

ARMS PROCUREMENT COMMISSION

Transparency, Accountability and the Rule of Law

PUBLIC HEARINGS

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DATE : 11 JUNE 2014

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HEARING ON 11 JUNE 2014

CHAIRPERSON: Good morning everybody. Can the witness confirm that he is still under oath?

MR LEKOTA: I do.

5 CHAIRPERSON: Advocate De Vos?

ADV DE VOS: Thank you, Chair. Mr Lekota, you explained yesterday that the request from, or the internal question that was put to you during your 10 year as Minister of Defence was answered by you and you gave a
10 written reply. The reply is attached to your, your statement on page 8, where you acknowledge that the Corvette supply umbrella [indistinct], specifically stated that any staff that were involved in the acquisition of the Corvettes my not be employed by the seller, without the consent of
15 the chief of the national defence force, or his deputy within the period of eight years, after the effective date of the contract. Do you agree with me that the purpose of this particular clause in the agreement is to correct corruption?

MR LEKOTA: I, I would consider that to be correct,
20 Commissioners.

ADV DE VOS: So, in order to prevent corruption, it is of the utmost importance that this particular clause in the various contracts and I assume they were a part of all contracts, not so?

25 MR LEKOTA: As I understand it, it is correct so.

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ADV DE VOS: Mr Lekota, you have to [indistinct]

MR LEKOTA: I am sorry.

ADV DE VOS: So, obviously, the enforcement of these clauses are of the utmost importance to prevent corruption.

5 Not so?

MR LEKOTA: That is correct, yes, Commissioners.

ADV DE VOS: Well, it seems to me, that according to the answer that was replied by yourself to parliament, Rear Admiral and Admiral Junior Grade Kamerman, began
10 working for Tyson Cook Marine Systems, within the eight year gap period, in other words, in contravention of this clause in the contract. Is that correct?

MR LEKOTA: Yes. [Indistinct] that is correct, Commissioners.

15 ADV DE VOS: Well, the question is, did he have the consent of the chief of the National Defence Force, because that is the stipulation in the contract.

MR LEKOTA: Commissioners, up until I came here yesterday, I, this, the last knew of this matter was, as my
20 reply was given to the National Assembly. I have since become aware that there is other, other information, which was not present and it was never presented to me and was not present, to my mind. So, I can only say this is, this reply I gave to the National Assembly was one I gave,

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because that was what department has replied to me and I cannot say more than that.

ADV DE VOS: But, Mr Lekota, let us start again. The fact of the matter is that the consent of the chief of the national defence force was a requirement. Is that correct?
5

MR LEKOTA: That is correct. That is correct, Commissioners.

ADV NGOBESE: Commissioners, with due respect the, the, it says that the permission of the chief of defence, or his deputy. In other words, his deputy can be the chief of navy, or the chief of air force. So, I wanted just to put it into record that not only the chief of defence, but however, also his vice, which might be the chief of navy.
10

MR LEKOTA: That is correct.

CHAIRPERSON: Thanks for that Advocate Ngobese. I think that is my recollection of the, of the evidence of Admiral Kamerman.
15

ADV DE VOS: I am not sure whether that is evidence before this commission. I accept that if the deputy could have been the chief of the South African navy, then obviously, the letter, if it is a correct, if it is a true copy of the letter that was present by Mr Kamerman is correct, I, I, although I want to go back to the answer that was given by Mr Lekota in parliament and his view of the matter at that time.
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CHAIRPERSON: Yes. I agree with you. I understand what you are saying. But, that the correct position is that the evidence before the commission is that he needs the permission of the chief of the South Defence force, or his
5 deputy and that is the evidence that is before the commission. If you are uncertain about it, I am sure we can take a short adjournment and we can try and look at that portion of the record and together with the letter that Admiral Kamerman submitted to the commission.

10 ADV DE VOS: Commissioners, I will accept the position that, for the purposes of Mr Kamerman, I just want to ask Mr Lekota one more question about the answer he gave to parliament. Mr Lekota you said in the answer that the Rear Admiral did not have the official consent from the chief of
15 the South African National Defence Force. You did not make mention of the fact that he may have had the permission or the consent of the deputy and in a question that was put to you, was whether any action has been taken against any party, in relating to an alleged breach of
20 the supply contract. Your answer was the following. No action has been taken against the said Rear Admiral and the explanation that you gave was not that the Rear Admiral had consent from the deputy. The explanation you gave is the following.

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“The umbrella agreement to the supply terms does not make provision for legal action against an individual member of the DOD, who takes up employment with the seller. The legal relationship is between the seller and the
5 *buyer.”*

Now, I want to ask you, am I correct in saying that if one interprets the last paragraph, it seems clear that at least, whomever drafted this answer was under the impression that the rear admiral breached the contract.

10 MR LEKOTA: Commissioners, to throw a matter there, on my reply to this question. The situation was like this. The execution of these provisions was done in the department. In this case, it would have been under the, the marine leadership under Rear Admiral Mudimo. Now, that
15 information, when a question is sent through, for accurate response the office of the Minister sent the question to the relevant section, to provide precise and accurate information from there. Or at least, when the reply thus comes, as Minister I would accept that, to be accurate,
20 because I am not hands on, on that kind of issue. So, this reply is a reply I was given as at this time and I then conveyed this to the National Assembly and all these some questions, would have been, would have gone through with that first question you see there. I would submit that and
25 then, and then respond to whatever else may arise from

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this, if there was clarification, I would send it back to the department for further clarification. In this case, there was no further information. So, so this information that is here, on this reply, is what I was given in full, from inside the
5 department. I had no, I was not given any cause to pursue the matter further than this. So, I cannot say more than what is on this paper, frankly.

ADV DE VOS: Mr Lekota, I am asking a very simple question, if one reads the last paragraph, it is obvious,
10 that according to the person who drafted this paragraph, that this person was under impression that the Rear Admiral breached the terms of the agreement.

MR LEKOTA: I am, I am ...[intervene]

ADV DE VOS: But, if, if this deponent, it, it says no
15 action has been taken against the Rear Admiral and the explanation for that is not because he did not breach the agreement, but because there was some legal reason why they did not feel like taking action. That is what, that is what the paragraph says. Now, my question to you is the
20 following. When you read this, did you not think that it was appropriate to take action, or at least to, to look into the matter at the time?

MR LEKOTA: Commissioners, I, I am sorry, but I cannot, I cannot attest to the impression to the individual that, that
25 wrote this thing. The facts are here that this person says

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what they say here, that the legal relationship is between the seller and the buyer. Now, either that the buyer would, I mean the seller would have said, you have breached the terms of our agreement in that you have employed
5 somebody from us, contrary to the provisions of the, of the act. The implementation part of this was being done in, in the navy, by Rear Admiral Mudimo. If there is any other different development, such as now, it is that they said that they had towards, indeed, there had been permission
10 granted, this situation would not have arisen. I am only attesting the fact that this is the reply I gave the National Assembly.

ADV DE VOS: So, you cannot give any explanation why you did not pursue the matter.

15 MR LEKOTA: With hindsight and with what I now know, I would have assume then that if there had indeed, been permission given, then there was no need for these other pursuit, pursuit of this matter. I did not pursue this matter, beyond this point.

20 ADV DE VOS: Thank you, Mr Lekota. Can you turn to the minutes of the sub-committee of cabinet ministers meeting of the 31st of August, you can find it on page 5 of your bundle. Do you have that before you?

CHAIRPERSON: Are you talking about the ...[intervene]

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MR LEKOTA: Madam, are you referring to, that my statement?

ADV DE VOS: Yes.

MR LEKOTA: Okay. Thanks. Yes. Yes. I have got it.

5 Okay. Sorry.

ADV DE VOS: Mr Lekota, Mr Naidoo the chief negotiator gave evidence about the affordability report that was presented to the sub-committee of cabinet ministers on the 31st of August. He was specifically asked whether he
10 presented this affordability report to the, to the sub-committee and his answer was yes. But, he did not have a minute of that meeting. Now, clearly, we have the minute now before us. Can you remember the discussions surrounding the content of the affordability report?

15 MR LEKOTA: Whilst I cannot recall it in detail, but I can recall the term of the discretion on this issue.

ADV DE VOS: The interpretation of my clients of the affordability report is that the affordability report actually highlighted the fact that a decision to proceed with the, let
20 us call it the, the combined package, in other words the tranche package of the Hawks and the Gripens was a high risk decision. Would you agree with that?

MR LEKOTA: AI would not agree with that.

ADV DE VOS: Well, according to Mr Naidoo, in his
25 evidence he said that the broad conclusion of the

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modelling exercise was that the impact of the procurement would be approximately neutral and not positive over the full eight year period, even at the highest expenditure level, level if the high risk scenarios were avoided in a relation to both interest rate and NIP commitments. In other words, what he was saying and what the report shows that it could only have been a success and a success meaning neutral, a neutral impact on, on the economy, if on the highest expenditure level, which was the level that the ministers chose, all the high risk scenarios were avoided. Now, clearly, that is a high risk situation, not so?

