

24 FEBRUARY 2014

PHASE 1

CHAIRPERSON: Thank you. Advocate Lebala.

ADV LEBALA: Chairperson, Commissioner Musi, you will note to my left and to the centre that Mr Frits Nortjé is not in the witness box and that's going to explain the approach that we have adopted and the reality of that approach will be better
5 informed when Mr Solomon SC addresses you and it is at this stage when I'm inclined to give over to him unless you have specific questions directed to us.

ADV SOLOMON: Morning Chair, Commissioner Musi. You
10 would have perhaps seen an application that we have brought on behalf of our client ARMSCOR before the Commission which serves to move the Commission to compel Dr Young to produce documentation which forms part of a schedule to a discovery affidavit that he deposed to finally I think on Friday the 20th or
15 Thursday the ..., Friday the 21st or Thursday the 20th. That application we'd like to move but also just to put in perspective where Mr Nortjé sits amongst all of this. We understand from our learned friend Mr Lebala that because of the further discovery that has been received from Dr Young he's not in a
20 position to lead Mr Nortjé on all the relevant documents and in that sense Mr Nortje has been appraised of where my good and learned friend Mr Lebala sits in relation to leading the evidence of Mr Nortjé and Mr Nortjé accordingly himself guided by Advocate Lebala would like the opportunity together with the
25 evidence leader to familiarise himself with a number of the

24 FEBRUARY 2014

PHASE 1

documents that have been produced by Dr Young. So, really our approach is to move the Commission to compel Dr Young to produce the documentation that he has foreshadowed in his discovery schedule. We would like to persuade the Commission that a period of five days for this purpose would be sufficient.

In our Notice of Motion, if you have the application before you, you would have seen that we had proposed in the first paragraph unnumbered, but the ... Does Chair and Commissioner Musi have the application? It's the first page of the Notice of Application and the first paragraph seeks an order that the Commission direct the third party which is Dr Young to produce the documents in the schedule to his discovery affidavit within five days after date of the order.

Now we've been favoured with an email that Dr Young has sent to Advocate Ndumbi, I believe on the 19th of February where he distinguishes between the documents 1 to 1061 and then from 1062 to the end which on my schedule ends at 1065 although he talks about 1066. I'm not sure if that's a typographical error or if there is in fact a schedule that ends at 1066, but be that as it may he draws a distinction between the documents from page 1 to page 140, half of 143 and then the last four documents which he says he hasn't yet had an opportunity of collating and paginating and counting the number of pages but what he is suggesting is that this task would take him a period of four ordinary weeks to complete and

24 FEBRUARY 2014

PHASE 1

that task he says really relates to item 1 to 1061.

Now what has been proposed by the Secretariat, which we think is a sound approach, is that he should be directed to furnish these documents to us in electronic format on a memory stick or in some or other form so that he doesn't need to physically make copies of these documents which he says will take him a long time. I have no doubt in my own mind that he already has these documents in electronic format because that seems to be suggested in newspaper interviews *et cetera*, that he has a virtual library or press room of these documents.

So, he can be directed either to produce the documents on a memory stick or in some or other electronic format, he can even do it on a Dropbox, whatever electronic format he chooses, alternatively to give us the hard copies. I might just mention Chair and Commissioner Musi, I'm not sure if you have as part of the application the annexures but one of the annexures, unfortunately these papers aren't paginated and I apologise but just due to the haste in which this application is being prepared but one of the annexures which in my file is Annexure "B", and I'll just check with you Chair and Commissioner Musi if you have the annexure, it's Dr Young's application to cross-examine, it's his second application to cross-examine. Do you have it Chair, Commissioner Musi?

You will see at the end of that it's page 8 of 8. At

24 FEBRUARY 2014

PHASE 1

the end of that document you will see it was signed by Dr Young on the 3rd of November 2013. If I could take you to page 3 of 8 of that document paragraph 22, and if you could just indicate Chair and Commissioner Musi if you have that paragraph, it's page 3 of 8 paragraph 22, I see Commissioner Musi is nodding, if I could just read that into the record, what he says is:

"I advise that I will need to use documents that I have not received from the APC thus far in my cross-examination. Clearly I will need to provide copies ..."

I suppose it must mean, the word "of" is missing:

"... of these to both the APC and its witnesses".

The APC is the Commission:

"I advise that this will need a not-insubstantial level ..."

I suppose again:

"... of effort and time to do this adequately, let alone fully and properly'.

