and just to
15 take this Commission to the relevant parts of this particular witness's evidence that makes the terms of the contracts relevant one would first have to look at the criticism levelled at the contracts and the methodology followed after the contracts were entered into by our clients, which is not now with this
20 Commission but also at what is said by the witness himself and I want to take the Commission to the witness's statement and more particularly paragraph 23 thereof where he specifically makes the following statements:

25 *"It is apposite however, to include in the material made available to the Commission, a fuller briefing*

on the NIP and its implementation”.

Now a fuller briefing of the NIP and its implementation clearly must imply the NIP terms of agreement that they are asking for.

“Related to this are the following pertinent issues that have been raised in the inquiry:

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23.1 The origins of the NIP; ...

23.2 The allocation of credits, the amendments made to the criteria applied, the use of multipliers and the credit methodology applied; ...”.

10 And then very importantly:

23.3 The variations made to the terms and conditions of the contracts; ...”.

Those are the issues that we want to test in cross-examination against the evidence of this witness because he doesn't only refer to his evidence as being very important. He then discusses them and he comes to the following conclusion and he wants this Commission to accept this conclusion which at this point in time is still untested and he makes the following point eventually after he has discussed the various issues he comes to the paragraph 43 where he says:

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“I close this part of the submission of the members of the Committee by emphasising that the primary policy decisions relating to the SDPP were taken at Cabinet level. Thereafter the Committee used its discretion to give effect to the Cabinet's policy

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choices. In using our executive discretion to give effect to those policy choices, some variations to the terms and conditions agreed to in the contracts were made, as attested [to] in the use of multipliers ...”.

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And that (indistinct) exactly the use of that discretion that we want to test, we cannot test that without the content of the contracts. He goes on to say that:

“The power to make decisions based on Government policy is mandated by the Constitution”.

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And then he wants this Commission to accept the (indistinct).

“I am advised that in law, when a power to take certain decisions is accorded to a structure of government, that power may be exercised as and when required within the framework of the law”.

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Now for reading “for framework of the law also within the framework of the contracts and it’s on that basis that we say that for this witness and many other witnesses to come we need the contents at least of the umbrella agreements and the (indistinct) agreements. Our instructions are that I submit in any event that this Commission will agree with me, and I’m sure the witness will also agree that one would not want to proceed with the piecemeal process of cross-examination, so that we obviously don’t have a problem if the witness is excused and as and when we get the relevant documents made

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available to us and obviously depending on what those documents say we can then approach this Commission and request that the witness be recalled at which time the relevance of the request can be debated in this Commission.

5 CHAIRPERSON: Thanks a lot. I can tell you I don't really agree with you that the Commission will agree with you that it's undesirable that you know the cross-examination must be in bits and pieces, I don't want that. The witness is here, the witness has testified, (indistinct) report, in any event that
10 report has been in your client's possession for some time now. The only outstanding document is the (indistinct). I think you can be in a position to start with your cross-examination right up on the basis of the evidence the witness has given and the Affordability Report which had been in your client's possession.
15 That's the first issue.

The second issue, as far as the contracts (indistinct) I think it will be very hard, if you can tell us which sections of the contract or which (indistinct) in the contract you think you might want to concentrate on, when we approached or
20 when the Commission approaches the various parties involved in this particular contract it might be easier for them to agree if at all we tell them which sections of the contract you are interested in. Then for you just to say (indistinct) the entire contract because the witness referred to one or two clauses in
25 those contracts I don't think it would be very helpful.

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ADV DE VOS: Yes Chairperson, may I answer that last issue first, the interesting thing is that I'm not able to say which parts of the contract I'm interested in because I haven't seen the contract, I have no idea which parts I'm interested in but I understand from my colleague that the sections that I've been referring to are contained in the umbrella agreements as well as the NIP part of the agreements, so those two parts are the parts that I'm interested in, so that's the first point, otherwise the possibility is always there that I am allowed to have a look at the umbrella contract and the NIP agreements and then stipulate which clauses we would like to use in cross-examination which is obviously also a possibility. That's one part of the issue.

The second part is I appreciate the Chair's position as far as cross-examination is concerned but I'm going to decline to cross-examine the witness at this time because that is my instructions.

