

**ARMS PROCUREMENT COMMISSION**

*Transparency, Accountability and the Rule of Law*

**PUBLIC HEARINGS**

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**HEARING ON 20 OCTOBER 2014**

CHAIRPERSON: Good Morning. Advocate Sibeko, let us start then.

ADV SIBEKO: Thank you Chair, Commissioner Musi. Today's proceedings will be led by my learned colleague, Advocate Sello, who had been assigned  
5 to lead the testimony of Mr Hennie Van Vuuren. She will address the Commission from now on.

ADV SELLO: Thank you, Chair, Commissioner Musi. As my learned colleague points out, I am scheduled today to lead the evidence of Mr Hennie Van Vuuren. I must point out to you that, as has been tradition, every  
10 witness that has appeared before this Commission, has provided a statement and on the Friday, or at least, about 48 hours, preceding the day on which they are due to give evidence, they are supposed to provide a summary of the evidence, which is then posted on the website. In this instance, Chair, we have neither. We have neither a statement nor the summary. The result  
15 being that I am not in a position to point out to the Commission exactly, what areas Mr Van Vuuren's evidence will be covering, if at all, that are pertinent to the issues before the Commission. I would like, for record purposes, to read into the record a letter, received for, from Lawyers for Human Rights, who are on record, as the attorneys of record for Mr Van Vuuren, Holden, or  
20 Van Vuuren, Holden and Feinstein. I read this letter purely in relation to Mr Van Vuuren. As evidence leaders, we, we requested consultations with the witness, for purposes of finalising their, his statement in particular. On the 13<sup>th</sup> of October, we received a written response from Lawyers for Human Rights, which I would like to read into the record and I believe that would  
25 assist the Commission in deciding how to take the matter forward and to

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advise us accordingly. The letter is addressed to Advocate Fanyana Mdumbe, the secretary of the Commission and reads thus:

*“Dear Advocate Mdumde.*

*Evidence of Mr Feinstein, Mr Holden and Mr Van Vuuren.*

- 5       1. *We acknowledge receipt of your letter, dated 8 October 2014.*
2. *Our clients informed that no practical purpose will be served by them, meeting with the evidence leaders.*
3. *We wish to reiterate that as previously advised, the draft statements, which our clients made available to the evidence leaders were purely*
- 10       *drafts, which were not intended for public dissemination or for use before the Commission in that draft format.*
4. *Thank you for the offer to make travel arrangements for our clients. As Mr Van Vuuren will already be in Pretoria on 20 October 2014, this will not be necessary.*

15       *Yours sincerely.*

*Lawyers for Human Rights.”*

Mr Van Vuuren is in attendance today, Chair and Commissioner Musi, and was his legal representatives. Advocate Sibeko and I briefly met with his legal representative, by briefly, I mean, literally a two minute discussion to get

20       a sense of how to take Mr Van Vuuren’s evidence forward, in light of the fact that he has refused to make a statement. We were led to understand that Mr Van Vuuren’s legal advisors would like to address the Commission on these matters and, Chair, having explained to the Commission the situation, as it currently stands, I think it is appropriate, probably, to hand over to Mr Van

25       Vuuren’s legal advisors. Thank you, Chair.

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CHAIRPERSON: Advocate Budlender?

ADV BUDLENDER: Thank you, Chair, Commissioner. Good morning, may I place myself on record? I am Budlender, representing Mr Van Vuuren with my learned colleague, Ms Snyman. I confirm the correctness of the account, 5 which my colleague, the evidence leader has, has given to the Commissioners. Commissioners, as you all know, in terms of Section 6 (1) of the Commissions Act, a witness is excused from taking the oath and answering questions, if he has sufficient cause. My client contends that he has sufficient cause and respectfully declines to participate in the 10 Commission, by taking the oath and by answering questions. I would like briefly, to state what my client's reasons are for this, with the leave of the Commission. My client's statement reads as follows. Can I say, Chair, we will hand up, I only have a marked up copy. We will hand up clean copies to the Commissioners shortly. Mr Van Vuuren's statement is as follows. He 15 says:

*"This Commission of Inquiry into the up to R70 billion Armsdeal, the Arms Procurement Commission represents a historic opportunity to support the struggle for transparency and accountability in South Africa. Your mandate, Commissioners, to establish the facts, by holding the parties to account for 20 alleged misconduct, means you carry a great burden. This mandate speaks directly to the spirit of the Constitution. Firstly, nobody, regardless of his or her status should be above the law. Secondly, the purpose of the law is to aid, in creating a fundamentally fairer, gentler and just society. The complete opposite of the Apartheid vision of a country governed by and in the interests 25 of a network of well connected elites. I am committed to supporting the key*

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tenors of our Bill of Rights and our Constitution. Therefore, I believe that it is a role of civil society to assist State agencies, to govern effectively. The Arms Procurement Commission is no exception. We offered such assistance with humility. We have provided the Commission with a large volume of evidence and attempted to assist it, by directing its attention to documentary material that establishes what we contend as an undeniable fact that the Armsdeal was facilitated through bribery and corruption. We have also defended the work of this Commission, when others have accused it of fundamental failures. We have argued that we must give you, Commissioners, an opportunity to consider the evidence, we and others submit to you, before passing judgment. However, Commissioners, I respectfully submit that we can no longer deny the following simple and documented facts:

1. We have been refused access to evidence. The Commission has refused to make huge amounts of evidence public. We have attempted to resolve this issue, during the 18 months that we have participated in the Commission's work and through more than 20 letters, directed to the Commission. The evidence includes millions of pages of documents from the official investigations of corruption, by South African law enforcement agencies. This material was collected at great expense and cost to the State and the South African people. Our repeated request to access this information, which is relevant to our evidence and which we were promised, in our initial subpoenas, has repeatedly been ignored.

2. We have been refused the opportunity to provide you with proof, or

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documentary evidence. The Commission has declared some of them as crucial documents, point to corruption to be inadmissible, including evidence of actionable allegation of potential corruption in the Armsdeal. The Commission ruled last week that a document commissioned by an arms company, reporting on its own alleged malfeasance and bribery is a privileged document, having the same footing as a stolen document and therefore, is inadmissible as evidence. This means the document cannot be relied upon, by any witness and this will block the public's right to know.

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10 3. We cannot speak to documents we have not written. The Commission has made a ruling that witnesses may speak only of documents they have written. The implication of this ruling is that only those, who have been involved in the Armsdeal, can introduce evidence. How the Commission intends to discover the truth, by only hearing from participants in the deal, is a mystery to us. The Chair has ruled that witnesses should only speak to corruption allegations, of which they have personal knowledge. This means that only those, who have been corrupted, who have corrupted others or who were intermediaries in such corruption can lead evidence of it. It is obvious that all of those parties have an interest in hiding the truth. Why would the Commission choose to rely solely on their opinions? I respectfully submit that this effectively means that all the research undertaken by my colleagues and me is having, is seen as having no value to the Commission, even before we have given evidence.

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25 4. The Commission has lost the public's trust. There is evidence to

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suggest that the Commission is following a second agenda, namely, to discredit critical witnesses and find in favour of the State and arms corporations [indistinct]. Since January 2013, at least four senior staff had resigned, in protest of the Commission's conduct. In August 2014

5 two senior evidence leaders resigned from the Commission, saying that: 'Its approach nullifies the very purpose for which the Commission was set up.' The Commission has called only two people to testify of the dozens who have been directly implicated in propriety. Most recently, almost 40 civil society organisations have called for the

10 Commission to be disbanded. The, we contend, I contend that the Commission has lost the trust of the public, whom it is intended to serve and I am now faced with a difficult choice, how should I respond to your subpoena. I am mindful of the fact that the Armsdeal has brought havoc on the lives of ordinary South Africans and corrupted

15 politics for the past 15 years. It has profited international arms corporations, while weakening our democratic State institutions. It has profited the rich, at the expense of the poor. I am also mindful that, the cover-up that followed the Armsdeal has put in place a system of patronage, for the purpose of keeping alleged corrupt elites out of

20 prison. It allows them to continue benefiting from the spoils of an unequal society. I have regretfully come to the conclusion that this Commission will provide no remedy to the situation. For these reasons, I can no longer, in good conscious, participate in a hearing of the Arms Procurement Commission. To do so, would be to aid, what I

25 see as a deeply unfair and flawed process. I am of a view that the

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*Arms Procurement Commission has strayed from its mandate and has become a fundamental obstacle to the public's right to know and to justice. Commissioners, I therefore, respectfully decline to take the oath and testify. I align myself with call from civil society for the Commission to be disbanded and replaced with a full and transparent criminal investigation. This should lead to the prosecution of all implicated in wrongdoing in the Armsdeal."*

That is my client's statement, Chair. Thank you.