MR LEKOTA: Commissioners, I did not, when everything had been discussed, I did not form the impression that it was a high risk think that we could not afford it at all. We were only going to be spending on these tranches, the available budget of the department of defence. It seemed to me, do-able and I did not consider it, in the manner, in the manner that, in the negative manner that is being suggested to me. So, I do not agree with that. Mr Lekota, I understood the evidence to be that the original payment, the first payment, or the first tranche, if I could call it that was paid out of the defence budget, combined with funds, made by the Department of Finance and that did not come of the Department of Defence's budget. Commissioners, the, what, whatever the first tranche, expenditure on the

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first tranche, the [indistinct] of whatever, what was spent there was simply defence budget that ordinarily would have come to defence. The reason that the [indistinct] and all of that were left out, was to enable us to stay within the budget of defence. As far as I am concerned, we, it was, it was an acceptable and perfectly do-able exercise.

ADV DE VOS: Mr Lekota, I am not going to argue with you. I am sure that the evidence will show that it was not the bulk of the, of the expenses that came out of the DOD budget. But, in any event, the, the, you also specifically stated that you thought that you could afford it, because there was the opportunity to refuse tranches two and three, if the situation so demanded. Is that correct?

MR LEKOTA: I do not understand why you think we could refuse. The, the rationale was that in tranche one it would enable us to do what we could do in tranche one in the year of 2000 and if by, by 2002 the situation was such that we could not take on the next equipment, we would evaluate the situation at that level. So, it was not a question of refusing. It was a question of what was affordable, given what is available and the limitations of the budget. So, for me it was a budget process, exercising final decisions, as and when the situation arose, when the time came.

ADV DE VOS: But, is it not correct to say that based on the affordability report, it is clear that the purchase of tranche one of the Hawk and Gripen almost certainly demanded this [indistinct] of tranche two and three, without
5 which, South Africa would have been left without any air combat capacity and also in terms of the financial structure of the deal.

MR LEKOTA: Commissioners, you know, I am a very practical person and dealt with that. When one buys a
10 house, you do not have all the money to pay for it there and then. You cannot buy it cash. So, you, I evaluate, will I be in a position to meet my obligations in relation to this purchase, year to year. I approached this thing in this way. In that year, the budget available allowed us to do
15 this purchase and it was do-able. We provided, we made this provision, two years from now, will the situation be even better than what it is, or will it be worse. At that point, we would then apply our self to what is available and what is do-able and then we would, would exercise that in
20 keeping with that. I had no other mysterious information that I would approach the issue with. There were all these other technical people with us, who also provided indicators, as they saw them. That persuaded me, among others, together with my colleagues to go along with my

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colleagues and I did that, because I believe that it was affordable and we could do it.

ADV DE VOS: Thank you. Mr Lekota, you, to move on, you spoke to students at the University of South Africa, in
5 the beginning of April 2009. I do not expect that you should remember that, but I am going to put to you what, according to my instructions it was that you told the students. You asked, or you said that without batting an
10 Zuma were being re-instated. Can you remember that speech?

MR LEKOTA: I cannot remember the precise, I remember addressing the students there. I remember that. It has always been my view indeed, up to now, that the evidence
15 that was led, because, before Justice Squires, the evidence that was there suggest to me, as a lay man. But, nevertheless, one will spend quite a bit of time before the courts, that that evidence, if we are to be faithful to equality before the law, needs to be tested in a court of
20 law, whether the President had done the things that were alleged in that evidence, in Pietermaritzburg, or not. I remain quite firm that that was my view, but, I mean, I am not a legal fundi, but I think that should have been done.

ADV DE VOS: And the reason why you felt that these,
25 well, the charges against President Zuma, obviously,

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circled around his relationship with Shabir Shaik and the arms deal contracts. Is that correct?

MR LEKOTA: Commissioners, this, that matter does not relate at all, to this issue, that is a, that is in the
5 secondary contracts. This, what we are dealing with here is the primary contracts, between government and the multi-nationals, which were going to supply this to the country. The secondary industry is where a number of the individuals, Shabir Shaik and others got arrested for what
10 they did, far away from these, these issues that we are dealing with here. Those were the secondary contracts. The evidence was there before Justice Squires. I think the legal people got to be very clear that this has nothing to do with this thing here.

15 ADV DE VOS: Mr Lekota, the commission is also going to investigate the secondary contracts. I am just asking you about your view and why you, why you felt that President Zuma should be prosecuted as he is tied into the commission's workload. But, I think you did that. I lastly,
20 want to ask you a very simple question and that is the following. You were a member of the NEC of the ANC at the time of the negotiations and the decision making process that resulted in the arms deal. I want to ask you a very simple question and I want to, you to answer knowing
25 that you are under oath before this commission. Did the

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ANC in any way benefit financially from the arms deal, or not?

MR LEKOTA: Commissioners, to the best of my knowledge the ANC, as far as I know, the ANC never
5 benefited anything from this arms deal. I have no knowledge of that. There can be no minutes or meeting, either of the national executive, the national working committee or the officials, whichever was given information that we are going to benefit, as the ANC, we are going to
10 benefit from this. That, I have no knowledge of such and I would reject an assumption of that nature.

ADV DE VOS: Thank you, Mr Lekota. Thank you, Commissioners, that is the questions for the [indistinct] Human Rights.

15 CHAIRPERSON: And besides that, is there any other person, who, who still wants to cross-examine Mr Lekota? Any re-examination? No re-examination. Minister Lekota, thanks a lot for giving evidence. You are now, you can go. Thank you. Sir, just hold on, as soon as you ready, hand
20 me that back.

MR BROWNE: Mr Commissioner, may read a, with your leave, may I read a document that I have handed to you earlier this morning, regarding the issue of documents that came out between yesterday's appearance?

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CHAIRPERSON: Mr Browne, just hold on, we are still busy with this witness. I already seen the document that you want to give in.

MR BROWNE: As you please, Sir.

5 CHAIRPERSON: Thank you. Minister Lekota, you are excused. Thank you.

MR LEKOTA: Thank you.

CHAIRPERSON: I think the next witness that we are going to deal with is Mr Trevor Manuel and I suggest that maybe
10 we should take an adjournment of about five, 10 minutes just to try and arrange one or two, two things. Mr Browne, the, the letter that you want to read, what does it relate to? Does it relate to the evidence of Mr Manuel, or what does it relate to?

15 MR BROWNE: I am not really sure. It relates to the issue of the documents that I made available yester and which was to be a matter of discussion this morning. I have furnished a letter through [indistinct] for your attention and, and Judge Musi's attention as well. I, I assumed that
20 you received it. But, I would like to read it into the record for my own [indistinct].

CHAIRPERSON: I have not read it yet today, because I am concentrating on the evidence. So, the next witness, probably [indistinct] and we can have a look at that at a

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later stage. But, then, I can, for today, I am going to concentrate of Mr Manual, which is going to lead.

MR BROWNE: If you wish, Sir.

CHAIRPERSON: I think maybe we must take a five ten,
5 minutes adjournment, in order to allow the evidence [indistinct] which you are going lead Mr Manual time to arrange their, their documents. We will adjourn for about five to 10 minutes. Thank you.

(COMMISSION ADJOURNS)

10 **(COMMISSION REOPENS)**

CHAIRPERSON: Advocate Mphaga?

ADV MPHAGA: Thanks Chair. We are ready to call Mr Trevor Manuel to give evidence. We have prepared a bundle of documents with annexures and we have also
15 made available to yourselves the bundle of Mr Donaldson's documents. From time to time in his evidence Mr Manuel will make reference to Mr Donaldson's statement, just to emphasise some points. Thank you, Chair.

CHAIRPERSON: Mr Manuel, do you mind to take an oath?

20 MR MANUEL: We have agreed to affirm, thank you very much, Chair.

CHAIRPERSON: Do you confirm that what you are going to say to us is the truth?

MR MANUEL: I so do, sir.

25 CHAIRPERSON: Thank you.

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WITNESS: TREVOR MANUEL AFFIRMS**EXAMINATION:**

ADV MPHAGA: Thank you very much, Commissioners. I see in paragraph 1 of your statement, you indicate that you were a Minister and a member of the Executive of the Government of the Republic of South Africa until 24 May 2014, is that correct?

MR MANUEL: That is correct, Commissioners, from May of 1994 to May of 2014, I was a member of the Executive.

10 ADV MPHAGA: Thank you. I understand that you are retired, but for the purposes of your evidence, allow me to call you Minister, if that is okay with you?

MR MANUEL: Commissioners, the evidence [indistinct] is entitled to do what he likes, but I am just an ordinary citizen, a pensioner, but if he is comfortable with it, I am okay.

ADV MPHAGA: Thanks. Thank you very much. Minister, you indicate in paragraph 2 of your statement that you were a member of the National Executive from time to time that President Nelson Mandela was Head of State and Head of the Executive, National Executive, is that correct?

MR MANUEL: That is correct, Commissioners. I served under four successive Heads of State. Presidents Mandela, Mbeki, Motlanthe and Zuma.

25 ADV MPHAGA: And you held the ministerial position of

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Minister of Trade and Industry from May 1994?