CHAIRPERSON: Thank you. If at all you are going to decline to cross-examine the witness at this stage, unfortunately we would have to excuse the witness and I suspect at a later stage if you come back and try and make an application to cross-examine this witness there would be various issues that we would have to deal with, but then before we close on this issue let me just talk to my colleague.

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COMMISSIONER MUSI: Let me maybe add something, the (indistinct) of the contract that has been (indistinct) relate to credit methodology where it was said that it was agreed that only three criteria would be used (indistinct) credits, that would be investment, export sales and local sales. Now all the evidence we've heard is (indistinct) that those are the terms of the contract, so it's common cause that that methodology, and there is no dispute that (indistinct) deviated from those terms in the sense that they then proceeded to apply multipliers, the multipliers in terms of the contract (indistinct), so yes, there can't be any dispute about that part. It's common cause, I don't know whether (indistinct) and I can't see how it can't (indistinct), it's agreed. (Indistinct) who was one of the people involved in the (indistinct) testified that there was a decision of IONT and that decision was (indistinct) that multipliers were also supposed to be used.

Now the Department of Trade and Industry through their witnesses are saying that they deviated and I'm quite mindful about this, so the question really, just an indication (indistinct) conflict and I think your cross-examination, cross-examination will focus on that, the justification (indistinct) on the terms of the contract, the terms of the contract itself (indistinct).

ADV DE VOS: Commissioner may I answer that, the (indistinct) one particular term of the contract is not in dispute

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as pointed out by yourself but the witness's statement says that variations made to the terms and conditions of the contracts are of importance. Now without seeing what the terms and conditions of the contracts are it's impossible for me to know which questions must be put to the witness, it's a question of first getting the information and then putting the questions. Without the information I'm not in a position to cross-examine the witness about the terms and conditions of the contracts and the (indistinct) thereof and that is also my instructions.

COMMISSIONER MUSI: Well, I rest my case because as far as this witness is concerned only (indistinct). Thank you.

CHAIRPERSON: Thank you Advocate De Vos. So, even after my colleague has tried to persuade you to cross-examine you still declines to cross-examine?

ADV DE VOS: Yes Mr Chair.

CHAIRPERSON: Thank you. Advocate Moerane, you want to add anything because we'll have to make an invitation to those who were interested to cross-examine your client and they said they don't want to.

ADV MOERANE: Chair, it will be recalled that my learned colleague's client have been at this Commission when the DTI witnesses gave evidence and those witnesses were cross-examined on various issues. It is surprising that now when the last witness who has been out of government for six years is

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about to leave the stand, there's this matter of the contracts being so vital, and that issue has been before the Commission all along. Chairperson my learned colleague has made an election not to cross-examine this witness and if there's an attempt to recall this witness to cross-examine on issues which he could have been cross-examined today those efforts will be strenuously resisted.

CHAIRPERSON: You know Advocate Moerane, just to add on what you have said I (indistinct) about seven, eight witnesses from DTI who testified, someone even testified about how multipliers were applied, they gave us these things and they gave us reasons why they think they were entitled to use multipliers and they gave us reasons why they thought that the new credit methodology as stipulated in the DTI policy document should be applied and not the (indistinct) stipulated in the functions.

The representative for Lawyers for Human Rights was sitting right here, they knew about this evidence, some of those issues they did not even cross-examine the witnesses, I'm surprised that the terms of the contracts are now a major issue when the witness who talks only about the policy issues has testified. The people who were in actual fact applying that methodology, who used that methodology in order to achieve certain results which results they were available to us, they were not cross-examined about the terms of the contract. I

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find it strange that at this last stage when the witness talks only about policy he's supposed to be cross-examined about the terms of the contract (indistinct). In any event we have given them an opportunity to cross-examine the witness, they
5 have declined to cross-examine, (indistinct) from cross-examining. Before I release Mr Erwin, Advocate Skinner, do you want anything?

ADV SKINNER: Nothing further thank you Mr Chairman.

CHAIRPERSON: Mr Erwin thanks a lot, you are excused,
10 nobody is interested to cross-examine you at this stage. But then just before you leave unless if at all Lawyers for Human Rights just suddenly might want to cross-examine Mr Erwin? Thank you Mr Erwin, nobody wants to cross-examine you, you are excused.

