

8 MAY 2014

PHASE 1

CHAIRPERSON: Good morning everybody. I think on the last occasion when we were here we said that this morning we will hear the applications of parties who wants to cross-examine Mr Esterhuyse. Is there [indistinct] Mr Reed and then
5 after we finish Captain Reed we may go to the evidence of, or the possible cross-examination of Mr Esterhuyse. [Indistinct].

ADV SIBEKO: Good morning Chair, Commissioner Musi. We [indistinct] Advocate Sibeko whether the evidence of the witness [indistinct] commenced with. It would seem [indistinct]
10 convenient with Mr Esterhuyse [indistinct] submission was to be dealt with. Our understanding is that he's not going to be very long and that might then give the opportunity to Mr Reed and the team leading [indistinct] to deal with his testimony and at leisure [indistinct] testimony. I'm not aware how long his
15 testimony is going to be, but that's merely a submission we make.

CHAIRPERSON: I understand what you are saying but [indistinct] an application from, or [indistinct] application from him. There might be certain [indistinct] applications. We have
20 seen the statement of Captain Reed, I suspect [indistinct] short statement, he might not be too long in the witness box. I suspect with the two applications to cross-examine Mr Esterhuyse [indistinct].

ADV SIBEKO: I can take the matter no further Chair,
25 [indistinct] submissions.

8 MAY 2014

PHASE 1

CHAIRPERSON: And besides that if I understand Captain Reed is from overseas, if we can deal with him as soon as possible so that he can go back. It might be to the benefit of everybody else. If we don't finish [indistinct] then one can
5 [indistinct] that we might only meet sometime next week and I'm not quite sure [indistinct] the country next week, and that is [indistinct] maybe let's start with him and then from there that we can go to Mr Esterhuyse. Advocate Lebala.

ADV LEBALA: Esteemed Commissioners, we are shown
10 that the testimony of Captain Reed, we assure you that the testimony of Captain Reed will not take more than 15 minutes and I'm certain that leaves a gasp of fresh air [indistinct].

CHAIRPERSON: Thank you. Any other person who wants to comment at this stage? Thank you, maybe let's start with
15 Captain Reed.

(Witness is sworn in.)

ADV LEBALA: We are ready to proceed.

**WITNESS (DoD and Military Veterans) : MR ANDREW JOHN
20 CUTHBERT REED (Hereinafter referred to as "MR REED"),
GIVES EVIDENCE UNDER OATH**

EXAMINATION IN CHIEF:

ADV LEBALA: Captain Reed, you have prepared a signed statement approximately 12 pages, am I right?

25 MR REED: Chair, that is correct.

8 MAY 2014

PHASE 1

ADV LEBALA: And this statement was prepared, duly assisted by the team of Bowman Gilfillan Attorneys?

MR REED: Chair, that is correct.

5 ADV LEBALA: At this stage you are not adding or subtracting anything from the statement?

MR REED: Chair, I would like to leave the statement as it is. Thank you.

10 ADV LEBALA: Now there's been testimony before the Commission of Admiral Howell the previous three days, to be appropriate, on the 5th of May instant, that is 2014, now we are going to take you through the salient features of that statement as it pertains to your testimony which is captured by your statement and we'll start there. During consultations on Tuesday, on the 6th when we met with you, you will remember
15 that we mentioned to you that Admiral Howell touched on certain aspects that pertain to your role as the project officer of Project Wills.

MR REED: Chair, that is correct.

20 ADV LEBALA: And we informed you that he testified before the Commission wearing his cap on as the moderator of Project Wills and Project Sitron.

MR REED: Chair, that is correct.

ADV LEBALA: Now we'll be focusing on what he said in as far as Project Wills is concerned.

25 MR REED: Could you just repeat the question?

8 MAY 2014

PHASE 1

ADV LEBALA: No, it's just an assurance that we are not going to take you through what he said in as far as Project Sitron is concerned, we'll be focusing on what he testified about with his cap on as a moderator in as far as Project Wills is concerned.

MR REED: Chair I'm happy with that, thank you very much.

ADV LEBALA: Now we went through his transcript and we had to be certain that his testimony meets and relates to what the statement says and this has been confirmed by what we also took you through when we were sitting during the consultations on Tuesday, do you remember?

MR REED: Chair yes, I recall.

ADV LEBALA: Now we'll start being specific by going to those points and salient features of his testimony. Now it has become common cause before the Commission and this has been confirmed by you through, during consultation that Admiral Howell was the moderator of Project Sitron and Project Wills. Now you were the project officer of Project Wills.

MR REED: Chair, that is correct.

ADV LEBALA: Now the Commission has heard what the functions of the project officer were, we are not going to repeat them. Now let's go to specifics as to what he said in as far as his moderating duties are concerned in the context of Project Wills. I beg your pardon Esteemed Commissioners. Now for

8 MAY 2014

PHASE 1

the sake of completeness we have to be careful not to mislead the Commission. Admiral Howell testified with his cap on in three capacities, he testified as the Chief of Naval Staff Plans, we advised you about it. He also testified as a Director of

5 Naval Acquisition. Do you remember during our consultation?

MR REED: Chair that is correct, I do recall that discussion.

ADV LEBALA: We just want to focus on his role as a moderator because that's where it relates to why you are

10 standing before the Commission. Now you testified that when he was moderating he sat down with you as the project officer of Project Wills and started discussing your reports based on the information that has been given to you by the Integrated Project Teams, is that correct?

15 MR REED: Chair, that is correct.

ADV LEBALA: And you further testified before this Commission that when you were formulating your report you would sit down with him, you would approach him, you will discuss it with him before it became a final evaluation report

20 that he had to moderate, isn't it?

MR REED: Chair, once again that is correct.

ADV LEBALA: He testified that you and him sat throughout the whole process for the first stage of the formulation of the report up until it became a concrete

25 evaluation report that he had to moderate.

8 MAY 2014

PHASE 1

MR REED: Chair, that is correct.

ADV LEBALA: He also testified that you even discussed that moderated report before it went higher to what the Commission has learnt to hear as the Second Tier SOFCOM.

5 MR REED: That is correct.

ADV LEBALA: Now I'm not, I've got to be careful to lay a foundation before I ask the question but it has become common cause that the Commission has been overwhelmed by the testimony of three tiers, some witnesses for the sake of
10 completeness called it a multitier approach consisting of three orders, we are not going there but you do appreciate where we are referring you to when we say it was going to be second tier, second order called SOFCOM.