MR MANUEL: I did hold the position of Minister of Trade and Industry, May 1994 to early April 1996 and Minister of Finance from April 1996 until the elections in May of 2009
5 and between then and May of 2014, I was Minister in the Presidency responsible for the National Planning Commission.

ADV MPHAGA: And in paragraph 4 it basically sums up the essence of your giving evidence today. Where you state
10 that you served on the Cabinet Sub-Committee of the Inter Ministerial Committee. Can you just take us through that Minister?

MR MANUEL: Thank you very much. I served on the Cabinet Sub-Committee referred as the Inter Ministerial
15 Committee established to oversee the Strategic Defence Procurement Package in my capacity as Minister of Finance and I make this submission as a member of the then IMC.

ADV MPHAGA: And you also further mention your role as a
20 member of the National Assembly since May 1984 and further also your role as a member of the African National Congress, National Executive Committee, from July 1991 to December 2012?

MR MANUEL: Both of those are correct. A member of the
25 National Assembly and member of the National Executive

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Committee of the ANC.

ADV MPHAGA: In paragraph 6 of your statement you basically state the purpose of the Arms Procurement Commission which is common cause and also paragraph 7
5 you deal with the rationale for the SDPP's and which has already been before the Commission, and I think in paragraph 8 it is where then you want to tell us about the essence of why you are here today. Can you just take us through that quickly?

10 MR MANUEL: Thank you very much, Commissioners. It would appear that the essence of what the Commission seeks to ascertain from the National Treasury and from me as the then Minister of Finance, relates to the rationale for the Strategic Defence Procurement Package, or at the very
15 least the extent of Government's appreciation of the affordability of the SDPP. Differently formulated what I hope to bring to the attention of the Commission this morning is the rationale for the decision of Cabinet to approve the SDPP, secondly to give insight into the
20 financial commitments that Cabinet appreciated, arose from the decision of the 18th of November 1998 and thirdly, to give some assurance of the minimal impact of Cabinet's decision on the expenditure allocated to other departments. Thank you.

25 ADV MPHAGA: Now in paragraph 10, 11, you give the

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overview in respect of the consequence of the decision taken in November 1998 by Cabinet. You may then proceed to take the Commission through that.

MR MANUEL: Thank you very much Commissioners. I
5 think that it is now well travelled that the Cabinet took the decision in November 1998 to procure the SDPP. This was a policy decision and one that was grounded in the Constitutional mandate conferred on the National Executive in Section 85 of the Constitution. Now it is very important
10 to recognise the comprehensive and public process that was undertaken to ensure that Cabinet had all the material and information required for the taking of a decision on how to give effect to sections 199 to section 204 of the Constitution, taking into account the governing principles
15 and national security set out in section 198.

It is very important I believe that we recognise the responsibilities of national security in the context of our discussion. Our Constitution covers many areas and this is one of the areas that some people choose to neglect in
20 understanding, but when one reads section 198 it affirms the responsibility to create peace and the objective of creating national security and a defence force, as the only armed force inside the country, is in fact to secure peace and that is a constitutional imperative as articulated in
25 section 198. Thank you.

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ADV MPHAGA: Can you proceed then to paragraph 11 where you indicate the tasks that were given to you post the committee decision of 1998?

MR MANUEL: Yes, thank you very much, Commissioners.

5 In the way in which the IMC was put together we all had different responsibilities. So then Minister Lekota had...or before him, Minister Modise had defence responsibilities, Minister Erwin looked at the Trade and Industrial participation issues. My mandate was to look at the
10 affordability. So the efficiency of and affordable method of servicing our financial obligations that we expected to arise from the SDPP was the responsibility that I was tasked with and in this regard I interacted with the financial negotiation working group and the international
15 office negotiating team that was appointed to investigate and gather relevant data and material on the budgetary implications and general affordability of the SDPP. They in turn worked closely with national and international financial advisors, as set out in the commission...in the submission
20 made to this Commission by the National Treasury. Thank you.

ADV MPHAGA: Minister, in paragraph 12 then you deal with the fact that once the recommendation had been made by the IMC and thereafter to Cabinet, as Minister then you
25 had the duty to oversee and sign the relevant loan

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agreements. Could you just take us through that paragraph 12 in regard to the role that you played.

MR MANUEL: Thank you very much. At the time that the discussions started, the legislation covering the treasury
5 that was in force was the Eschegge [?] Act and in clause
16 the Eschegge Act in fact empowers the Minister of Finance to oversee and sign relevant loan agreements, that Government was prepared to enter into and this would have
been the case with the SDPP. With the National Treasury I
10 also monitored and reviewed the expenditure on the SDPP on a regular basis and effected the necessary payments in accordance with established National Treasury procedures. These are matters that were well canvassed by Mr Donaldson in his statement.

15 ADV MPHAGA: Thank you very much. I see you make reference to Mr Donaldson's statement, page 85 to 121, where he extensively dealt with this aspect. Do you want to refer to any of the paragraphs of Mr Donaldson just to
[indistinct] in particular if you start at page 41, paragraph
20 55.

MR MANUEL: Thank you very much, Commissioners. We concluded the loan agreements on the 25th of January 2000 in respect of foreign, or with foreign banks for the SDPP. At that stage as I have pointed out the Public Finance
25 Management Act was not yet in force, so the Minister's

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authority derived from the Eschegge Act. Subsequent authority to manage his financial facilities is derived from section 66(2)(a) read with section 71 of the PFMA Act 1 of 1999. We entered into a number of agreements to procure
5 the arms that ... and the National Treasury was the borrower and the four international banks were the lenders. That was Barclays an amount of 2,5 billion dollars. Commerzbank, 611,88 million Euro. Commerzbank 846,339 million Euro. Société Générale 188,06 million Euro and
10 MedioCredito Centrale 199,778 million dollars. But these agreements in the main governed the Export Credit Agency loan facilities which were negotiated and agreed upon to finance the imported components of the SDPP. The terms and conditions of the loans were stipulated in respect of
15 the loan agreements.

ADV MPHAGA: Thank you very much. I do not expect you to through and revisit the whole evidence of Donaldson. I just refer you also to paragraph 100 on page 46.

MR MANUEL: The loan agreements are separate Chair
20 from the supply agreements. The supply agreements would have been signed by the Ministry of Defence. The loan agreements to finance the supply were signed with the banks and so Mr Donaldson in paragraph 100 articulates this point and the distinction between the two are, is of
25 relevance because the supply agreements were managed

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by ARMSCOR and the Department of Defence, and the financing agreements by the National Treasury.

ADV MPHAGA: Ja, the point you are making I think is emphasised by Donaldson in paragraph 12 at page 47?

5 MR MANUEL: Yes.

ADV MPHAGA: Okay, let us revert back to your statement on page 5, paragraph 13. It deals with your task to liaise with the Department of Defence and ARMSCOR in overseeing the expenditure. Can you just take us through
10 that paragraph?

MR MANUEL: Commissioners, it was my task to liaise with the Department of Defence and with ARMSCOR to oversee the spend on the SDPP expenditure commitments within the particular budgeting cycle, to ensure that all payments are
15 made in respect of the SDPP and that this was done in the context of an allotted budget. Now I want to just digress for a moment, if I may, there seems to be a bit of confusion I have heard. My experience of budgeting and I grant that it was limited to a few years I served as Minister of
20 Finance, saw me responsible for an entire budget. The budget is financed by taxes and loans and allocated to departments according to need. So no department has a budget separate of that unless they have cake sales, Commissioners. The budgeting comes from taxes and
25 loans and in the context of the SDPP, it was funded on the

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budget of the Department of Defence through the appropriations placed before Parliament in legislation each year, there was no separate side event for funding the acquisition of the SDPP. Thank you.

5 ADV MPHAGA: And I take it that Mr Donaldson had covered that point in detail in paragraph 58 to 84 of his evidence?

MR MANUEL: I would like to confirm that and not necessarily go over it again.

10 ADV MPHAGA: Now on page 6, paragraph 14, you just make a reference to the [intervenes]

CHAIRPERSON: Just hold on a bit now. The paragraph that you have just referred to, which you said is in Mr Donaldson's statement, how much pages is it?

15 ADV MPHAGA: I said 58 to 84. It is on the foot note on page 6, foot note 3.

CHAIRPERSON: Thank you.

ADV MPHAGA: Thank you. Minister, paragraph 14.

MR MANUEL: Paragraph 14, we will not seek to cover that
20 ground again, we will deal with the policy and legal framework that underpinned the decisions of the IMC and the projected total cost of the SDPP to Government. The conclusion Commissioners, we will address the impact of cancelling the loans that were secured to finance the
25 SDPP.

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ADV MPHAGA: Thank you very much and in paragraph 15 you just mention that former Minister Alec Erwin has already traversed matters relating to the IMC. You do not want to add that?

5 MR MANUEL: No, I hope that the Commission is well served by my colleagues who dealt with these matters at some length. Thank you. I would like to confirm Commissioners, if I may, the submissions of both then Minister Erwin, Minister Kasrils, Minister Lekota and also
10 of course of Andrew Donaldson with whom I worked very closely in [indistinct]

ADV MPHAGA: Thank you. Now in paragraph 16 you have already indicated that you want to refer to the submissions of National Treasury and paragraph 16.2 also to the
15 findings of the Joint Investigation Report into the Strategic Defence Procurement Packages dated November 2008, and in paragraph 16.3 you make reference to the is it *Ecar [?] South Africa & Another v President of the RSA & Others*. Do [indistinct] on the [indistinct] of this case so that we
20 can get it later.