15 MR ERWIN: Thank you very much Sir.

CHAIRPERSON: Thank you. Advocate Skinner, this seems to be end of the witnesses of DTI.

ADV SKINNER: That is so Mr Chairman.

CHAIRPERSON: What is going to be the next step?

20 ADV SKINNER: Mr Chairman as I understand it there will still be in the future some evidence that may relate to the DTI in the sense of Mr Jayendra Naidoo's evidence, but certainly there's no intention to call further witnesses at this stage relating to DTI. Mr Naidoo will be testifying on a range of
25 topics that are of some relevance to the issues that are

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presently before the Commission, so that at this stage we have nothing further to place before the Commission and it would seem that the Commission should then proceed to carry on with its published programme of other witnesses.

5 CHAIRPERSON: Thank you. Advocate Lebala.

ADV LEBALA: Chairperson, Commissioner Musi, our team has been requested to be present here this morning, I don't not know whether I should start by firing a salvo. In as far as our presence is concerned I should give over to my senior
10 colleague Richard Solomon but we are able to appraise you of the following, if we have been invited to come and update the Commission about our preparations in as far as Mr Frits Nortjé is concerned we would like to advise you that we are
crossroads Mr Chair. What does that mean?

15 Are we ready to cross the road to start taking (indistinct) the testimony? Those questions would be answered by a number of requirements and those (indistinct) we are confident that they could be positively addressed also by Mr Solomon. For our part Chairperson, Commissioner Musi we
20 have received a draft discovery affidavit from Mr Richard Young, it's not signed and probably I should recapitulate and remind you that Mr Richard Young intends cross-examining Mr Frits Nortjé in as far as the aspect of the combat suite, in as far as the frigates are concerned has to be looked at. Now
25 that's the (indistinct) way Mr Richard Young would like to go,

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but there's been events and journeys in as far as that (indistinct) is concerned.

Mr Richard Young has been advising our team, myself, Mr Ngobese, the ARMSCOR team, the Arms
5 Procurement Commission that he's got volumes and volumes of documents that ought to be used in as far as the cross-examination of Mr Frits Nortjé is concerned. Now that process has (indistinct) and be informed Commissioner Musi and Chairperson it has frustrated us, we are all (indistinct) because
10 we are not even certain as to where should we start our preparations with Mr Frits Nortjé.

Now let's (indistinct) is this, since we learned that Mr Richard Young intends cross-examining Mr Frits Nortjé there's been documentation after documentation sought from
15 our side, from the IT Procurement Commission and (indistinct) files that Mr Richard Young intends using, the large profound of some documentation that we do not know of, that we cannot locate, the origins thereof are questionable subject to the following; that there's no one better informed to assist this
20 Commission to (indistinct) use those documentation other than him, it makes sense Mr Chairperson, Commissioner Musi to note what he says in that regard, but it also multiplies problems on our side in as far as our preparations are concerned in this context.

25 We are told time and again that there are additional

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documents, when we are just about to start our preparation in sitting with Mr Nortjé we are told that be advised that there is additional documentation that Mr Frits Nortjé has to (indistinct) or that the Commission has to give to us. Now what does it do to us, it informs us that either we start consultation with Mr Frits Nortjé, ignoring that which Mr Richard Young must bring our attention to, or we wait for Mr Richard Young to be certain that there's a cut-off point of his request for documentation of alerting us about the additional documents that have to be drawn to your attention before we hear the testimony of Mr Nortjé, including more substantial whether the documentation that we have is accurate for us to lead this testimony.

Now what does that mean Chairperson, Commissioner Musi? Are the inadequacies going to be exposed or we try to be adequate? Now we've made several propositions to avoid this drama and let's advise you it is dramatic, it is dramatic because we are not in control of the process. We as (indistinct) were concerned, we sat with our heads held high that we are ready to lead the testimony of Mr Frits Nortjé, we were ready even before the adjournment Mr Chair, we (indistinct) a very profound statement that has been prepared in as far as Mr Frits Nortjé's testimony is concerned, we've given the document, we've supplemented it, we've requested additional documentation in line with our research and preparations outside those documentation, low and behold

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we were overtaken and confronted with the fierce urgency of demanding that additional documentation has to be looked at by Mr Richard Young.