MR REED: Chair, that is correct.

15 ADV LEBALA: Now he testified that that evaluation report that he moderated was taken to SOFCOM and you did the presentation before SOFCOM.

MR REED: Chair that is correct, I did the presentation of the complete evaluation to the SOFCOM.

20 ADV LEBALA: But he mentioned something very critical that in as far as his [indistinct] of moderating Project Wills is concerned, in as far as the submarines are concerned, he only adjusted two issues and those issues related to the logistic aspect and the costs, is that correct?

25 MR REED: Chair, that is correct.

8 MAY 2014

PHASE 1

ADV LEBALA: And he further testified that SOFCOM accepted the evaluation report as it was not questioned.

MR REED: Chair, that is a correct statement.

ADV LEBALA: Now these aspects, if one looks at them in
5 the context and the content of your statement before the
Commission, I would like you to go to your statement. When
we were sitting during consultation, and we don't want to
overwhelm the Commission because the, these aspects are still
fresh on the Commissioners' minds, I do have a transcript and I
10 have my iPad here that relates to most of the things that I've
summarised, I did not want to even take the Commission to the
relevant pages as in as far as the testimony of Admiral Howell
is concerned to confirm what you were confirming but to
complete the picture in line with your statement permit us to
15 just summarise your statement by saying most of the issues
encapsulated in your statement have become common cause.

MR REED: Chair, that is correct. I have read some of
the other transcripts and evidence led and most of the
information, if not all of the information covered in my
20 testimony has been covered before.

ADV LEBALA: Just to complete the picture we have
revisited the statement of Rob Vermeulen. Just to put it on
record and to complete Mr Rob Vermeulen was the programme
manager, your counterpart in the project in the Project Wills,
25 and we satisfied ourselves that what you have captured in your

8 MAY 2014

PHASE 1

statement echoes what Mr Rob Vermeulen has said in as far as Project Wills is concerned.

MR REED: Chair, I'm in agreement with that comment.

ADV LEBALA: We also revisited the transcript and
5 analysed what Mr Byrall Smith said. Mr Byrall Smith was the
programme manager for ARMSCOR, your counterpart in
ARMSCOR in as far as ... I beg your pardon, I beg your
pardon. There was no need for us to go, I don't know, I was
just trying to draw a distinction between Mr Rob Vermeulen and
10 Mr Byrall Smith, Mr Byrall Smith was Project Sitron, that is the
Corvettes, that had nothing to do with ..., and Mr Frits Nortjé
also is Project Sitron, they have nothing to do with you but just
to complete the picture, what we have established is that most
of the things that are being captured in your statement, in
15 actual all details of your statements have become common
cause before the Commission.

MR REED: I believe that statement to be true Chair.

ADV LEBALA: Now is there anything that you want to add
to your statement?

20 MR REED: Chair, I don't believe that there is anything
that I need to add to what Advocate Lebala has said.

ADV LEBALA: I know that I asked you initially whether
you want to add anything when we started but now because we
have refreshed you what your statement encapsulate in line
25 with the testimony that the Commissioner as to whether is there

8 MAY 2014

PHASE 1

anything that you want to add, it's different from the, when we started because by then we didn't take you through these common cause issues that have become part of the Commission's testimony. Chairperson, I think it would be
5 dilatory to belabour the record by taking you through the pages, these aspects, all of them have become common cause. I know that the Commissioners, the esteemed Commissioners [indistinct] and prepare, if you hold a different view esteemed Commissioners and you want to take this witness to task and/or
10 us to task, please guide us and let us know.

CHAIRPERSON: Just one question from me, I see your statement is signed on the 6th of May 2014, is that correct?

MR REED: Chair, that is correct.

CHAIRPERSON: And you confirm the contents of the entire
15 statement as true and correct?

MR REED: Chair, I confirm that.

CHAIRPERSON: Thank you. Any cross-examination? Any re-examination?

ADV CANE: None, thank you Chair.

ADV LEBALA: Chairpersons, Commissioner Musi, there
20 are two aspects on this statement that needs ...

CHAIRPERSON: [Indistinct] before we come back to you. Judge Musi suggests that you go ahead and then he will come after you. If you still want to clarify any issue with this
25 witness Judge Musi says that you can go ahead and then he

8 MAY 2014

PHASE 1

will come after you.

ADV LEBALA: Thank you Chair. It's just a typographical error in as far as the footnotes are concerned and at this stage because the witness's statement is accepted by the Commission without the witness traversing it, it's important first to assist the Commission in doing the corrections now. May we draw your attention to page 9, footnote 10. Footnote 10 esteemed Commissioners, it's supposed to be at the bottom page 188, not page 190.

5
10 CHAIRPERSON: Advocate Lebala if you don't mind [indistinct] done and brought to our attention. I see in the bundles that we have it has been corrected.

ADV LEBALA: Well, beholding Chair in that case we are done, unless there are specifics arising from the Commission.

15 COMMISSIONER MUSI: There is just one thing that I wanted clarification on.

QUESTIONS BY COMMISSIONER MUSI:

COMMISSIONER MUSI: Did Admiral Howell participate in [indistinct] evaluation of offers?

20 MR REED: Chair could you repeat that question, I didn't quite hear it?

COMMISSIONER MUSI: I want to try and get clarity about the role of Admiral Howell in as far as the evaluation of the offers is concerned. I want to know if he participated in the

8 MAY 2014

PHASE 1

actual evaluation process.

MR REED: Chair, Admiral Howell was my superior and he kept himself abreast of all the details that were going on throughout the evaluation process, however, he did not sit in
5 on any of the evaluation deliberations, the deliberations and the calculations of all the scores relating to the various aspects that were being examined were done by the teams, Admiral Howell occasionally visited the rooms that the people were in but did not participate as an active member of any of
10 the evaluation teams.

COMMISSIONER MUSI: Thank you. I note on page 7 of your statement paragraph 26 the second sentence:

*"I reported to Adm Howell that there were two ways to factor in cost to determine the military value index, and he decided upon the formula as set out
15 in paragraph 15 of the evaluation report. It resulted in the Type 209 German Submarine being recommended, which was R800 million cheaper than the next contender".*

20 Is that the sort of role that he played in the [indistinct]?

MR REED: Chair, that is the correct statement.