MR MANUEL: Thank you very much, Commissioners. I have here a exceedingly heavy bag. I could not lift it with one hand. It must weigh about 40 kilograms of paper that relates to litigation on this matter, Commissioners and a
25 litigation was institution by Mr Terry Crawford Browne on

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behalf of ECAR against the President, the Minister of Finance and a range of other Government officials. The matter was disposed of by Judges Blinow [?] and Biakiso [?] in Cape Town. The decision was that the application be
5 waived with costs. Sorry, dismissed with costs. It was taken to all levels. There was grounds for appeal sought, it was turned down by the court. The SCA was petitioned. It was turned down there. The Constitutional Court was petitioned and the gist of that matter Commissioners dealt
10 with the contracts, the financing contracts for the SDPP and I would like to submit that that matter having been traversed by the courts in the way that it has, is *res judicata*. But we will come back to that in a moment, thank you.

15 ADV MPHAGA: Thank you very much. Commissioners, we have attached the relevant annexures, the judgment itself [indistinct] the court orders of the Western Cape High Court, the dismissal of the leave to appeal by the Western Cape High Court, the refusal of leave to appeal by the
20 Supreme Court of Appeal and also the refusal of the leave to appeal by the Constitutional Court. There are annexed as TAM1 to TAM6. Thank you. Paragraph 17 basically deals with the structure of the submission and I do not want to take the Commission through that. Maybe then let
25 us proceed to paragraph 20 in respect of the separation of

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powers among the three [indistinct] of Government. I would just like you to deal with it in the manner of the best way you can deal with it, without necessarily dealing with each and every paragraph, thank you.

5 MR MANUEL: Thank you very much, Commissioners. As Members of the IMC we maintained that we were a sub-committee of Cabinet and acted within the framework of the law. The core challenges of November 1998 of the decision of Cabinet to procure defence, sorry, armaments,
10 which had been adjudicated to finality by a court, have found no merit in the complaints lodged in those court proceedings. It is essentially due to the fact that the executive decisions taken, were in accordance with the prescripts of law and the Constitution in particular.

15 So I want to draw to the attention of this Commission, that it is necessary to confirm the basic [indistinct] as political, the separation of powers which our Constitution confirms. The submission will also locate the executive authority relied on by the IMC and Cabinet in taking
20 decisions of, within the context of sections 84 and 85, and I raise these Commissioners, because I do not believe that these matters are on record within the Commission, yet. At the heart of our constitutional democracy lies a separation between legislature, judiciary and the executive. The
25 powers according to the National Executive by the

Constitution and the limitations inherent in the discharge of those public powers, must be understood in the constitutional context.

In section 84 the Constitution accords to the President
5 of the Republic the status of Head of State and Head of the National Executive and as Head of the National Executive, the President exercises executive authority together with other members of Cabinet. Where these decisions are policy laden, the courts have tended to interpret them to be
10 executive action as opposed to administrative action. Within the matrix of the confirmative duties, responsibilities and functions and obligations on members of the National Executive is the question of accountability and section 92 clearly states that the Deputy President and
15 Ministers are responsible for the powers and functions of the Executive assigned to them by the President and, secondly, the members of Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

20 Members of the Cabinet must act in accordance with the Constitution and provide Parliament with full and regular reports concerning matters under their control. All of these would be covered in the way in which we deal with the submissions here.

25 The constitutional duties and functions imposed by

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Parliament, on Parliament by the Constitution on the other hand, have their source primarily in Chapter 4. The legislative authority of Parliament, of the Republic lies within Parliament's domain. The role of the judiciary as a
5 branch of Government vested with judicial authority is according to section 165 to apply the law including the Constitution which serves as a [indistinct], impartiality and without fear, favour or prejudice.

Two points arise from this Commissioners on the nature
10 and ambit of the separation of powers doctrine and from the powers confirmed on the President, acting in collaboration with the National Executive and those of Parliament. First [indistinct] section 42(3) of the Constitution prescribes the responsibility vested in
15 Parliament particularly the National Assembly, is not that of instructing the National Executive or that of making policy choices for the National Executive. Section 42(3) emphasises, scrutinising and overseeing.

The necessary public consultation processes were
20 applied with respect to the review of the Defence Force. This is patent from a reading of the white paper on the National Defence for the Republic of South Africa, dated May of 1996 and the South African Defence Review which was approved by Parliament on the 22nd of May 1998.

25 It is against this backdrop, Commissioners, that on the

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18th of November 1998, Cabinet resolved somewhat uniquely because it was an in principle decision, to accept the Department of Defence's recommendations on preferred suppliers for the SDPP and it then tasked the Departments
5 of Defence, of Finance, the Department of Public Enterprises and Trade and Industry with the further conduct of the matter.

The decision of Cabinet was an in principle decision that required the further investigation of the merits of the
10 presentation made by Defence. On the 25th of November 1999 and after an affordability review had been concluded negotiations with identified suppliers and [indistinct], Cabinet approved the Department of Defence's procurement of the SDPP.

15 The Executive decisions that were consequent on the implementation of the Cabinet decisions of the 18th of November 1998 and 25th November 1999, were scrutinised by Parliament. By way of example, in or about 2000 the Parliamentary Standing Committee on Public Accounts so
20 called SCOPA received reports, deliberated on these and recommended the establishment of an independent and expert forensic investigation into matters that arose in relation to the SDPP. I should point out Commissioners, that subsequent to that it was called the 14th Report of
25 SCOPA. There was an engagement for the Ministers

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concerned and there is, on public record, a minute of a meeting of the 26th of February 2001, where for the first time members of the Executive were afforded an opportunity to be heard by SCOPA on a range of issues.

5 ADV MPHAGA: Thank you. Minister, may I just also get your explanation whilst we are here, in respect of various criticisms that were made against the press statement that was made, amongst others, by yourself on 12 January 2001, basically seemed to be criticising the record of the
10 proceedings of SCOPA of 11 October 2000, including the 14th Report. Could you maybe elaborate and explain that?

MR MANUEL: Well, it... there was a challenge that confronted us, Commissioners. In the manner in which SCOPA had arrived at its decisions, it sought not to call
15 the relevant departments. In the context of Parliamentary procedure SCOPA tends to call officials and only in extreme circumstances would call members of the Executive. In this case SCOPA arrived at certain conclusions in its 14th Report dealing with the SDPP, and I
20 can say without fear of contradiction, that I know that nobody from the National Treasury was called into that.

We had these discussions and so there was the 14th Report in November of 2000. Ministers met and had a press conference in January of 2001, and thereafter the
25 meeting of the 26th of February that I referred to. In that

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meeting we were able to, perhaps for the first time, explain a range of issues that SCOPA had previously not invited us to do. For instance... well, one of the issues that was at hand was the then Chairperson of SCOPA. Dr Gavin Hood
5 said but they did not need Government, they relied on other information and the point that we were raising quite strongly was, if you want to engage in a discussion or level accusations as that 14th Report did, then asymmetry of information is actually fundamentally important, so that all
10 sides could be heard in the matter. That was the gist of our press statement and what gave rise to the meeting of the 26th of February 2001.

Amongst issues that were canvassed in that meeting for instance, is something that I hope to cover in the course of
15 this submission, and that relates to the question of interest, because the SDPP was a cost as though it was the present value cost, excluding a range of issues. This is a matter that was well canvassed by Mr Donaldson in his submission, but I will come back to that in a moment.

20 ADV MPHAGA: Thank you very much for that explanation. Let us proceed to paragraph 33 where you are dealing with the joint investigation team and the report.

MR MANUEL: Ja, as a consequence of the SCOPA report and those discussions, a joint investigating team was set
25 up, made up of the Public Protector, the National

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Prosecutorial Authority and the Auditor General, they were commissioned to do a report and submit it to Parliament in terms of sections 182(1)(b) and 188 of the Constitution and section 36(2)(b) of the NPA Act. The Commission is referred to the findings in the JIT Report and chapter 9 thereof. We have attached it as TAM7 and there a range of issues that arise from that report.

If I would be permitted to briefly skip across to that, Commissioners. I would like to draw attention to a few issues. The first relates to a matter raised on page 248 of their report, paginated 54 of our report at paragraph 9.1.1.5, which deals with the affordability exercise undertaken. The JIT Report also refers to the fact that the National Treasury had invited in the Bureau for Economic Research of the University of Stellenbosch, as part of the early affordability exercise. It takes forward a very important point and one I hope to return to, and that is it states:

“Affordability is ultimately a question of political choice.”

So the task of the affordability team was not to make that choice. I do not believe Commissioners, that the Executive can outsource their responsibility. But it has to be advised and we will come back to this point in a moment.

The second issue I would like to draw attention to, is

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that the... as far as the impact of the industrial participation benefits is concerned, the affordability took into account a certain percentage of risks that all of these benefits would not materialise.