Now we are where we are because of this background that we give you. Where do we start preparing Mr Chairperson, Commissioner Musi? Are we starting to prepare what we have or we should wait for Mr Richard Young to advise us there's additional documentation that we would have to look? Now it creates a problem for us and the issue of the documentation is being used as a string ...

I beg your pardon Mr Chair. Now there's a (indistinct), it is used as a (indistinct) as to whether I, we as evidence leaders, are we ready to lead the evidence of Mr Frits Nortjé or not. I've seen communication where Mr Richard Young boldly assures whoever that he does not think that we are ready. Now we cannot lose control of the evidence leaders in guiding this process. Chairperson, Commissioner Musi, we have several practical propositions that would allow us to cross the road.

Now we want to make the following suggestion, we intend sitting down with Mr Richard Young on one condition and we humbly make this request, if he is legally represented, but the reason why we make this proposition is because if he is legally represented there will be accountabilities and there won't be accusations that we (indistinct) into practical

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propositions that we would like to make to guide this process. Now this includes the following; we will agree with his legal representative to say from now on these are the documentation that we would use in as far as leading the testimony of Mr Frits Nortjé, outside this kind of date, and this is in line if we agree on choosing a cut-off date, one or the other Chairperson, Commissioner Musi, we have to draw the line in the sand and that would be actuated by that cut-off date that we are (indistinct).

10 Now once we agree on a cut-off date then we will say to Mr (indistinct) legal team in our view we've seen the documents that Mr Young intends in cross-examining Mr Nortjé and be advised that up to so far Chairperson, Commissioner Musi we have 1 065 pages of documentation, some of which my
15 colleague Mr Ngobese managed to seek for us, we've looked at them and we (indistinct) into total obedience and thinking like us we assure you we also (indistinct) are irrelevant and I've got to be careful not to testify at this stage in the absence of Mr Young.

20 Now going back to meeting with Mr Young's legal team we'll be able to give them assurance that we will follow the relevant documentation that we feel are in the principles of basic rules of evidence that are relevant and that would assist in as far as the Terms of Reference that we deal with at this
25 stage of the Commission in as far as the testimony of Mr Frits

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Nortjé is concerned are applicable, we'll say to that legal team that these are documents that we think are relevant, these are the documents that we do not believe are relevant, if they disagree with us we'll isolate that point and come right before you, and we trust your discretion that you'd make a better informed decision.

Now what does that mean Chairperson, Commissioner Musi, that will guide the process ahead, then we won't be confronted with a fierce urgency saying to us before we start leading Mr Frist Nortjé the next day to be told that there are additional documents that we should look at.

Now we have decided to reach out to Mr Solomon's team, they agree with this approach and I'm certain that they will put themselves on record in that regard, but in closing Chairperson we've been ready, we are still ready and we assure you that we can start leading Mr Frits Nortjé's testimony on one condition, this Commission is not going to accept a large component of this 1 065 ..., I beg your pardon, please help me compute, 1 065 Mr Chairperson, my act is not together, that's 1 065, 1 065 voluminous documentation, we didn't have sight of some of these documentation.

Now would we be prepared to consult with Mr Frits Nortjé without seeing some of this documentation? No. What does that mean, the process of operation is being halted in our own foot tracks. Now this journey has amazed us, it remains a

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journey, it's not an event. For us we are of the view that preparing a witness is not a journey, it's an event, requesting documentation is not a journey, it's an event but Mr Young mentioned a journey. For instance we do not know as to whether next week we are going to be told that there are additional documentation.

Now in closing Chairperson and Commissioner Musi please help us, assist us, give a directive that would say we meet with Mr Young, Mr Richard Solomon's team and Mr Young should be represented and we agree on formulation of what could be guidelines to assist us to fabricate (indistinct) in as far as leading the testimony of Mr Frits Nortjé. And in closing we say the following, if there is one witness we are certain would be easy to lead, that witness would be Mr Frits Nortjé, simple, uncomplicated (indistinct) concept and we are surprised and perplexed that up to so far we (indistinct) this witness.