So already in November he was aware of the need to produce documents that he knew Mr Nortjé didn't have and he's taken an inordinate length of time to do that, he only produces his discovery affidavit on Friday and he now in this letter that I've referred you to where he says he requires a period of four weeks to prepare these documents, we submit such length of

24 FEBRUARY 2014

PHASE 1

time is unreasonable, he should be directed to produce this within a reasonable period of time which we believe is not less than five court days and as I have submitted we believe that the memory stick or some alternate methodology of electronic storage and facilitation can be used to furnish the documents to the Commission and we will then be able to obtain it from the Commission.

So Chair and Commissioner Musi, what we are faced with is a witness who has been called to give evidence in the second phase whose made two applications, the second one withdrawing the first, to be allowed to cross-examine my witness who is being led by Advocate Lebala, Mr Nortjé as well as Mr Kamerman, which doesn't affect me, he's a DoD witness but he's been granted leave to cross-examine these witnesses, he's told us in his discovery schedule that he wishes to utilise the documentation which runs into a 165 or 166 odd number of documents, he says in this email that just documents 1 to 1061 are about 15 000 pages of documents if I've understood that correctly, and then he indicates very large sums of money to print these documents, he says just items 1062 to 1064 would be of the order of R1.197 million including VAT and I'm not sure if that's just the printing charge or also his effort but he can be spared that effort if he provides it to us electronically or provides it to the Secretariat who can in turn provide it to ourselves and the DoD.

24 FEBRUARY 2014

PHASE 1

5 So Chair, Commissioner Musi, we would ask you to
make that order, it seems to us that Dr Young has not always
been as cooperative as he could be with the furnishing of
documents and requests for documents, he seems to do this in
fits and starts, it's not one request, it's numerous requests.
You would have picked up from our application that you have
before you that there have been, if I could take you to page 5
Chair and Commissioner Musi, paragraph 12 of the application,
if you would indicate if you have it, it's the affidavit that
10 accompanies the application affidavit of Meshack Tefa, the
head of Legal. Do you have it Commissioner Musi? I want to
read from page 5 paragraph 12 where he says:

"The third party ...".

This is Meshack Tefa speaking:

15 *"The third party in Appendix 'A' ..."*.

Which is reference to Dr Young:

"... to his application dated 3rd November 2014 ...".

That's the annexure I just took you to Chair and Commissioner
Musi, Annexure "B":

20 *"... requested documents from the Commission in
order to prepare for the evidence of the witness.
The Commission requested the applicant's
assistance in locating and declassifying these
documents. A further request to locate and
25 declassify documents for the third party were*

24 FEBRUARY 2014

PHASE 1

*received on 27 January 2014, then again
29 January 2014 and then a third request
11 February 2014”.*

I can tell you that the request in the letter of
5 11 February 2014¹ only came to ARMSCOR’s attention on
Thursday the 20th of February and those documents have not
yet been accessed which again prejudices Mr Nortjé’s
preparation to be a useful and really frank witness in this
Commission, and if I could just continue:

10 *“Some of the documents requested were on the
memory stick provided to the Commission in 2009
which are relatively easy to find”.*

You will recall Chair and Commissioner Musi that ARMSCOR
had right at the outset of this matter prior to my involvement
15 and my attorney’s involvement furnished to the Secretariat and
to the Commission a memory stick which contained all the
documents that ARMSCOR was able to locate which it felt was
relevant to this Commission. I can tell you that the vast
majority of documents that are on Dr Young’s discovery
20 schedule we have not been able to locate.

He makes the point “you could locate them from
other sources” but then the question arises Chair,
Commissioner Musi, is to what extent is there this obligation
upon ARMSCOR to go and locate these documents that Dr
25 Young readily has in his possession? It’s already taken, and

24 FEBRUARY 2014

PHASE 1

we've described the process, it's taken Mr Nortjé a period of in excess of six weeks where he has literally gone to a designated room which has been given the euphemistic name "the ice box", where these documents have been sealed in ARMSCOR's possession since 2000 and it's those documents that were put on the memory stick and furnished to the Commission but Dr Young seems to have many, many documents that we have been unable to locate.

I'm not suggesting that with another search that will take a further three months or longer, further documents may not be located, we're after all talking 14 years ago, a lot of the documents that were in ARMSCOR's possession that were not sealed have presumably been shredded or filed elsewhere or discarded because of the length of time, a lot of the documents that he has fall into that category.