5 ADV MPHAGA: Could you just point us to the page?

MR MANUEL: Sorry, it is over the page, on page 55, paginated paragraph 9.1.1.7. Mr Donaldson in his submissions spoke of the fact that there was in fact a discounting of the industrial participation because the risks
10 were perceived in the way in which the affordability was looked at. The next paragraph 9.1.1.8 on the same paginated 55, says:

“The affordability assessment dealt with additional expenditure to be financed, but not the costs of financing.”

15 Now it appears that it is a matter that I have to canvass at some length, the costs of financing and then it says:

“Financing costs do not form part of the expenditure of DOD on the SDP, but are accounted for as state debt costs and charged against the National Revenue Fund.”

20 This is quite important to understand in the context of the wider discussion. That is what I wanted to draw from the joint investigating team report. Thank you, sir.

ADV MPHAGA: Do you have any comments with the findings, the ultimate findings that was made by the JIT
25 Report, the ultimate findings on page 69 of the report?

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Page 69 of the bundle in 9.2.1 to 9.3.5.

MR MANUEL: Yes. Again this is a matter that Mr Donaldson had canvassed at some length, explaining how the exercise is performed to arrive at what are called 'net
5 present value costs. I heard Mr Lekota earlier describe this thing as buying a house and you see the price advertised, and that is the price you negotiate. The fact that there would be interest payments, is not advertised as part of it and most of us conduct our everyday lives, along
10 exactly the same norms.

So the costs of raising the finance are actually the responsibility of the National Treasury. I believe that we will canvass that at some length and I have no disagreement with the observations made the JIT at 9.3.1.
15 If I may, sorry, over the page in 9.3.3 of that report, although two independent economists criticised elements of the financial and economic models used, they confirmed that the model as a whole was reasonable. Having worked with economists Commissioners, to find a conclusion like
20 that of reasonable agreement between them, is a milestone achievement and I think we should record that, for purpose of evaluating just going forward.

ADV MPHAGA: Thanks Minister. Then can you proceed to page 14, paragraphs 34, 35 and 36. If you can just take us
25 through those paragraphs.

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MR MANUEL: Ja, paragraph 34 deals with the reporting and accounting responsibility to Parliament, Chair. The power vests as prescribed by section 42(3) of the Constitution, to represent the people and to ensure
5 Government by the people and the Constitution to scrutinise and oversee the use by the National Executive of public power according to Ministers under the Constitution.

Paragraph 35 emphasises the fact that our Constitution creates a Defence Force. Again it is not a point that we
10 frequently talk about but in creating a Defence Force, there are a number of concomitant responsibilities that accrue. The injunction in section 200(2) of the Constitution with regard to the primary object of the Defence Force, and then the responsibility cast on the President as Head of the
15 National Executive, and Commander in Chief of the Defence Force to act in terms of the Constitution, and the obligations that vested in the Minister of Defence, again a position created by the Constitution to take responsibility for the Defence Force and in so doing ensure that the
20 Defence Force had the necessary capacity and functionality to discharge its constitutional mandate.

Now I would proceed, with your permission evidence leader, to touch on the public participation process that culminated in the approval of the defence review and
25 consequent taking of the Executive decision by, of the 18th

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of November 1998. But I need your permission and that of the Commission.

ADV MPHAGA: Ja. This topic has been traversed since the inception of the Commission. If you want to do so you
5 could do that briefly without getting into [indistinct]

MR MANUEL: Clearly Commissioners, the discussion started with the establishment of democracy, because in the period before democracy under the Apartheid regime, defence expenditure was actually very very high. The
10 question that confronted us was how to construct a defence force that was representative as articulated under the the Interim Constitution, representative of all the people in a way that combined various forces, statutory and non-statutory as the division then existed, and was able to be a
15 voice that articulated the letter and spirit of our Constitution.

Of course we were operating under an Interim Constitution then and it was under that, theegis of the Interim Constitution, that the defence white paper process
20 got under way, fairly early, so that key questions about the shape and size of... and capability of the Defence Force were canvassed in the white paper process, and the... and what is important about the period if I may, was because you know the constitutional issues were entirely new, all of
25 us involved in the Executive had to watch very carefully to

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ensure that we did not overstep the limits and so. That was the environment within which the defence white paper and defence review processes were actually undertaken.

The white paper followed and once we had a sense of
5 the desired capabilities of the Defence Force and you know, part of our responsibility was to create what we colloquially called "the post-Apartheid dividend". Defence Force expenditure under Apartheid was about four and a half percent of GDP, and part of what we sought to do was
10 to reduce this, so that we met our constitutional obligations, but brought the spending to within a framework of reasonableness, and this would have been the political underpinnings of both the white paper and the defence review process that was then undertaken.

15 And so all manner of issues ensuring that the Defence Force was not an instrument of repression, but focussing on defence policy of the armed forces, looking into matters of civil military relations, military professionalism, civic education and the responsibilities of Government towards
20 the SANDF, transparency and the freedom of information, the structure of the Department of Defence, all of these were actually matters that canvassed within that context.

The defence review process was launched thereafter and a working group was established, Commissioners,
25 comprising not just of the ruling party, but to the best of

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my recollection all parties represented in the ... in Parliament at that stage, participated in this process. What they also did was to undertake two national consultations, so that people outside of Parliament could
5 be heard in the context of formulating the defence review process and that gave rise to four costed options.

Now during this period Commissioners, President Mandela gave voice to these matters in public addresses at various forum and in the State of the Nation
10 Address on the 7th of February 1997, he said and I quote:

*“Debate will continue this year on the white paper and the defence review, but what is critical is to move towards practical implementation. One of the issues in this regard is the Defence Force’s requirement of equipment. The
15 question here is not whether, but how to meet these requirements and how much the country can afford. As Commander in Chief I wish to emphasise that we shall not shirk our responsibility to the Defence Force.”*

The State of the Nation Address, two years later on the 5th
20 of February 1999 again had the President stating:

*“We wish to assure members of our Defence Force that the nation is behind them in their endeavours be it in the fight against crime, in peace keeping operations, or in the
clam and their professional assistance to voter
25 registration, we remain as committed as ever to equip the*

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force in a manner that ensures its effectiveness and adds value to the economy.”

ADV MPHAGA: While at that Minister, while at that Minister, we were told by the witnesses from the Defence
5 Force that the military added valued in us acquiring the World Cup, what would be your comment on that in terms of [indistinct]

MR MANUEL: If we had a different Constitution I may plead the fifth, sir. No I could not really attest to that in
10 any detail. I think that as with Brazil now all of the forces would be involved and assure a message of broad safety as articulated I think in section 199 of our Constitution, because it is a measure of our general success and the Defence Force along with the police certainly played a role
15 in that regard as well.

ADV MPHAGA: You may then proceed with paragraph 37 on page [indistinct]

MR MANUEL: So I am saying Commissioners, drawing from these two State of the Nation Addresses by the Commander
20 in Chief, Rolihlahla Nelson Mandela, the message was abundantly clear and if one looks at the way in which the executive authority vests, I think we had a very clear mandate about re-equipping, about affordability and about sending a very strong message about the peace and
25 security that we seek for our country.

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The defence review also drew attention to defence capability that was not commensurate with our constitutional responsibilities and obligations, and then made recommendations on what could be done to supplement and re-enforce the Defence Force's capability. That then gave rise to the November 1998 decision of Cabinet to enter negotiations with preferred bidders. Government to invest in approximately 29 billion in the SDPP. The intention was that the special defence account would carry the costs of the SDPP, but would, as I said earlier, be funded by the fisc. The financial feasibility of this commitment by Cabinet was informed by various reports of task teams and structures whose duty was to advise on these matters and I as Minister of Finance saw myself as a role player in interrogating these reports along with other members of the IMC.

At a technical level, the force designs, force levels, armaments, and related capacity issues were and continued to be the preserve of the Defence Force. National Treasury under my guidance was one of the departments that had a constitutional mandate to ensure that any funding intended for the SDPP, was affordable and budgeted for, and so that is the background to what I believe is the constitutional, the set of constitutional obligations and the unfolding political responsibilities as

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allocated to the Executive within this context. Thank you.

ADV MPHAGA: Thank you very much, Minister. Now let us proceed to paragraph 53, then when you are then deal with the, your role as the Minister of Treasury and we also see
5 there the measure of [indistinct] finance [indistinct] if you can maybe explain that to the Commission.

MR MANUEL: Thank you very much. Paragraph 53 draws attention to the fact that we transitted from the Eschegge Act in terms of which many of the decisions were taken,
10 into the Public Finance Management Act, during the period. Now the National Treasury is actually a complex organisation, because it has many different branches and because these are headed in the main by economists, there are very different views on these matters. But it is
15 pertinent to recognise that it has a branch that deals with macroeconomics, it has a branch that deals with public finance, it has one that deals with inter-Governmental relations, one that deals with asset and liabilities, where loan agreements would be scrutinised. It has one that
20 deals with tax policy for instance and so all of these actually interact to ensure that there is a cohesive and coherent view out of the National Treasury on a range of issues, and something as complex and as expensive as the SDPP, would have been through that entire process.
25 Ensuring that the affordability function and responsibilities

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arise from objectives of promoting fiscal prudence, National Treasury arranged for a detailed affordability study to be undertaken as explained to this Commission by Mr Donaldson in his submission.