We've assured ourselves that it's not easy to bring testimony before any forum, particularly this Commission, we've led very difficult witnesses and we relax when we are just about to confront the testimony of Mr Frits Nortjé, when we were confronted with a request for documentation, so Chair, Commissioner Musi, you will direct us tomorrow and say we should start, we do not know whether we are going to be told that you are leaving some documentation out and there will be consequences when we do that, our reputation will be at stake,

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it may be reported to our profession and one can imagine, we pose ourselves the following question, if it be found that it's true that we ignore some of this documentation that Mr Young has drawn our attention to and it is relevant, there will be consequences, firstly we'll be failing our duty to the profession that we both know and (indistinct), we'll be failing the duty to this Commission and significantly we'd be putting our careers at stake. Assist us Chair.

CHAIRPERSON: Thank you. Advocate Solomon, I think last time we were here we did give some direction or some type of directive on how this issue should be dealt with. You will recall I was saying that there is no way in which we are going to be held ransom by a person who ends up asking documents after (indistinct) and making it very difficult for the evidence leaders to prepare the witness, and secondly we said that Dr Young will not be allowed to use documents in cross-examination which he has not included in his discovery affidavit, and I thought that the evidence of Mr Nortjé will be much easier to prepare.

You only take into account documents that Dr Young has produced, has mentioned in his discovery affidavit because mainly for Mr Nortjé to come and give evidence doesn't depend on what Dr Young is going to say, he must prepare a statement and give evidence, if at all cross-examination crops up it can crop up but then Dr Young will only be allowed to use

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documents that he has included in his discovery affidavit. I thought that was the basis on which we parted ways the last time.

ADV SOLOMON: Yes Chair and Commissioner Musi that's
5 my recollection, there was a ruling by yourself and
Commissioner Musi to that effect. The difficulty that one is
faced with is we have this draft discovery affidavit that my
learned friend Mr Lebala has spoken about which runs into over
a 1 000 documents, probably 10 000 or 20 000 pages of
10 documents, one doesn't know what the length of each document
is. That draft discovery affidavit was only produced on Friday
the 14th last week.

We've looked at it, it's very difficult to assess
documents just from a schedule, we don't have the documents.
15 It seems to us there are probably a number of documents in
that schedule that are hardly relevant in as far as Mr Nortjé is
concerned and we would object during cross-examination
concerning those documents, but we can't make that final
determination until we've seen the documents.

20 We've written to Advocate Ndubmi and the
Secretariat to request him to request Dr Young to produce the
documents that is foreshadowed in his draft discovery affidavit
Schedule Part 1 and Part 2. We must just place on record
Chair, Commissioner Musi just some of the chronology because
25 it may be important when one has at some point in time to

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determine what is to be done with the ongoing request by Dr Young concerning documents and his application to be allowed to cross-examine witnesses.

5 Just to give you a bit of a chronology, on the 17th of October 2013 Dr Young applied for leave to cross-examine Mr Nortjé. You may recall that his evidence in chief stood down to allow Dr Young an opportunity to prepare for that cross-examination and obtain insight into documents. He provided a supporting statement on the 20th of October to
10 which he attached a number of documents.

On the 25th of October Chair yourself and Commissioner Musi granted leave to Dr Young to cross-examine Mr Nortjé. All the documents submitted by Dr Young were then provided at that point in time. What he then subsequently did
15 is he withdrew that application and brought a second application on the 3rd of November 2013 and in that application he specifically says that I withdraw my previous application.

Attached to that application was an appendix in which he requested a list of documents which again you will
20 recall Mr Nortjé was charged with locating and providing and he spent many, many weeks, you will hear when he gives evidence literally maybe six weeks in what has become known as the ice box where these documents are located, and which has no indexing and no proper collation of the documents, so he has
25 really spent literally hours, days and days of his time to of

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assistance to the Commission, he has other duties at ARMSCOR but he's been engaged in that exercise.

What subsequently happened is there were further requests that only came to our attention much later. My attorney from Baumann Gilfillan Ms Kabindi Zondo wrote a letter to the Commission on the 27th of January setting out that there had now been further requests, subsequent to the 3rd of November there were two further requests by Dr Young for documentation.