COMMISSIONER MUSI: Thank you, that's all.

CHAIRPERSON: Any question arising from the bit of information that the witness gave as a result of the questions
25 of Judge Musi? Thank you Captain, you are excused. Thanks

8 MAY 2014

PHASE 1

a lot for your evidence.

MR REED: Thank you Chair.

CHAIRPERSON: [Indistinct], is there still something that you want to tell us.

5 MR REED: I understand that Chair, I understand that excused means I can leave the room now?

CHAIRPERSON: You can leave the room if you want to.

MR REED: Thank you very much.

CHAIRPERSON: Thank you.

10 COMMISSIONER MUSI: [Indistinct].

MR REED: Chair no, I understand it is for the completeness of the record, so I'm quite happy with that. Thank you very much.

CHAIRPERSON: Advocate Sibeko, do you want us to take a
15 break or do you want us to keep [indistinct]?

ADV SIBEKO: Chair, we can kick off [indistinct].

CHAIRPERSON: [Indistinct]. Can the witness take the oath?

(Witness is sworn in.)

20 CHAIRPERSON: I see this morning we were given two applications from Bowman Gilfillan and from Lawyers for Human Rights, both parties wants to cross-examine Mr Esterhuyse. The first application that we have, Bowman Gilfillan, they pointed out that they wish to cross-examine the witness and
25 ask the witness to clarify his evidence in regard to the Policy

8 MAY 2014

PHASE 1

Directive for 1/147. I [indistinct] the witness dealt with this issue, so probably [indistinct] that the parties that want to cross-examine him on that issue should [indistinct]. [Indistinct], I see what you are saying in here, but can you just
5 tell us from your own understanding what is that was [indistinct].

ADV CANE: Chair, thank you for the opportunity to address you. In fact there's been a change of decision on behalf of the Department of Defence. May I also just make it clear that
10 Bowman Gilfillan has two distinct teams, the one team represents the Department of Defence and the other ARMSCOR, and so the team representing the Department of Defence was initially concerned that unless it challenged a certain portion of Mr Esterhuysen's evidence it would stand on the record and
15 therefore applied for leave to cross-examine. Upon reconsideration the issue pertains to firstly the interpretation of Policy Directive 4/147 and secondly an allegation made by this witness as to the content of that document.

We have formed the view that our issue in this
20 regard pertains to the terms and interpretation of the document and that this witness's opinion on both of those elements would actually be irrelevant. We therefore no longer seek to cross-examine Mr Esterhuysen and simply seek to have it on record that the relevant portion of his evidence which appears at
25 transcript 5708 lines 13 to 22 is not ...

8 MAY 2014

PHASE 1

CHAIRPERSON: I'm sorry, you said 5?

ADV CANE: 5708 lines 13 to 22, that evidence is not accepted by the Department of Defence and we would like in due course during legal argument at the appropriate stage, and
5 should the need arise, to deal with it in that manner, that we consider the cross-examination on an issue pertaining to the content and interpretation of the document would not elicit evidence that would be admissible and therefore of assistance to the Commission. Thank you.

10 CHAIRPERSON: I understand that you [indistinct] are you in a position to answer that first question and if you are no longer going to cross-examine and [indistinct] the purpose of cross-examination.

ADV CANE: Chair, I certainly would give what
15 assistance I can in relation to that topic. Our law and the leading authority on it is the case involving the Rugby Union in which Mr Mandela had to appear, it's the SARFU case, and in a few moments in fact I will be able to give you the reference because I do have it on my computer. That is the leading
20 authority on the proposition that unless and until a section of evidence is challenged when the opportunity to cross-examine arises it then stands and a party would not be entitled later on in argument to then suggest that unchallenged evidence is incorrect in any way or alternatively to seek to argue that the
25 witness's credibility should be impugned because that section

8 MAY 2014

PHASE 1

of the evidence is incorrect, untruthful or unreliable.

The Constitutional Court made it very clear that parties are duty bound to traverse and put to the witness whatever it is they disagree with in that witness's testimony the appropriate time during cross-examination and unless and until they do so then that evidence stands. So, the purpose of cross-examination Chair and my understanding of the law is to put into contention what would otherwise be factual evidence that would be on the record and unchallenged and therefore what the Commission would be bound to accept. Thank you Chair.

CHAIRPERSON: Thank you.

ADV CANE: Chair, if you just give me a couple of minutes I'll get the reference for you. May I indicate when I have it ready?

CHAIRPERSON: That's fine. Can [indistinct] or in the meantime go to Lawyers for Human Rights? We have received your letter and maybe let me also start by asking you the question that I asked Advocate Cane, what is your understanding of the purpose of cross-examination and [indistinct] I'm asking you that question because in your letter, your application [indistinct] cross-examination, [indistinct] issues which this witness never testified to, issues that were raised in this application the witness has never testified about, there are only one or two issues that the witness testified

8 MAY 2014

PHASE 1

about but then you also referred [indistinct] to the joint submissions which this witness, I'm not too sure whether this witness was ever [indistinct] issues and that is why I first started by asking, trying to find out what is the purpose of cross-examination and from what I put [indistinct] and the purpose to try and deal with the evidence of this witness and not to introduce new evidence for this witness and refer to documents which we might not even have before us. Maybe just for the sake of the record can you first start by reading into the record your entire application as you submitted to us so that we have it on record.

ADV SNYMAN: Thank you Chairperson, Commissioner Musi. I will start by reading in our application which we filed on Tuesday the 6th of May, seeking leave to cross-examine Mr Esterhuyse, and then I will seek to deal with, to answer your question on what is the purpose of cross-examination and thank you for that question because it does tie into our interpretation of our role in this Commission. If I may start with reading into the record our application to cross-examine. It is an *ex parte* application brought on behalf of our clients Paul Holden who is the first applicant, Andrew Feinstein as the second applicant and Hennie Van Vuuren who is the third applicant, and it is an application to cross-examine the witness Mr Esterhuyse. The applicants bring this application to cross-examine the witness based on the following; that Mr Esterhuyse was a high ranking

8 MAY 2014

PHASE 1

official within ARMSCOR at a critical time within negotiations and evaluations of the bidders within the Strategic Defence Procurement Package. In this capacity the witness sat on a number of committees and particularly on the *ad hoc* Committee
5 [indistinct] evaluating proposals on the Defence Export Services Organisation based in the United Kingdom, as well as the various structures set up under the Management Committee.