5 The Treasury at that stage did not have all of the requisite skills in house, but there was the added advantage Commissioners, of bringing in international players to raise the profile of the way in which Government sought to evaluate these issues. The [intervenes]

10 ADV MPHAGA: Minister, whilst you are at that point, maybe ... I see it is eleven o'clock Commissioners, unless my watch is [indistinct]

CHAIRPERSON: I would suggest that maybe let us adjourn at quarter past eleven.

15 ADV MPHAGA: Thank you.

CHAIRPERSON: Thank you.

ADV MPHAGA: Thank you, Chair. You may proceed, Minister.

MR MANUEL: Thank you very much, Mr Mphaga. Now I
20 would just like to try and explain what happens when you undertake an exercise like this Commissioners, you ask the mathematicians who are the modelists to synthesise a set of circumstances and frequently you ask what the worst possible risks are and in this discussion, you run from
25 exchange risks, to affordability risks, to inflation risks, all

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kinds of risks and you ask them what the worst possible things are that can happen. It is a very important exercise, because once we understand what the risks are, then in the context of management, we know how to circumvent those kinds of risks and so if you read the affordability report, and did not understand that it meant to provide some risk appraisal, you might actually become very scared about everything. But the same thing happens in life. If you had to read a gravity report, none of us would ever fly in an aeroplane. It is the same here. We asked experts to use the mathematics that they know to help us understand what the risks are, because the task of management is not to avoid taking decisions, but to avoid unnecessary risk in the circumstances, and that essentially is what paragraph 57 sets out here, some of the risks that we had asked the affordability exercise of mode lists to do for us.

Now we then used these scenarios to help us understand these issues and there is a very important set of issues that I would like to draw attention to, Commissioners, and it arises from some of what Mr Donaldson had submitted to the Commission and I would like to take the indulgence to read from his paginated page 38 at paragraph 78. It is an important point which is why I digress to deal with the matter. He says:

"In considering the affordability and appropriateness of

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the [intervenes]

CHAIRPERSON: Just hold on Mr Manuel.

MR MANUEL: I am sorry, sir.

CHAIRPERSON: I am still trying to get that paragraph.

5 **Note: Caucus.**

CHAIRPERSON: Yes?

MR MANUEL: May I proceed? Thank you, sir. He says and it is Donaldson, paragraph 78 on paginated page 38, he says:

10 _____ *“In considering the affordability and appropriateness of Government’s expenditure on the SDPP, it is instructive to compare this expenditure with annual outlays on other social and development, or development priorities. In the year 2002/2003 SDPP expenditure was at*
15 *its peak and amounted to R6,342 billion. In this year consolidated Government expenditure included the following amounts, as reflected in the 2003 budget review.”*
Which of course is the report to Parliament.

“On Education R62.76 billion. On Health
20 *Services, R34,94 billion. On Social Security and Welfare Services, R41,966 billion. On Housing and Community Development, R13,68 billion. On Transport and Communications, R13,825 billion. On Police Services, R20,53 billion.”*

25 He goes on to say:

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“As is readily apparent from the annual budget review and other budget documents published by the National Treasury, there has been strong growth in both nominal and real terms in expenditure on Education, Health and Social Security and Welfare, Housing, Transport and other social and development priorities during the years of expenditure on the SDPP.”

In fact, Commissioners, one can take that entire position forward to recognise firstly, the fact that at no point during this high point did defence expenditure inclusive of the armaments, rise above 1.7% of gross domestic product. I mentioned earlier the figure of 4.5% which seemed to be the norm under Apartheid. The 1.7% is below the international average in general, certainly below the international average for developing countries. It is a fundamental important point in the context, of what President Mandela asked of us. Equip the Defence Force but ensure it is affordable and in our reading of the Constitution ensuring that the remit from the preamble Commissioners, the second bullet which requires of us to raise the living standards of all South Africans and to free the potential of each person which frequently would be articulated by how we spend on social and development priorities, was not undermined by this [indistinct]

That is now a matter of record and we can look

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at this with pride and hindsight and record the fact that, we understood what the risks were and we mitigated against those risks, to ensure that we could advance the quality of our democracy.

5 ADV MPHAGA: I also see you list in paragraph 58 you are referring to Donaldson, but it indicates that National Treasury was able to produce the first ever fiscal surplus within a decade of [indistinct] and it is in your paragraph 58, [indistinct] but in paragraph 81 of Donaldson he also
10 further mentions that. Can you just look at paragraph 81, page 39 and take the Commission through that.

Note: Caucus.

MR MANUEL: I refer to Donaldson's paragraph 81 on page 39, because it details what it is we are looking for. He
15 says:

— *"During the years in which the Strategic Defence Procurement Packages expenditure was at its highest, and that is between the years 2001 and March 2008, the budget deficit did not exceed 2.7% of GDP and in
20 2007/2008 a budget surplus of R20,4 billion was recorded. Subsequent to the 2008/2009 recession the budget deficit increased substantially, but the SDPP expenditure accounted for a small fraction of this approximately 2% in 2009/2010 and less thereafter."*

25 So I would like to submit to the Commission the fact that

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we were diligent in exercising the mandate, because a fiscal surplus in a country like South Africa was unprecedented and it was not done by not providing for the Defence Force, and it was not done by starving the other
5 social functions of the necessary expenditure. Thank you.

ADV MPHAGA: Let us proceed then to page 25, paragraph 61 of your statement.

MR MANUEL: Chair, the point in paragraph 61 is even though at some point [indistinct] in February, the Minister
10 of Finance gets up before Parliament and tables the budget, it is not the budget of the Minister. It is perhaps one of the strongest expressions of collective Cabinet interest, because all Departments would have been heard, all Departments would have debated, all Departments
15 would have complained about how little they have, how much more they would like to have, but it is that statement of collective Cabinet decision and the budget reflects the outcome of a very long and detailed process followed certainly in this country.

20 The end result is that the decisions on allocations are policy laden and fall within the parameters of section 85 of the Constitution. Thank you.

ADV MPHAGA: Thank you. I think we have dealt with 62 and paragraph 63 and in paragraph 64, you indicate that
25 the third function of National Treasury was to reduce the

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cost of borrowing. Can you just [indistinct]

MR MANUEL: Thank you very much. If we look at the Constitution, Commissioners, we will see that a debt service cost is the first charge against revenue. Now if
5 Government builds up huge fiscal deficits and then has to service that debt, it reduces the amount available for expenditure on a range of issues, and I think it is one of the ways in which the National Treasury will see its responsibility to ensure that it can reduce the costs of
10 borrowing by the maximum amount possible.

During the period of course if one looks at the other side of the equation, our tax, individual tax rates were also reducing, but we were able to provide for all of these things and so we were very conscious and in the
15 context of just the inter-governmental set up, our provinces would remind us very quickly Commissioners, that the debt service costs were increasing and they had less available to spend on [indistinct] services. And so we were able to deal with these issues and part of what we did, was always
20 to seek out the ability to borrow at the most favourable terms. That is why an issue like the credit, the [indistinct] credit rating is an important matter, because it determines the rate at which the country can borrow and it has intergenerational impact in fact, because the one thing we
25 inherit from previous generations, is the amount of debt

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they have in society. And so finding the ability to borrow at the lowest possible cost, is part of the way in which the National Treasury should be expected to undertake its responsibility. What we did in the context of the

5 agreements of... the financing agreements was also to work with Export Credit Agencies that exists in a number of countries. They exist sometimes as export banks, sometimes as export credit insurance schemes. The Germans have one called Hermaise [?], that is the export

10 guarantee insurance scheme and they use that to reduce the costs of borrowing and it was a discussion we entered into bilaterally with States, but also with the guarantee agencies and so when I go back to those agreements with the four banks, the cost of the borrowing was reduced

15 because of the way in which we sought out the agencies to reduce the cost of financing the SDPP.

ADV MPHAGA: Maybe whilst you are there, can I refer you then to Donaldson's statement on page 136 of the paginated papers. That is the affordability report.

20 MR MANUEL: Yes.

ADV MPHAGA: I am just waiting for the Commissioners to find the page. Paragraph 2.4 of the loan packages. That is part and parcel of what the IMC or the financing committee found in respect of loan packages. What would

25 be your comment, especially on the last sentence, or the

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last paragraph 2.4, to where he is saying:

___ *“These concessions by the ECA’s are largely unprecedented, the terms now achieved with the ECA’s and banks have substantially improved the financing in terms of cash flow, foreign exchange risks and have [indistinct] substantial savings for the borrower amounting to approximately 101 US dollars.”*

What would be your comment on that?

MR MANUEL: At today’s exchange rate it might be closer to R1 billion. I think that what Mr Donaldson does in these pages is to give a lot of substance to the point I have just raised. You know I would like to just draw the attention of Commissioners to the fact that this was actually a technically complex exercise, partly you have to... I mean the imported inputs are in different currencies. Some of it were in Swedish Krone. Some in UK Pounds. Some in... it was then still Deutsche Mark. It is now Euro and some would have been I think even in French Franks and became Euro later.