It was in a letter of the 17th of December that we requested the Secretariat to use its powers to discover under oath, that was on the 17th of December, he only discovered on the 14th of February as I mentioned and that's not proper discovery, it's not confirmed under oath but I think the upshot of it is you did make a ruling that he should not be allowed to refer to documents that are not in his discovery affidavit, the difficulty is he now has this very comprehensive draft discovery affidavit which my learned friend Mr Lebala has referred you to, which places him in a position where he doesn't feel that he would do justice to the Commission to lead Mr Nortjé when one doesn't know what the state of the documentation is.

From our perspective we have spent many, many hours and weeks in obtaining the documentation, in making Mr Nortjé available, in preparing what is a more than adequate statement which will be amplified and Mr Nortjé is ready to give

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his evidence and he's anxious to do so because it weighs on him, the fact that he has to give this evidence and that he's probably going to be detained in giving this evidence for a number of weeks if one looks at the sheer volume of documents, but I think what Mr Lebala is saying is sensible. The only way one can try and curtail this entire process is to have some form of structure where we can agree with Mr, with Dr Young's legal representative what are the documents that are relevant, what are the documents that are going to be used, otherwise one is going to have a continuous interruption where the relevance of the document becomes an issue, the preparedness of the evidence leader, Senior Counsel Lebala, whether he is prepared to take the witness through that document which he hasn't yet seen, so it's all very unfortunate but I think one should try and get some sense and some type of structure into the approach, and I think what Mr Lebala said yes to is sensible, I don't have a (indistinct) of the commission to make such a ruling but anything that can just allow Mr Nortjé to give his evidence as quickly as possible and in the most efficient manner we will support. Thank you Chair and Commissioner Musi.

CHAIRPERSON: And Advocate Lebala as I understand it you are ready to lead the evidence of Mr Nortjé and I will suggest that you go ahead and prepare on the basis that you have prepared so that you can lead Mr Nortjé on Monday. Two;

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think we did (indistinct) that Dr Young will not use any documents in cross-examination unless those documents are contained in his discovery affidavit, as I understand you we don't have a discovery affidavit now because that's still a
5 draft.

Three; I think it must be made clear to Dr Young that he is not going to be allowed to use any documents to cross-examine Mr Nortjé unless one, that document, he has mentioned that document in a discovery affidavit (indistinct)
10 some time ago to provide us with (indistinct) that he has made a copy of that document available to you so that you can be in a position to deal with that document with the witness, otherwise if at all I'm afraid we might not be in a position to say to Dr Young that he must obtain the service of legal
15 representatives, but then I agree with you, if at all it is possible that they can get the services of a legal representative maybe that might help in order to bring some structure in the possible cross-examination of Mr Nortjé, but as a starting point I want you to be ready with Mr Nortjé on
20 Monday morning, other issues can follow later.

ADV LEBALA: Chairperson, Commissioner Musi, tedious as it is we will do our best but may the following be put on record, we do not intend short-changing this Commission, that might come out with consequences that might be dire to us in
25 line with our duty to this Commission (indistinct). As we're

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glared at this draft discovery affidavit we discovered that there are highly relevant documentation that (indistinct), that we would like to take Mr Frits Nortjé through in presenting his evidence before this Commission.

5 We invited (indistinct) of the Chairperson, Commissioner Musi, we'll determine that after consulting with Mr Frits Nortjé those consultations could start sooner than yesterday, meaning today or tomorrow, we'll be better informed as to whether are we prepared to take you through all the
10 relevant documentation that has come to our attention after glaring at this informative draft discovery affidavit.

 Now we have to be careful Chairperson, Commissioner Musi not to cut too close (indistinct) a duty beyond us and we'd be short-changing, more significant to this
15 Commission if we confidently believe that we could discharge this function of leading the testimony of Mr Nortjé on Monday if there is detail and information that we still have to (indistinct), and we want to put the following on record that I'm certain that I'm (indistinct) Mr Solomon on this point (indistinct) I'm going
20 to make a point that we assist him in confirming the following; we have discovered on the documentation that we've gone through that there are very highly classified details and we are going to invite you to go into *in camera*, at this time we are going to go into *in camera*, I will demonstrate to you.