As such the witness was personally present in a
10 number of meetings with DESO as well as various ministers, Department of Defence and other ARMSCOR officials, he especially [indistinct] to give evidence regarding the contents of these meetings. The witness was also present and interacted with various role players including the late Minister
15 of Defence Mr J Modise, as well as ARMSCOR management including [indistinct] during the SDPP evaluation process before September 1998.

The witness was also present when the costed
20 *versus* non-costed options regarding the LIFT [indistinct]. The applicants wish to cross-examine the witness specifically with regards to the meetings with DESO and the interactions which [indistinct] officials during those meetings, the urgency and speed with which the SDPP proposal was evaluated, concerns recorded in meetings regarding "spurious external involvement"
25 in the SDP processes, the costed *versus* non-costed options

8 MAY 2014

PHASE 1

[indistinct] proposal and any other issue which arises from the cross-examination.

5 These issues were dealt with to a certain extent during the witness's examination in chief, the questions in cross-examination, however, was due to provide further clarity, it is submitted that this clarity is necessary for the Commission to have a full and comprehensive view of the decision making processes.

10 The applicants have been issued with subpoenas to appear before the Commission hearing Phase 2 of the evidence, dealing with items 1.5 and 1.6 of the Commission's Terms of Reference. The Commission has in a media statement dated 8 January 2014 acknowledged that evidence relating to Phase 2 of the evidence may be addressed to Phase 1
15 witnesses. The applicants have widely written on the subject matter covered by these witness's testimony and have included such information on pages 104 to 111 of the first and second applicants' joint submission [indistinct] submitted in February 2013, as such the information forms part of the
20 evidence that is currently before the Commission.

 It is, with respect, submitted that these lines of questions will assist the Commission in gaining a fuller picture of the processes from the witnesses, from this witness's perspective. It is on this basis that we're seeking an order
25 granting the applicants leave to cross-examine this witness.

8 MAY 2014

PHASE 1

That concludes the written submission application that was made to the Commission on Tuesday. I'd now like to respond directly to the question put by the Chairperson of what is the purpose of cross-examin...

5 CHAIRPERSON: I'm sorry, just before we come to that, in paragraph 9 you say that the joint submissions [indistinct], I don't quite understand that statement, I thought there's a big difference between a submission and evidence, now you say that the submission forms part of the evidence, I don't quite
10 understand this, I thought submissions were based on evidence and not around [indistinct]. How does you know [indistinct] submission clarify as evidence unless we don't understand what [indistinct] evidence means. Can you just clarify as to that point when you say the submissions forms part of that
15 [indistinct].

ADV SNYMAN: Perhaps if I can clarify, the submissions which our clients submitted during March 2013 and February 2013 form part of the record which is to form part of the evidence before this Commission and it is this record which
20 we submit and argue [indistinct] for the Commission, important for the Commission to have a broad, broad insight and broad investigation into the allegations made by our clients in their submissions, so our argument is that their submissions form part of the record before this Commission and it is on that
25 basis that that record must form part [indistinct] in the

8 MAY 2014

PHASE 1

evidence of this Commission.

CHAIRPERSON: They form ...

ADV SNYMAN: Can I just add to that Chairperson?

CHAIRPERSON: Sure.

5 ADV SNYMAN: Thank you.

CHAIRPERSON: They form part of the record but can one say that those submissions are evidence? Legally can one go to a point of saying that you know if somebody makes a submission and those submissions turn into evidence, then
10 [indistinct]? These are submissions which come from your client, evidence is given before the Commission which is tested by cross-examination. You have given us submissions and they form part of the record of the Commission, can one say that those submissions are [indistinct]?

15 ADV SNYMAN: Thank you Chairperson. I think this puts us in a very difficult [indistinct] situation where because of the structure of the Commission where our clients [indistinct] to give evidence based on these very submissions in Phase 2 of the hearings, that this, based on your definition and as you've
20 just described it, they are not on that definition technically [indistinct] evidence. I'll argue, however, that they ought in any event to be, to be provisionally admitted because our clients had been subpoenaed and we intend to come in Phase 2 to bring evidence on these very submissions at which time they
25 will form part of our evidence.

8 MAY 2014

PHASE 1

As to the question of whether or not evidence can be deemed to be evidence until such time that it has been tested by cross-examination in my view that supports our application to cross-examine this and other witnesses in that one of the very purposes [indistinct] answering a certain questions, but one of the very purposes to cross-examine witnesses is to have a more rounded version of their evidence that is in the record.

If I can then, because in my view to answer your question on what is the purpose of cross-examination will also assist in this question, I'm of the view that to answer that question is threefold, firstly I'd like to point to the guide to the directives of this Commission, in particular Section 19 and this directive relates to our clients making application to cross-examine the witnesses and in particular 19(b) where:

"When an application is brought the legal representative must state whether questioning will raise new issues and if not, why the questioning should be permitted".

Now my interpretation of what this directive section 19(b), it would mean that cross-examination should be permitted in instances where new evidence would be brought, not where, and not be limited to only evidence which was raised in the examination in chief, and I can go further to say that there is a very important reason for this to be the case as certainly

8 MAY 2014

PHASE 1

evidence in chief could be limited to that which the witness wants on the record and that the only way to challenge that evidence or certainly if that evidence falls short of being a complete picture, would be for questions to be allowed that expand on the issues raised in the examination in chief. This leads me on to two further points on the role of cross-examination, particularly an admission, firstly I would agree with the referral to the, the reference of that [indistinct] its authority on the purpose of cross-examination in a court process, but as far as we would submit this is a commission of inquiry which has a much further scope than that of a court because it is an inquisitorial process the very point of which is not to be confrontational in a court, as in a court process but as the purpose of eliciting as much information that is relevant to the aims and goals of the Commission as possible and that in order to do so an inquisitorial process the scope of cross-examination must by its nature be broader than [indistinct] authority and that on that basis we would submit that it would be to allow the cross-examination of this witness to the extent that he is able to answer questions put to him that would assist the Commission in a broader perspective of the evidence coming before it.

[Indistinct] because while our clients will be giving evidence in Phase 2 related to [indistinct] 1.5 and 1.6 of the Terms of Reference and also to the matter that [indistinct]

8 MAY 2014

PHASE 1

extensively allowed in their books which are already in the public domain and [indistinct] in their submissions which form part of this, the record before the Commission. As far as we are aware now this witness is not on the schedule of witnesses
5 to be called during Phase 2 and so it would not be possible then to test any of our clients' evidence were we not able to put it to this witness now.