20 ___ So there are variable exchange rates that impact and because of the variability of exchange rates and the variability of interest rates between different jurisdictions, you cannot foresee what your payment cycle would be in total, which is why the provisions that we have made and this was something we actually canvassed with

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the SCOPA at that meeting in February of 2001. The fact that you cannot at the start of the process, allocate the amounts of debt service cost is because of the... just, sorry, just the technical complexity of trying to deal with
5 these kinds of packages. Thank you.

ADV MPHAGA: Commissioners, I see it is at quarter past.

Note: Caucus.

CHAIRPERSON: We will adjourn and come back at quarter two. Thank you.

10 MR MANUEL: I think [indistinct]

CHAIRPERSON: Thank you.

(COMMISSION ADJOURNS)

(COMMISSION REOPENS)

CHAIRPERSON: Mr Manuel, do you confirm that you will
15 tell the truth?

MR MANUEL: I so confirm, Commissioner, thank you.

ADV MPHAGA: Thank you, Minister. I think we were on page 27 of your statement, paragraph 66. [indistinct] take us through those paragraphs.

20 MR MANUEL: Thank you very much Mr Mphaga. Paragraph 66 merely confirms something that we raised already, in that there are two sets of contracts. There are supply contracts which would have been signed by the Minister of Defence and then there are the financing
25 contracts which fall within the sphere and scope of the

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Ministry of Finance. All sovereign debt is the responsibility of the National Treasury and the Minister of Finance deals with this, primarily through a branch of the Department called Asset and Liability Management and the

5 loan agreements would be covered by that and absorbed into the normalcy of a Government debt.

The Treasury reports on an annual basis through the defence review has set of tables that deal with liabilities and contingent liabilities which is the basis on

10 which Parliament is kept informed of the amount of debt outstanding and paragraph 68 refers to the fact that the policy purposes of the defence review, informed by the Constitution and financed through the agency that we just described. Thank you.

15 ADV MPHAGA: Thank you, Minister. Now in paragraph 69 to 75, then you deal with the Ecar Judgment. I think paragraph 69 to 71 basically deals with the relief that was sought by the applicants in that matter and I note in particular that Ecar was the first applicant and Mr Crawford

20 Browne was the second applicant, do you confirm that?

MR MANUEL: I can confirm that. I do not quite know what the distinction is, but certainly on the papers that was what the position was.

ADV MPHAGA: And amongst, about the second

25 respondent, it is you the second respondent in the matter?

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MR MANUEL: Yes, I was as is customary with some kinds of matters, the President is called as the first respondent and the President would delegate that responsibility. It happened in this matter as well. Thank you.

5 ADV MPHAGA: In paragraph 72 of your statement on page 29, you indicate that the application was dismissed with costs, making the issues raised therein *res judicata* and you refer to the annexed court orders, is that correct?

MR MANUEL: You are correct, sir. The annexed court
10 order is annexed as TAM1, pages 32 to 47 of my bundle, Commissioners. It spells out in detail how the Cape of Good Hope High Court or Provincial Division, arrived at the decision it did and what follows over the next few pages, are comments on the next set of review applications.
15 Leave to appeal to the Cape High Court and then SCA and the Constitutional Court, all of those are now matters of record. The submission I make at paragraph 72 therefore is Commissioners, that given the extent of legal journey that this matter has walked, I submit that it is *res judicata*.
20 Thank you.

ADV MPHAGA: Let me take you to then page 45 of the actual judgment of the Cape of Good Hope. Page 45 of the bundle and paragraph 45 of the judgment. I will read paragraph 45 into the record and I will ask for your
25 comment thereafter. It reads:

“In my view there is merit in at least two of the principle defences put forward by the respondents’ counsel...”

And I take it the respondent’s counsel would be counsel
5 acting amongst others on your behalf, Minister?

MR MANUEL: Yes, that is correct. That is correct.

ADV MPHAGA:

— *“The real thrust of applicant’s complaint in this matter is that massive funds have been committed by the
10 Government to the acquisition of arms which this country does not need, whereas the funds should have been used for poverty alleviation. That being so, applicant’s attack should have focussed on the real and effective decision to acquire these arms namely that of Cabinet. That decision
15 should have been made the primary object of the review application. In the applicant’s notice of motion there is an alternative prayer attacking Cabinet’s decision but this is only a consequential attack, dependent upon the invalidity of the second respondent’s [indistinct] being established.
20 This approach, with respect, is putting the cart before the horse. The primary attack should have been gathered against the Cabinet’s decision with perhaps a consequential attack on a seconded decision to raise funds. Applicant’s wrong strategy I should point out, is not
25 a simple procedural matter. The result thereof is that the*

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merits of the [indistinct] the reasons for the [indistinct] and all documents that appeared before the Cabinet, are not [indistinct] in the present review application. The Cabinet's decision must accordingly be understood as
5 *having been a valid decision, once it is accepted the [indistinct] for applicant's attack on second respondent's [indistinct] falls away."*

Can you comment on that?

MR MANUEL: Thank you very much, Commissioners. I
10 think there are... firstly, I was very relieved at the quality of the judgment, because I think it put matters beyond dispute. It also brings in to very sharp relief the fact that our Constitution as I indicated earlier is multi-facetted because in the same way as we have the responsibility of
15 poverty relief, I indicated just before the tea break that we discharged that responsibility with [indistinct]. We need to remind ourselves that clause 198 of our Constitution also requires national security as an imperative and these things go hand in hand and we dealt with these in a
20 composite way. I think that the spirit of that is confirmed by the court. I think it is also very important Commissioners, to recognise that beyond that decision by Judges Blinow and Biakiso, every court at the next level that was sought as a means of relief, rejected the
25 application. So I think it deals with the matter for once

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and for all and I wish it were so in fact, but legally I think that the matter is dispensed of. Thank you.

ADV MPHAGA: Ja, if I also can then move on in paragraph 46 of the judgment, I think it deals with the so called
5 'warnings' that were given to you before you signed the loan agreements, but you basically proceeded to sign those loan agreements, despite those warnings. Let me read into the record and get your response. Paragraph 46 of the judgment reads:

10 *"There is, in my view, also merit in respondent's counsel second main defence. Applicant's charge of [indistinct] is squarely based upon the existence of the warnings contained in the affordability report. These warnings must however be read in the context of the*
15 *document as a whole. They are contained in the report which purported to provide advice to the Government in regard to the affordability of a proposed acquisition. The object of the warnings in the report is to bring possible negative consequences of the decision to the attention of*
20 *the decision maker. The thrust of the warnings is not to advise the decision maker to desist from concluding the transactions in question. The real thrust is to inform the decision maker what risks to take into account if he does not proceed with entering into the loan agreements. Other*
25 *elements of the report are quite positive. For example the*

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comments on the method of financing referred to in paragraph 24 above. It is relevant furthermore that the applicant [indistinct] the warnings was before Cabinet who then took the decision to acquire the arms in question. It
5 *must be accepted that therefore that Cabinet approved of the arms acquisition with the full knowledge of the warnings.”*

NOTE: Caucus.

ADV MPHAGA: Can you just respond on that?

10 MR MANUEL: Thank you very much, Commissioners. I think that what paragraph 46 of the judgment does for me, is to confine by external parties the judges in question, that the decisions we took were rational and well informed, well-grounded decisions. I will also remind the
15 Commission that we earlier drew attention to the JIT Report which says that affordability exercise, affordability is ultimately a question of political choice. We had analysed the choices in the context of our constitutional imperatives, we recognised what was affordable and we
20 took the best decisions of balance, and I think that taking account of risks is what paragraph 46 affirms and I think that in his testimony before the Commission, Mr Donaldson had dealt with this matter at some length. Thank you.

ADV MPHAGA: Thanks, Minister. I would then read the
25 last paragraph 47 into the record and then ask for your

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final comment on it. It reads as follows:

“In this case second respondent (referring to yourself) said that he did apply his mind to the affordability report including the warnings. It is trite law that the test on review is not whether this court agrees or disagrees with the decision in question and as reference to the [indistinct] School Governing Body & Others v Premier Western Cape & Others 2002 (3) SA 265 (CC) in paragraph 45 at 282(f) to (g) which says: ‘the fact that there may be more than one original way of dealing with a particular problem, does not mean the choice of one rather than the other, is an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable’. To continue on the very paragraph, the question when [indistinct] is whether the decision is so irrational that no rational person would have taken it. By mainly focussing on the warnings applicants have not established such irrationality in this case. I am accordingly of the view that there is no merit in the review.”

Your comment?

25 MR MANUEL: If I could so “boo unteti [?]” I would, but I

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am not allowed to in the house, so I will say I concur fully with the views expressed in the judgment.

ADV MPHAGA: Thank you, Minister. Let me just take you back then to page 44 of the same judgment. It will be my
5 last take on the judgment itself. You will note that there has been a lot of criticism wherein it was stated that the signing of the loan agreements were not in compliance to the Eschegge Act and therefore they should have been invalid, and I take it that in the very same application, the
10 very same arguments were raised. Can I take you to page 44 of the bundle, paragraph 40 of the judgment and the last sentence of paragraph 40. It says there:

*“The various allegations in the affidavits that the agreements were invalid by reason of particular
15 statutory provisions, were not pursued in argument.”*

Can you just comment on that?