Mr Nortjé just can't spare the time, he has other work to do at ARMSCOR, he has literally devoted the last two or three months to this task of finding documents that Dr Young request. It was that which prompted the request by ARMSCOR's legal representatives to the Commission to kindly request Dr Young to discover because, and it is documented in the affidavit before you because it appeared to ARMSCOR that Dr Young had these documents that he was asked in ARMSCOR to find, so I mean one really wants to bring the documents before the Commission, that's what the Commission is tasked

24 FEBRUARY 2014

PHASE 1

to do, that is what Mr Nortjé wants to do, he wants to talk to documents that he has knowledge of and have all the documents that are relevant before him. Now Dr Young has these documents and wishes to cross-examine Mr Nortjé on
5 them, he should have produced them a long while ago.

This obviously inhibits and really retards the work that the Commission is charged to do, but having said that we don't want to preclude Dr Young from having the fullest opportunity to cross-examine Mr Nortjé on all relevant issues
10 that Mr Nortjé is able to deal with and if he has documents that he wishes to place before the Commission that facilitates that endeavour of his, we're not trying to stop it, all we want is an opportunity to at least let Mr Nortjé look at those documents before he gives his testimony.

15 We understand from our learned friend Mr Lebala that he has been placed in an extremely invidious position because it's not just that Dr Young wishes to cross-examine Mr Nortjé on these documents, Mr Lebala has told Mr Nortjé that he's considered the schedule and certain of the documents
20 have sprung off the page and have landed with him to the extent where he says: "Well, I would like you in your evidence in chief to deal with those documents for the benefit of the Commission", so it just seems to us that my learned and good friend Advocate Lebala SC is not in a position to continue, we
25 from our perspective would like Mr Nortjé to see these

24 FEBRUARY 2014

PHASE 1

documents, hence the application that we brought, we have to put Dr Young to timeframes and timescales, otherwise the entire work of the Commission is going to be rendered nugatory and I know speaking, I've seen your attitude Chair and
5 Commissioner Musi that you do want to get on with the business of dealing with the evidence, dealing with the documents and bringing this Commission to an expeditious conclusion but we are left in this position where Dr Young has been granted permission quite fairly by the Chair, by
10 Commissioner Musi to cross-examine Mr Nortjé, if that's the case he's been given that privilege, there is an obligation that goes with it, that obligation is if you are going to wish to put documents to a witness he must at least have seen them beforehand.

15 But from our perspective we're not trying to inhibit the work of the Commission, if the evidence leader was prepared to continue in this state of uncertainty we would be surprised but we would leave it in the hands of the Commission, but we understand that Lebala SC is not in a
20 position to continue, we believe that we need to see these documents from our own perspective, from the representative of ARMSCOR's legal representative's perspective representing this witness, we're required to see these documents.

25 We're in the Commission's hands as to what the Commission considers a reasonable period of time and what

24 FEBRUARY 2014

PHASE 1

format the discovery and production should take but I think I've gone on enough, unless you Chair and Commissioner Musi want me to take you through any elements of the affidavit, I mean it is there on record, it does set out what has happened
5 chronologically since Mr Nortjé was first summonsed as a witness, what has been happening in parallel with Dr Young which has inhibited Mr Nortjé from giving his evidence and why we are today in this predicament.

Mr Nortjé wants to give his evidence, we would like
10 to place that very firmly on record, we don't want the impression to be created that on each occasion that Mr Nortjé is called to give evidence he doesn't eventually give the evidence, we want to suggest that the reason why Mr Nortjé has not given evidence up to to-date and why we believe he
15 can't give evidence today really lies at the door of Dr Young, he would resist it, he would argue against it but we believe the facts, stark facts speak for themselves, the stark facts are that he has continuously requested documents to be produced, he has said that unless he has those documents he is not in a
20 position to cross-examine, we have accommodated him by on three separate occasions locating the documents, we're at a stage where we have five files prepared for the Commission, for Mr Nortjé with the kind assistance of Advocate Lebala and the very helpful input from the evidence leaders to be able to
25 lead his evidence in a cogent and coherent manner but now we

24 FEBRUARY 2014

PHASE 1

are confronted with a further 1065 documents which run into 15 000 and then from 1062 to 1065 or 1066, a further 100 000 documents. We don't suggest that all those documents are relevant, we have done an analysis of the documents which we have provided the evidence leaders with, which runs to five pages but that is our take on what is relevant, we would hope that before this Commission starts with the evidence of Mr Nortjé some agreement could have been reached with Dr Young's representatives as to what they consider to be relevant so we don't have a fight as and when each document is produced as to its relevance, but that's something I don't believe the Commission need concern itself with, I know steps have been initiated through Advocate Ndumbi and Advocate Lebala SC to try and facilitate a meeting with Dr Young to see if some agreement can't be reached in regard to the document, if it can't we would have to deal with them through you Chair and Commissioner Musi as and when it arises but I just want to firmly place on record that there is no delay in the giving of Mr Frits Nortjé's evidence from ARMSCOR's point of view, we have done all in our power to facilitate his giving evidence today but we are left in a situation where Advocate Lebala is feeling extremely uncomfortable to proceed with leading his evidence and we endorse his approach and we think it's a sensible approach and a mature approach, and coupled with that approach we bring this application before you humbly but we

24 FEBRUARY 2014

PHASE 1

would wish you to consider it in the light in which it has been brought and hope that you will favour us with a firm order that Dr Young produce these documents. Thank you.