CHAIRPERSON: Before you come in Advocate Sibeko, you know I think [indistinct] I did mention to you that if at all
10 evidence is led which [indistinct] to recall any witness, that [indistinct]. If at all when your client comes and end up presenting evidence which requires a reply from a witness who has already testified [indistinct], the point is would there be such evidence? Was there a time to [indistinct] the situation or
15 there's sufficient [indistinct], people end up cross-examining on issues which they will never testify about. That is [indistinct] but if your client [indistinct] when they testify they can say whatever they want to say and if at all from that evidence there's a need to recall any witness, those witnesses
20 could be recalled, then before you [indistinct] finish this point let me hear what Advocate Sibeko is going to say.

ADV SNYMAN: Excuse me Chairperson, if I may just respond to that point first. The difficulty that we would have with that position is that when our clients come to give their
25 evidence and certainly this is based on the submissions before

8 MAY 2014

PHASE 1

the record, before this Commission, they would be referring to the various [indistinct] of meetings, to documents, to conversations, to people, some who have been [indistinct] and to make up the board and that would lead to specific standards where virtually sentence by sentence of our clients giving their evidence during Phase 2 would lead to another person, apart from our clients having to be recalled to come and agree or disagree or contradict that evidence which to [indistinct] process then when there are witnesses already before the Commission, this being one of them who can confirm or contradict now the statement [indistinct] that will form part of our clients' evidence in Phase 2, and in this regard he is specifically mentioned by name in our clients' submission which form the record and he will be referred to as a quotation that is in our clients' submissions and [indistinct] public domain and on that basis we're also of the view that this would be the appropriate time to have that statement put to him.

CHAIRPERSON: Okay thank you Ma'am, I hear what you are saying. I don't think [indistinct] seem to be having, the statement of Mr Esterhuysen was changed [indistinct] and the point thereof is to make sure that people who are, or wanted to be implicated by that statement [indistinct] be aware of that fact and they can then be left [indistinct] to come and process that now, now if at all you are going to go out on a cross-examination [indistinct] the statement to the witness [indistinct]

8 MAY 2014

PHASE 1

my opinion will testify the answers that we receive from Mr Esterhuysen will then [indistinct] simply by the fact that we would not be here, would not have been warned in advance that such a procedure [indistinct] because sitting here I've
5 [indistinct] statement of Mr Esterhuysen, I don't really know what else might be [indistinct], so how do we deal with those [indistinct]?

ADV SNYMAN: Thank you Chairperson. In respect of the two of them which I've mentioned by name in our application.
10 The difficulty that we do have is that one of them is deceased and so it would not be possible to give that notice. The other we are not aware whether he will be being called at all in Phase 2, we certainly are of the view that he ought to be called. As far as giving notice to the [indistinct] I can confirm that we
15 have not given such notice, if that becomes the final stepping point of our being [indistinct] cross-examine the witness, then I [indistinct] questions related to that specific still-living individual.

CHAIRPERSON: Thank you. Advocate Sibeko.

20 ADV SIBEKO: Chair, in principle we have no objection to the cross-examination of Mr Esterhuysen by the Lawyers for Human Rights acting on behalf of the clients they represent, save to state the following, that in a number of paragraphs that are set out in the application to cross-examine certain
25 references are made of matters which are factually incorrect in

8 MAY 2014

PHASE 1

the one instance, but also in other instances where reference is made to matters in a very broad and generalised manner which of course [indistinct] and we do submit that the manner in which reference is made to those matters might require some
5 form of limitation.

Now that brings to question the grounds on which the application to cross-examine is based especially with regard to Mr Esterhuysen. One accepts that the witnesses or the applicants they represent will in due course give evidence
10 because [indistinct] and to the extent that there is any evidence they seek to elicit from Mr Esterhuysen that would support their version of event when they come to give evidence in due course or might seem to contradict the version of the evidence of Mr Esterhuysen when they come in due course to
15 testify or seek clarification of certain, of certain of the evidence attested to by them we would be, we would have no objection to that save for the qualification we have made to say it would seem that some of the questions they seek to pose to the witness do not fall within his knowledge as a result of
20 which he may not be able to assist further.

Or by way of example if one has to, has regard to paragraph 1 of the application where it is stated that Mr Esterhuysen was a high ranking official within ARMSCOR at a critical time of the negotiations with an evaluation of the
25 bidders within that Strategic Defence Procurement Package Mr

8 MAY 2014

PHASE 1

Esterhuysen's evidence in this regard was very clear, he was not involved at any stage in the negotiations with bidders, nor was he involved in the process of evaluation of any of the packages or the programmes in the packages, so it is not clear to us
5 what questions Mr Esterhuysen would have been able to answer in relation to the negotiations with and evaluations of the bidders.

With regard to paragraph 2 the capacity in which Mr Esterhuysen is said to have participated, there is a very broad
10 generalisation made in the first line where reference is made to the witness having sat on a number of committees. Now specifically Mr Esterhuysen's evidence was to the effect that apart from being a general manager at ARMSCOR he was a permanent member of the AASB, he was a member who chaired
15 the Ministerial Committee which was established for purposes of dealing with, it is the Ministers' Committee which was established for purposes of interacting with the DESO matters when the first proposals were made on behalf of the UK, it is this body that later evolved into an IONC which was, to my
20 recollection established in terms of the letter that was, or directive that was circulated and authored by General Du Preez and it is this body that later became known as the SOFCOM.

Now he was co-chair of the SOFCOM but his evidence is also very clear that at the critical time when the
25 SOFCOM had its [indistinct] on the 1st and 2nd of July 1998 Mr

8 MAY 2014

PHASE 1

Esterhuysen was on leave, on long leave and again when certain decisions were taken around the 8th of July 1998 Mr Esterhuysen did not participate in any manner whatsoever in what would have been decisions made under the auspices of the SOFCOM.

5 Now the NCI [indistinct] was the Management Committee itself and the Ministerial Committee, so it is not clear to us what assistance Mr Esterhuysen would give to the Commission outside of these structures. In paragraph 3
10 mention is made of a number of meetings with DESO and it is contended in the last sentence of paragraph 3 that he is specifically placed to give evidence regarding the contents of these meetings. To our recollection and from our reading of
15 the record there appeared to have been only two DESO meetings of any consequence that Mr Esterhuysen attended, one of which was on the 14th of February 1997 and he's given extensive evidence regarding the proceedings of that meeting.