25 There are also consequences that we need to take

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you into our confidence about. We may end up having a commission within a commission if we go the way you are directing us and one way or the other we could be wrong Chairperson, Commissioner Musi, we say this cautiously. We think, that's our view, that's this team's view, we think that Mr Young wants to have a commission within a commission and we will resist it.

Assist us to resist that, by sitting with his legal team, and I believe it is our view that we would direct the issue (indistinct), avoiding the consequences of saying we bulldozed him into making certain concessions. If we sit with his legal team we would be able to advise (indistinct), these are documents we think are relevant, these are documents that are not relevant, if we want to debate that relevancy let's go before the Commission, we'll make it a point then.

That could only happen Chairperson if you have glared some of this documentation. For instance I wish you had a copy of this draft discovery affidavit, we have seen that some documents are not relevant, they relate to a litigation that Mr Young had with ARMSCOR and the DoD. Now if you invite (indistinct) documentation you really need a commission within a commission and we are not going to allow you, unless you can exercise your fairness, instincts, that we do not doubt, you insist that this testimony should come in. I could take you through this (indistinct) affidavit, advise (indistinct) to

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demonstrate to you that ...

CHAIRPERSON: Advocate Lebala, unfortunately it's not a discovery affidavit, that as it says is a draft, it has not been signed.

5 ADV LEBALA: May I interpose Chair? Thank you Chair. But there is something in the documentation that we would like to look at, my colleague Ngobese has even been drawing my attention, I saw some of that documentation that are not before the Commission. Now what does that mean Chair, it means we
10 are going to delve deeper, look at the content and the context of this documentation. My colleague has captured it so well, at face value we can see those that are relevant, those that are not relevant, and actually there are even some that we are looking at that ...

15 CHAIRPERSON: Advocate Lebala, Commissioner Musi has just told me that I must tell you that Monday call Mr Nortjé, we will proceed with Mr Nortjé. We have been told that (indistinct) parties will deal with that witness as and when we go off record. Secondly if at all you discover there are certain
20 documents that you need to deal with Mr Nortjé I'm sure (indistinct) those documents.

ADV LEBALA: Chair, ...

CHAIRPERSON: Otherwise if at all we are going to sit here and try and identify what are the likely difficulties we will not
25 start and I want to proceed with Mr Nortjé on Monday the 24th

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as we have mentioned.

ADV LEBALA: Chair I will proceed on Monday, we wanted to identify these difficulties (indistinct) identify solutions.

CHAIRPERSON: Okay two; if at all Dr Young wants to cross-examine he will make an application, he will tell us exactly on which issues does he want to cross-examine, which documents he wants to deal with, we'll make a ruling at that stage.

ADV LEBALA: May I pose a question Chair?

10 CHAIRPERSON: Yes.

ADV LEBALA: We've confirmed that we will proceed on Monday. I'm forced to give you a deep question, I know that (indistinct) several times. What if this documentation (indistinct) let me put that before you consider, it is highly relevant that (indistinct) that he has and fortunately for us Chairperson, Commissioner Musi, be informed that we've consulted with Dr Young, we've been to his offices, we've seen bundles of documents that we have to explore and we know that some of this documentation the Commission doesn't have, our colleagues from ARMSCOR do not have, the DoD does not have, and we are looking for that documentation, hence we state Chairperson, Commissioner Musi that please join us (indistinct) and agree with this proposition, we would be better informed during the next coming days and if there are difficulties we will let you know but we will do our best to be

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prepared to proceed on Monday Chairperson, Commissioner Musi, thank you.

CHAIRPERSON: Thank you, then we will proceed on Monday morning. If at all at a later stage there is a need to
5 adjourn and give you a chance to go through some of the documentation that Dr Young would have made available to you we will do that at that stage, but then we'll start on Monday with Mr Nortjé.

ADV LEBALA: Thank you Chair.

10 CHAIRPERSON: Advocate Solomon, Monday morning.

ADV SOLOMON: Thank you Chair.

CHAIRPERSON: Thank you. We'll adjourn.

(COMMISSION ADJOURNS)