CHAIRPERSON: I hope I didn't misunderstand, you say the
5 total number of pages Dr Young's referring to are, what is the number?

ADV SOLOMON: Chair, over a 100 000.

CHAIRPERSON: Advocate Lebala, do you want to add something?

10 ADV LEBALA: Certainly Chair. The trajectory of the assertion angling the thinking that we are not prepared to lead Mr Frits Nortjé has to be put in a proper perspective, it has got merit and truth in it. Remember Chair, Commissioner Musi, hence you are sitting there with an experience which is not
15 doubted I need not go into the history of your practice credentials and you being elevated to the seat that you occupy in the highest judicial forums in this country.

This team is not in a motion court application, we are not standing before you to make submissions, we lead
20 evidence, we lead evidence through a witness. I wish we could testify, this Commission would be going on, but you both know we are not testifying, it is the witness Mr Frits Nortjé who testifies.

I want to go on record to put it in a proper
25 perspective that Mr Frits Nortjé is not comfortable to testify,

24 FEBRUARY 2014

PHASE 1

it's not because we are not prepared to lead his evidence. If we were testifying Chairperson, if for instance we were making closing submissions on this first Terms of Reference, utilisation rationality you could compel us with a directive to say come and make submissions on Monday and I assure you we wouldn't resist that. How do we lead evidence of a witness who is not comfortable to testify?

And my the record reflect the following, with the risk of testifying, Mr Frits Nortjé reminds us that his reputation is at stake if he testifies given the circumstance of what we see surrounding the documentation, we assure him also that our reputations are at risk still because if we ignore this documentation what if some detailed information comes out at a later stage?

Now the Commissioners have got nothing to do with it, they are being assisted by us, hence we are appointed. Now on this basis alone Chairperson, Commissioner Musi we are not prepared to allowed this weighty witness Mr Frits Nortjé to punch below his weight, we assure you that he is such a heavy credible witness and you will appreciate once he starts to testify. He is simply saying: "I don't want to go into a dual to go into a fight (indistinct), I want to confront the situation and really box". Now he is saying to this Commission that: "I will testify when I'm certain that I've considered and looked at everything".

24 FEBRUARY 2014

PHASE 1

Now what do we say come to think of it, now hence we mentioned to you the previous week that we have a duty to this Commission but a duty to the profession. Now let's pose ourselves this question Chairperson, Commissioner Musi, what if someone who is so hostile to this Commission picks it up that we led Mr Nortjé's testimony by piecemeal, we ignored some very important detail that we ought to have considered? Now my society will ask me a question, my colleagues will say: "Wait Lebala, you and Ngobese, why did you go on when there is this detail before you?". Now we could say it was irrelevant but what if it's proven that it's relevant, and there are consequences Chairperson and Commissioner Musi that brings our reputation, but low and behold (indistinct) of it is Mr Frits Nortjé throughout our consultation with him says the same thing: "I'm not prepared to sacrifice my reputation" meaning himself, he says: "I want to be comfortable, I want to look at all this documentation".

What does that mean? There are two-pronged challenges before the Commission, one is Dr Young's production of the self-same documentation and Mr Frits Nortjé's ability to testify. Our truck [sic] is Mr Frits Nortjé's ability to testify. Once again we assure you Chairperson, Commissioner Musi, hence we said the following in the previous week, if the Commission decides that it wants to ignore Mr Richard Young's schedule of discovered documents we'll go

24 FEBRUARY 2014

PHASE 1

ahead with what we have prepared but your wisdom and practicality which comes from undoubted experience, that's why you are sitting there and that's why you occupy such a very responsible position in the country outside this Commission as
5 judges, call for your judicial instincts to say this should be considered and you have a duty to assist this Commission Chairperson, Commissioner Musi by disclosing these things and the challenges presented by the developments we see.