 Part of the presentation Chair you will find at the witness's bundle at "EE4" which starts from page 53. Now it is not clear what interactions sought to be elicited from this
20 witness regarding interactions with DESO. Now furthermore with regard to paragraph 4 of the application it is stated there or contended that the witness was also present and interacted with various role players including among others Mr R K Wood during the SDPP evaluation process before September 1998.

25 Again the role played by the witness with regard to

8 MAY 2014

PHASE 1

the evaluation process is limited to the formulation of the best value equation which was submitted to the Board of ARMSCOR for approval and further on to the COB for its consideration and subsequent guidance given that the best value equation, and that would be equation one, should be used as a guideline to evaluators in the various evaluation of the programmes and that is the only role he played with regard to the evaluation process [indistinct]. And unless it can be demonstrated otherwise that there is any other role that Mr Esterhuyse played in the evaluation process and details are given it does appear that Mr Esterhuyze would have no further assistance to give to the Commission regarding the evaluation process.

Furthermore in paragraph 5 it is contended that the witness was also present when costed *versus* non-costed options regarding the LIFT proposals were evaluated. This was not Mr Esterhuyse's evidence and nothing further needs to be said in that regard. Now paragraph 6 seems to be a summary of the basis on which Mr Esterhuyse is sought to be cross-examined, 6.1 refers to meetings with DESO and the interactions with the various officials within those meetings. I have dealt with the DESO meetings and the role played by Mr Esterhuyse during those meetings. It is not clear, however, which various officials he would have interacted with during those meetings but it is clear that Mr Esterhuyse gave evidence as to what transpired at any of the meetings that he attended.

8 MAY 2014

PHASE 1

Reference is made at 6.2 to the urgency and speed with which the SDP proposals were evaluated, again he was not involved in any evaluation but to the extent that there is mention made in his evidence with regard to the urgency and speed with which the SDP programme was, or had to be attended to, this is apparent from the meetings of the CoD to which the witness gave evidence where the Minister appears to have suggested that the matter require some urgency but that is the extent of the witness's evidence that which is based on the minutes of the proceedings of the CoD.

At 6.3 mention is made of concerns recorded in meetings regarding the spurious external involvement in the SDP Process, it's recorded in the minutes. Again the costed *versus* non-costed options of the LIFT proposals are dealt with there, and any other issue that might arise in cross-examination.

Chair, having made the submissions it seems to us that to the extent that there can be any basis to cross-examine this witness by the applicants, the evidence that would be elicited from this witness, that would go to supporting their evidence when they come and give it in due course or that would seek to dispute the evidence of Mr Esterhuyse given in chief but thirdly that would go to expanding or eliciting perhaps his views on what the witnesses are, will come and say in due course, we would submit the right to cross-examination must be

8 MAY 2014

PHASE 1

limited to the extent that [indistinct] submit it. Those would be our submissions.

CHAIRPERSON: Advocate Sibeko, the last [indistinct].

ADV SIBEKO: Our submissions would be why we have no
5 objection to the process as mentioned and subject to the purpose of cross-examination as pointed out the applicants may cross-examine Mr Esterhuyse subject to the proviso that I have [indistinct] as I have dealt with the various paragraphs in the application.

10 CHAIRPERSON: Thank you. As it is almost 11h00 maybe let's adjourn for tea and when we come back we will make the ruling and proceed.

ADV SIBEKO: Perhaps Chair before we adjourn I'm not
15 certain if my colleague Mr Masilo would wish to make submissions, he is also part of the team representing the witness.

CHAIRPERSON: Mr Masilo. No, you are sitting next to [indistinct]. I always get confused whenever I try to find [indistinct].

20 ADV MASILO: Chairperson, thank you very much. I was [indistinct] the mic so that I can be able to speak before the chair makes a ruling that we adjourn for tea. Chairperson from ARMSCOR's side we would like to firstly point out that insofar as ARMSCOR is concerned we would not firstly be [indistinct]
25 an opportunity to cross-examine the witness Mr Esterhuyse to

8 MAY 2014

PHASE 1

the extent that such cross-examination is [indistinct]. As my learned colleague Advocate Sibeko has raised most of the issues that we had underlined but the one thing that I noted that he had not dealt with, without regurgitating what he had dealt with, specifically also on specifically paragraph 1 of the application it is pointed out that the witness was involved at the critical time of the negotiations and [indistinct].

The witness's testimony is clear that he was not involved in the negotiations because his employment relationship with ARMSCOR and that at the time before the final decision could be made, so as such the witness was not present during the negotiations which was done by the IONT, but Chairperson to the extent that it has already been pointed out that there are a number of difficulties that arise as a result of the request for cross-examination, that the Lawyers for Human Rights may be afforded an opportunity to cross-examine to the extent that such cross-examination is limited only to what the witness has testified on and not what they would want to confirm from their book or that which they would want to try and deal with which the witnesses will deal with in the future and also we would want to align ourselves with the sentiment expressed by the Chair that to the extent that it is necessary an application is made [indistinct] for the witness to be recalled to deal with this specific issue, such would be considered based on the merit of such application at that point

8 MAY 2014

PHASE 1

Chair, thanks.

ADV SNYMAN: Chairperson, may I be afforded an opportunity to respond to my learned friend Mr Sibeko and Mr Masilo? Firstly on the issue of Mr Esterhuysen's involvement so to speak with negotiations that were [indistinct], I know this has been raised twice now, I think this is semantics in the difference of interpretation on our application. We have now stated that Mr Esterhuysen was involved with the negotiations and the evaluations, our application is also on the basis that Mr Esterhuysen was however a high ranking official in ARMSCOR at the time that these negotiations and [indistinct] were taking place and therefore he has personal knowledge of the broader context at the time.

Secondly [indistinct] of two submissions being made now that should he be afforded the opportunity to cross-examine this witness it is limited only to evidence which has already been given by this witness and thus reiterates again what section 19(b) says of the guidelines for the Commission, that it is only with questioning will not raise a new issue, there needs to be a justification of why it should be permitted and it seems now that the opposite is being sought to be applied.