MR MANUEL: Thank you very much, Mr Mphaga. They could not be pursued in argument, because I think they are invalid *ab initio*. We have been able to demonstrate how
20 our actions were informed both by an Interim Constitution and a final Constitution and how we had interpreted the legislation, both in transition from Eschegge to well, as with the Constitution, the transition from the Eschegge Act to the Public Finance Management Act and I think that we
25 demonstrated due care and attention to the detail of what

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we were doing. Thank you.

ADV MPHAGA: Thank you. If we then can proceed back to page 29 of your statement. I think in paragraphs 73, 74 and 75 you basically refer to the findings of the court judgment. I do not know if you want to add anything on those paragraphs?

MR MANUEL: No, I think we have canvassed it, well, 73, 74 and 75 I think are articulated in the judgment as reported and just a little rider that there was no challenge to the decision of Cabinet which gave rise to the loan agreements and therefore the decisions of Cabinet, must have been taken to have been valid by the applicants in the matter, and you know I think it informs why my submission is that this matter is *res judicata*. Thank you.

ADV MPHAGA: Let us proceed to page 30 and deal with the conclusion. I will leave it to you Minister to deal with those paragraphs in conclusion.

MR MANUEL: Thank you very much, Commissioners. Paragraph 76 merely alludes to what I raised earlier and that is that the submission of the National Treasury encapsulates the factual material on which this submission draws and I stand by the probity of the contributions that the National Treasury and the IMC made to securing the integrity of the recommendations placed before Cabinet, and relied on by it. I was convinced that the selected

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package was affordable and within Government's fiscal envelope. My understanding of the failed court litigation that was launched against me as Minister of Finance, is that the courts were satisfied that my conduct and the
5 decisions taken, were consistent with the mandate conferred on me.

In closing it is important to emphasise that as Minister of Finance I was part of the collective and though the core mandate I discharged was that of evaluating the
10 affordability of the options assessed to realise the SDPP, I discharged those responsibilities as a member of the National Executive.

Paragraph 79 Commissioners, reminds us that I was not party to deciding on the selection of equipment.
15 In this regard I was advised and I accepted that National Treasury did not have the particular skill to offer advice on the technical capability of the equipment procured, but this would not be unique. The Treasury in its function is transversal to Government. We do not decide on
20 pharmaceuticals to be dispensed at clinics, nor do we decide on the curriculum content in education. We have responsibility to be convinced of public finance obligations and then of the ability and affordability, the ability to pay for that skill and paragraph 79 deals with that.

25 What I would like to do is to give this

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Commission a view on the impact of cancelling the loans that were secured to finance the SDPP. In a nutshell not only would South Africa's credit rating as a country be impacted and this country now waits for two credit
5 agencies to give us a rating on Friday this week, but so would all credit facilities obtained in the global credit market. Credit markets everywhere are determined by trustworthiness and the ability to pay and cancelling loans after such a long period would basically say, that we are a
10 poor taker, we would not be able to raise any deficit financing in the country, and I think the impact would be felt most particularly on the poor who are exclusively dependent on public services, because they cannot afford to go anywhere else.

15 So we would then be seen as a non-investment grade. In a nutshell the consequences of cancellation of loan contracts would have a profoundly negative impact on South Africa's credit worthiness and the perceptions of constitutional continuity. I am not a Minister any longer
20 but I do believe that constitutional continuity is of the essence. Thank you very much, Chairperson and Commissioners.

ADV MPHAGA: Minister, maybe before I excuse you, or you are excused by the Commissioners, now having
25 championed the [indistinct] what would that, what would

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the effect of this cancellation of the NDP.

MR MANUEL: Commissioners, if one looks at the NDP we drew very extensively from our Constitution. In fact the NDP and some of the work still to be completed would
5 include trying to give effect to the security of citizenship of South Africa. It is not canvassed in the NDP as they exist, but the NPC, the National Planning Commission has it on its agenda. But if we... you see the basic point I think is one that I have tried to articulate now. What Government
10 spends its finances through taxes and what it can borrow. It is plain that we need to be exceedingly cautious in how much we borrow because debt service costs would be the first charge. If we cannot borrow, then we can only have available what we can raise as taxes. The economy is
15 likely to be in decline and we will face a diminishing ability to raise revenue even from South African tax payers and I think as I would like to repeat the point, the idea that you could implement all of this national development plan which deals with a series of social obligations, but also
20 infrastructure and job creation in the economy, will be severely undermined and I think we will come back to the point then, to try and understand that as a nation we would be a lot more insecure.

ADV MPHAGA: Thanks. That concludes the evidence of
25 Mr Trevor Manuel, thank you.

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CHAIRPERSON: Advocate De Vos, does your clients have any instructions to cross examine Mr Manuel?

ADV DE VOS: Yes, Chair, we do have instructions to request the opportunity to cross examine. I also have been
5 informed that Mr Crawford Browne would also like to cross examine the witness. He is in court, he is here.

CHAIRPERSON: Ja, I will come to Mr Crawford Browne. I would prefer to have the [indistinct] to first cross examine and thereafter Mr Terry Crawford Browne, he will be
10 granted permission to cross examine.

ADV DE VOS: In that case, Commissioners, I am going to request for an adjournment for this afternoon to give me the opportunity to prepare a proper and coherent cross examination. I only received the statement of the Minister
15 yesterday afternoon at round about six o'clock and as the Commissioners know I used last night to prepare for Mr Lekota's cross examination. I do not mean to delay the proceedings, but I would ask for the opportunity of the afternoon and overnight to prepare and I will be in a
20 position to cross examine tomorrow morning at ten o'clock, and I do not intend to keep the Commission for much longer than about an hour and a half at the most.

CHAIRPERSON: Thank you. And Mr Crawford Browne of course you also intend to cross examine?

25 MR BROWNE: Commissioners, yes, I do. I am still

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awaiting the bundle of documents that are... for pagination. They are being fully copied at the moment by the Commission and then will be circulated and until I receive that as I do not know what the pagination numbers are.

5 CHAIRPERSON: I suppose the issues that you are going to raise, maybe let me say it up front, issues which are [indistinct] particularly by the courts, those issues are certainly *res judicata* and I am not sure whether it will be appropriate to raise those issues either, because once the
10 courts have made a determination on a particular point, we as a Commission cannot overturn that. Do you understand that?

MR BROWNE: Commissioners, if I may, I believe there are some very serious allegations of perjury, the court over
15 ruled that issue.

CHAIRPERSON: But then you understand what the legal position is? Once a determination has been made by a court of law, we are bound by that determination.

MR BROWNE: Sir, I understand that entirely, but the issue
20 I am raising is the use of perjury which [indistinct] consequently to that judgment against me.

CHAIRPERSON: I suppose we are not here to deal with that. [indistinct] you think that that judgment is incorrect, there are certain procedures that you can follow, in order
25 to get that judgment overturned. We cannot overturn it.

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But we can discuss those issues when we come to your cross examination. For now we are going to adjourn until tomorrow morning and the Lawyers for Human Rights will cross examine, and thereafter we will then deal with your
5 case.

MR BROWNE: May I simply comment and say that, I do not expect the Commission to overturn the judgment, that is not a suggestion. It is simply to establish the climate that the court proceeded in the judgment against me.

10 CHAIRPERSON: Thank you. We will deal with that tomorrow, tomorrow morning. I think we... unfortunately, Mr Manuel, we are unable to finalise your evidence today. You will have to come back tomorrow because those who intend cross examining you, say that they are not ready
15 and I think in all fairness one should give them an opportunity of preparing them for the cross examination, and from what you are saying... I suppose you are saying that no one can [indistinct]

ADV DE VOS: That is correct, Chairman.

20 CHAIRPERSON: Mr Browne, how long do you think you are going to be?

MR BROWNE: I think about two to two and a half hours.

CHAIRPERSON: Two to two and a half hours?

ADV MOERANE: You can only get nonsense out of that.

25 CHAIRPERSON: Advocate Moerane, you seem to

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[indistinct] you want to say something?

ADV MOERANE: Yes, Chair. I have a personal problem. I have to go down to the Eastern Cape in connection with a funeral. I would have appreciated it if this afternoon could
5 maybe, be made use of. When Mr Terry Crawford Browne has assembled his papers, perhaps if he could start with his cross examination this afternoon at two o'clock, that would certainly save some time.

CHAIRPERSON: Unfortunately we do not [indistinct]. The
10 first one to deal, give the Lawyers for Human Rights an opportunity to cross examine and thereafter only deal with Mr Browne. So the suggestion that you are putting forward now is going to... it will not be possible for us to first start with the Lawyers for Human Rights.

15 ADV MOERANE: As the Commission pleases.

CHAIRPERSON: Thank you.

Note: Caucus.

CHAIRPERSON: I think we will adjourn until tomorrow morning at nine o'clock. We will now adjourn.

20 **(COMMISSION ADJOURNS)**