What does that mean? Please allow us to take Mr
10 Frits Nortjé through this voyage which would be properly complete if it is prepared, it is staffed with resources, or else we doubt as to whether we will continue and come to a destination, and on those basis we are left with no option but to go back to the drawing board and assist this witness to be
15 properly prepared so that he should bring evidence before the Commission. Now unless there are specific questions those are our submissions Chair.

NOTE: Caucus.

CHAIRPERSON: Advocate Lebala, Advocate Solomon, I
20 think what we are going to do is that we are going to grant the order, but then I'll want both of you to prepare a draft for me. Dr Young must be asked to discover the latest by Monday the 3rd at 16h00, latest by Monday the 3rd of March at 16h00 and the method of discovery, you said to me that you were in
25 discussions with Dr Young on how those documentations can be

24 FEBRUARY 2014

PHASE 1

made available, you can include that in the draft order, which draft order I will sign at a later stage.

ADV SOLOMON: Thank you Chair, Commissioner Musi, we're most grateful.

5 CHAIRPERSON: If possible, if we can get the draft by 12h15 we can still sign it today and it will be on our website and I'll also ask the Advocate Ndumbi that Dr Young, that that order must be sent by email to Dr Young.

ADV SOLOMON: Thank you Chair, Commissioner Musi.

10 ADV LEBALA: I confirm Chair, Commissioner Musi.

CHAIRPERSON: Advocate Solomon, I suppose the modalities of how those copies of documents must be made available to you will be included in the draft order?

ADV SOLOMON: Thank you for your guidance Chair.

15 CHAIRPERSON: Thank you. I think that then disposes of Mr Nortjé.

ADV LEBALA: Certainly Chair.

CHAIRPERSON: Thank you.

20 ADV LEBALA: We once again assure you that what is left is for us to act maturely as evidence leaders outside the Commission. We cannot be guided by the Commission all the time, myself and Solomon SC together with the Advocate Ndumbi will put in place a programme of action that would assist us to make it a point that the testimony of Mr Nortjé
25 comes before the Commission speedily Chair. We assure you

24 FEBRUARY 2014

PHASE 1

that we are certain that we would like to assist this Commission if it's engaged in making a report on the first two Terms of Reference that by the time that time comes we would have turned a corner jointly with this Commission, if that's what the Commission is envisaging.

CHAIRPERSON: Thank you. Advocate Sibeko.

ADV SIBEKO: Mr Chair, Commissioner Musi, in the light of the developments that have taken place over the past weeks we have been required to prepare the leading of the testimony of the DIP witnesses. We are, together with our colleagues who represent ARMSCOR in the process of finally getting ready to have those witnesses come and delivery their testimony regarding the DIPS and we are making our best endeavours to be ready with our first witness who is going to be Mr Johannes Bernardus Barry De Beer at the earliest possible time being the 3rd of March 2014, subject however to whatever protocols that may need to be observed with regard to the declassification of certain documents and the lettering of statements that will form part of the proceedings that we intend to commence on the 3rd and 4th March 2014.

CHAIRPERSON: Do I understand you to be saying that by the 3rd of March you will be in a position to lead the evidence of Mr De Beer?

ADV SIBEKO: Yes Chair, we're trying to get our best endeavours to have that process unfolding on the 3rd of March.

24 FEBRUARY 2014

PHASE 1

CHAIRPERSON: So, we can safely adjourn until the 3rd of March for the evidence of Mr De Beer?

ADV SIBEKO: Indeed Chair.

NOTE: Caucus.

5 CHAIRPERSON: I think we have come to the end of this proceedings. Unfortunately we will have to postpone or adjourn until Monday the 3rd. As you know in terms of our programme we were supposed to have started today dealing with the evidence of Mr Nortjé but then because of the
10 difficulties that has been articulated by Advocate Lebala and Advocate Solomon we are unable to deal with the evidence of Mr Nortjé today. The evidence of Mr Nortjé will be dealt with at a date to be announced at a later stage, but then for now the only witness that seems to be ready to, or who seems to be
15 able to testify will only be able to testify on the 3rd of March, so unfortunately we will have to adjourn until the 3rd of March. Advocate Sibeko, can we make sure that by before the end of the week if the statement of the witness is available, that it must be put on our website?

20 ADV SIBEKO: We're making every endeavour to have that done.

CHAIRPERSON: Thank you. Then in that case we'll adjourn but Advocate Solomon, Advocate Lebala, I'll wait for the draft order so that I can sign it before we leave.

25 ADV SOLOMON: Certainly Chair.

24 FEBRUARY 2014

PHASE 1

ADV LEBALA: Certainly Chair.

CHAIRPERSON: We'll now adjourn. Thank you.

(COMMISSION ADJOURNS)