And then finally just to refer again to the media statement of this Commission of 8th January where [indistinct] stated that it is its preference for witnesses not to be recalled at a later date when their evidence can be dealt with at the

8 MAY 2014

PHASE 1

time that they were first called. I can take it no further. Thank you.

COMMISSIONER MUSI: Just one problem, one problem [indistinct] relates to [indistinct] for myself [indistinct] simple question that [indistinct] based on negotiations [indistinct] those discussions were [indistinct] when[indistinct], I can't see why we would want to go back and cross-examine on questions relating to [indistinct].

CHAIRPERSON: Thank you. As I said let's adjourn for tea and we'll come back after 20 minutes or so. Thank you.

(Commission adjourns.)

(Commission reopens.)

CHAIRPERSON: Can we first start by asking the witness confirm that he is still under oath?

MR ESTERHUYSE: I do.

CHAIRPERSON: Following the application from Lawyers for Human Rights [indistinct].

ADV SNYMAN: [Indistinct]. I apologise. Can you hear me now? Chairperson I apologise for interrupting you but if I may, may I first be given an opportunity to respond to the final question put to me by Commissioner Musi before we adjourned?

CHAIRPERSON: Yes.

ADV SNYMAN: Thank you. In response to the question by Commissioner Musi where he talks to whether [indistinct] question to this witness about DESO's involvement in the

8 MAY 2014

PHASE 1

Upholder Submarines had already been sold to Canada I just have to respond that [indistinct] it would be our client's evidence that this witness had been, had said during investigations that there were concerns about the actions of
5 DESO in British companies regarding South African politicians and parliamentarians and that's the basis for which we deem it necessary to put questions concerning this concern to this witness. Thank you.

CHAIRPERSON: Okay, thank you. [Indistinct], one; the
10 applicants are granted permission to cross-examine Mr Esterhuysen subject to the following. (a), Cross-examination is confined to issues raised in his evidence. (b); Any information at the disposal of the applicants which contradict his evidence during the [indistinct] may be put to the witness. (c); If
15 [indistinct] applicants testify that they disclose evidence that requires a response from Mr Esterhuysen [indistinct]. Thank you.

ADV SNYMAN: Thank you Chairperson. May I ask you to repeat the third limitation?

20 CHAIRPERSON: If you at any stage ... If at a stage when the applicants testify and disclose evidence that requires a response from Mr Esterhuysen he will be recalled.

ADV SNYMAN: Thank you. Chairperson, may I request an
25 adjournment of 10 minutes to take these limitations into account with the questions that I intended to put to this

8 MAY 2014

PHASE 1

witness?

CHAIRPERSON: I'm sure you do have questions which relate to the evidence that is already led. Shouldn't we start by that rather than adjourn again and come back at a later stage? If you do have questions relating to the evidence that we led, because [indistinct]. Shouldn't you just kick off with your cross-examination because this witness actually testified sometime last week.

ADV SNYMAN: I can do so, but I was hoping to avoid a situation that we overlap with the limitations and the objections [indistinct].

CHAIRPERSON: The limitations are simple and straightforward, they are not complicated, the limitations are that you are restricted to evidence that is given, at a later stage your clients have got other information which contradicts the evidence, you can put that to him. When your clients testify, if they bring in evidence before the Commission which requires the response of Mr Esterhuyse, Mr Esterhuyse will be recalled.

ADV SNYMAN: Thank you. I will proceed.

COMMISSIONER MUSI: Can I just get clarity here, do you not understand the second condition that you are entitled to put your clients' questions to him [indistinct]?

ADV SNYMAN: Yes, thank you Commissioner Musi. [Indistinct].

8 MAY 2014

PHASE 1

COMMISSIONER MUSI: Yes, thank you.

ADV SNYMAN: Thank you Commissioner Musi. Let me just clarify that (b) is that any evidence which our clients have which is in contradiction of the evidence being given by Mr Esterhuyse can be put to this witness. Thank you, yes, I'm aware of that. Our concern is more going into deeper detail of the evidence which was already given [indistinct] contradictions. Thank you.

CROSS-EXAMINATION:

10 ADV SNYMAN: Mr Esterhuyse, ...

MR ESTERHUYSE: Good afternoon Commissioners.

ADV SNYMAN: You have mentioned the urgency with which the SDP was pursued to the point of compiling baseline documents in the space of a few short months. Can you explain why there was such haste to pursue the SDP?

MR ESTERHUYSE: Commissioner can I please be referred to the document that, where this was raised? I would like to ask Commissioner and the Chair to what document we are referring to at the moment or is it a question in general?

20 ADV SNYMAN: The question was in general.

MR ESTERHUYSE: Chair, the indication during the discussions with DESO starting in January 1997 was that there is an urgency to complete the negotiations with DESO in approximately four to five months and that information I have explained in my statement and also in my evidence to the

8 MAY 2014

PHASE 1

Commission, I cannot really add anything further to that, that was the requirement, the timescale requirement.

ADV SNYMAN: Thank you Mr Esterhuyse. Was it ever considered that the Defence Review would need to be approved by Parliament and that this could lead to changes in the force design?

MR ESTERHUYSE: Chairman, the role of ARMSCOR is to respond to defence requirements when we get valid requirements from the Department of Defence or the Secretary for Defence, then ARMSCOR respond to that, we do not question or test the validity of the requirements, it's not the function of ARMSCOR.

ADV SNYMAN: Thank you. Can I now ask you to turn to page 76 of your evidence bundle.

MR ESTERHUYSE: Chair, I found it.

ADV SNYMAN: Can you confirm that this document is a set of confirmatory notes of the meeting between representatives of ARMSCOR, DoD and [indistinct] members of DESO?

MR ESTERHUYSE: Chair, that's correct.

ADV SNYMAN: And can you confirm the date of this meeting?

MR ESTERHUYSE: Chair, that would be 14 February 1997.

ADV SNYMAN: It is also implicated that you were the chair, is that correct?

8 MAY 2014

PHASE 1

MR ESTERHUYSE: That's correct.

ADV SNYMAN: Let's now turn to paragraph 9 of the minutes.

MR ESTERHUYSE: I've done that, thank you.

5 ADV SNYMAN: [Indistinct] concern regarding the
[indistinct] external involvement in the Strategic Defence
Package, for example [indistinct] of ministers or
parliamentarians was expressed? It was agreed that the
[indistinct] and UK activities related to the Strategic Defence
10 Package be communicated to the central coordinating
committees. My question is can you recall who raised this
issue as a concern during this meeting?

MR ESTERHUYSE: Chair yes, can I refer to Item 3 at the top
where the DESO representative indicated that they are in
15 discussions and intend to, for further discussions with the
deputy president, the Reserve Bank and the Minister of Finance
and Defence.

ADV SNYMAN: Can you recall what specific examples
were provided to illustrate these [indistinct] external
20 involvement?

MR ESTERHUYSE: Chairman, at the stage when we engaged
DESO the issue centred around the affordability and the way
these packages will be funded and if we look at paragraph 5 it
indicates that the DESO's view was that the procurement
25 authority should only focus on the programme financing and

8 MAY 2014

PHASE 1

finances and, but the actual funding of the project will be an issue at another level and that really concerned me at that stage because in standard ARMSCOR procedures we do not procure if we do not have funding authorisation from the Secretary of Defence.

ADV SNYMAN: At the time of this meeting were you aware of members of DESO and in particular British Aerospace engaging in [indistinct] activities with members of the DoD, Parliament or governance executive?

10 MR ESTERHUYSE: Chairman, I have no direct knowledge of lobbying.

ADV SNYMAN: Did you believe at the time that any [indistinct] had an influence on the decision to pursue the SDP?

15 MR ESTERHUYSE: Chairman, I didn't consider it.

ADV SNYMAN: Moving on to another line of questioning. Mr Esterhuyse you have referred to the analysis of the LIFT [indistinct] as a costed and a non-costed function. Were any items [indistinct], ALFA, Corvette and submarine ever considered as a non-costed option?

MR ESTERHUYSE: Chairman, no.

ADV SNYMAN: So, in other words then the LIFT analysis was unique in being considered a [indistinct] cost?

MR ESTERHUYSE: Chairman, that's correct.

25 ADV SNYMAN: Why do you think that the Hawk was

8 MAY 2014

PHASE 1

treated in this way?

MR ESTERHUYSE: Chairman, I do not know that answer.

ADV SNYMAN: In your view do you think it was remarkable that it was the only product that received the advantage of not being evaluated by cost?

MR ESTERHUYSE: Chairman, I was not involved in the decision making of cost *versus* non-costed options.

CHAIRPERSON: I'm sorry, probably let's try and avoid asking the witness an opinion, unless if he testifies on that point as an expert. He's not an expert on that issue, please let's try and avoid asking [indistinct].

ADV SNYMAN: Thank you. Mr Commissioner, just bear with me. Mr Esterhuyse you have discussed your involvement in the *ad hoc* committee established to receive and evaluate proposals from DESO. Now in one of the books that our clients has written, and also repeated in their submissions to this Commission you have been quoted in the submission and in our client's book as saying that:

"As early as March 1997 DESO was clearly in discussions with other government officials under Minister Modise. At this stage we were already concerned about the actions of DESO and British companies regarding South African politicians and parliamentarians".

Now my question is were you involved with any of the meetings

8 MAY 2014

PHASE 1

between DESO and Minister Modise?

MR ESTERHUYSE: Chairman, apart from the first meeting which I've given evidence that the Minister initiated the discussions in January 1997 no other meetings, no.

5 ADV SNYMAN: And what was your impression of Minister Modise's attitude to the DESO offer and to the concept of the SDP as a whole?

MR ESTERHUYSE: Chairman, I do not have knowledge to answer that question.

10 ADV SNYMAN: My final question then is did you ever get the impression that either representatives of DESO or any other UK equipment manufacturer had established any type of informal or behind the scenes relationship with Minister Modise?

15 MR ESTERHUYSE: Chairman, I have no indication of such a relationship.

ADV SNYMAN: Thank you, I've no further questions.

CHAIRPERSON: You asked the witness a question and you quoted from a book, which book is that and which page is that?

20 ADV SNYMAN: The book I'm quoting from is *The Devil in the Detail* written by Paul Holden and Hennie Van Vuuren and the quotation is on page 172. This also is reflected in our clients' submissions on page 105, the first paragraph at the top of that page.

25 CHAIRPERSON: Lastly, do you still require 10 minutes or

8 MAY 2014

PHASE 1

do you prefer to give you the 10 minutes now to consider the other two points that you have mentioned or [indistinct]?

ADV SNYMAN: Thank you Chairperson, it's not necessary.

5

CHAIRPERSON: It's not necessary. Thank you. Any re-examination?

ADV MASILO: Chairperson, no re-examination from ARMSCOR.

ADV SIBEKO: No re-examination from us.

10

CHAIRPERSON: Mr Esterhuyse, thanks a lot for the evidence that you gave, you really came a long way in helping us to carry out our mandate. Thanks a lot.

MR ESTERHUYSE: Thank you Chairman, appreciated.

CHAIRPERSON: Yes, [indistinct].

15

MS RAMAGAGA: Yes Chair, [indistinct] assist the Commissioners.

CHAIRPERSON: What is the next stage from here?

20

MS RAMAGAGA: Chair and Commissioner Musi, according to the timetable the next witness to be led by Advocate Sibeko and I is Mr Pierre Steyn and he is schedule to appear on the 14th of next week. We are on track for that and we shall be leading his evidence on the 14th of May.

CHAIRPERSON: And can we make sure that a summary of his statement is on our website as soon as we are in a position to get hold of his statement?

25

MS RAMAGAGA: I confirm we will do so Chair.

8 MAY 2014

PHASE 1

CHAIRPERSON: Thank you.

MS RAMAGAGA: Thank you Chair and Commissioner Musi.

CHAIRPERSON: Thank you, we'll adjourn until the 14th
[indistinct] start at 09h00 on the 14th?

5 MS RAMAGAGA: Chair, I hear Advocate Sibeko to my left
[indistinct] that 09h00 tends to be challenging and to the extent
possible could we be accommodated at 09h30, to start at
09h30?

10 CHAIRPERSON: I'll tell you why I say so, it's just that I'm
anxious that we should finish his evidence on the 15th unless
you say to me that you know we can start at 10h00 and give an
undertaking that on the 15th we'll be done with that witness.

15 MS RAMAGAGA: Chair, I'm advised by Advocate Sibeko that
if we were to start at 09h30 on the 14th he gives assurance that
by the 15th this witness will be disposed of.

CHAIRPERSON: Thank you, then we will adjourn until the
14th and we will start at 09h30. Thank you.

(COMMISSION ADJOURNS)