CHAIRPERSON: Thank you, Advocate Budlender. You know, I have listened to this statement very carefully. I am not hearing that for the first time. Okay. You know, those issues have been repeated, repeated. In fact, we are just trying to think that maybe, you have just given a copy of the previous letters that we have already received from [indistinct]. I think, I want you to give them to the, to us, table it and then make copies of that document, because I think these are very serious allegations that your client is making and some of the fact that are stated in that document are incorrect for reasons in the type of ruling that I made, it is incorrect. I am sure that you have not even bothered to look at the ruling that I, and that was made and that ruling is in writing. It is part of the transcript. Then two, I think, there are other legal practitioners, who are involved in this matter. I would also want to give them an opportunity of commenting to, to the contents of your client's letter, because it also affects, I know, they have been engaged with your client for the past 18 months, trying to sort out the question of their [indistinct]. Three, some of them will raise a point that we are not asking your clients to, to investigate and this point we have made several times to

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them. We are not asking them to investigate. It is not their function. It is the function of this Commission. What we are simply asking them to do, is to come and tender evidence that they have, evidence that they say they have collected over the past 15 years. Lastly, I think, I should emphasize the fact  
5 that this exercise, we thought we are giving your client an opportunity of coming to give the public their evidence that they say they have, relating to, to corruption. It appears it is as if they do not want to take that invitation. We have seen the statements that they have made in the past. We have seen the attack in the press, if the, what is written in the press is correct, that they  
10 directed to the evidence of Mr Crawford-Browne. So, all these activities, we are well aware of that. We have been, we have been working with them for the past two, over the past two years. I think, in all fairness, let us have that document. We will give it to the other legal practitioners and then we will take the case from there. But, then, let me emphasize, by subpoenaing your  
15 clients, we thought we are giving them an opportunity to come and share with the public their alleged evidence, relating to corruption that they claim to be having. That is what this whole exercise is ...[intervene]

**ADV BUDLENDER:** Chair ...[intervene]

**CHAIRPERSON:** We have seen that you are now, I mean, as recently as  
20 last week, that they still continue making press statement that we do have the evidence that proves corruption and this is what we are interested in. We are not interested in the, in their skills to do research and now to give them may documents to be researched. We want them to give us the evidence that they claim they have, relating to corruption and we have given them the  
25 opportunity for them to do so. In the light of what you have told us, I will ask

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you to give the, a copy of that document, distribute it to, to the legal practitioners and then, from there, let us come back at 11:30.

ADV BUDLENDER: Thank you, Chair.

CHAIRPERSON: Unless, if at all, there is a, an objection from other legal  
5 practitioners, who no longer have an interest in this case.

ADV CANE: Chair, I would be in a position, speaking for myself, to address you on these submissions immediately, without any adjournment. But, I am in your hands.

CHAIRPERSON: No. What I am trying to find out whether is there any  
10 objection about the suggestion that I am making, that we first get copies. Then we come back at 11:30 and then deal with the issue, at that time.

ADV CILLIERS: Chair, when we return, we would also want a copy of the statement, before we would like to address you on that.

CHAIRPERSON: Thank you, Advocate Cane, I suppose you are also in  
15 the same position. Mr Chowe?

MR CHOWE: We are in agreement with your ruling.

CHAIRPERSON: Thank you. Advocate Moerane?

ADV MOERANE: Chair, we are in respectful agreement with the proposal.

CHAIRPERSON: Thank you. Then let us adjourn. Then we will come  
20 back at 11:30. Thank you.

**(COMMISSION ADJOURNS)**

**(COMMISSION RESUMES)**

CHAIRPERSON: What is the order? Is there any order? Or what is the position?

25 ADV CANE: Thank you, Commissioner. On behalf of the department of

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defence, we submit that the letter that was read out to the Commission ...[intervene]

**CHAIRPERSON:** I am sorry, Advocate Cane, can you just talk into the mic. We are struggling a little bit to hear.

5 **ADV CANE:** Commissioner, I think, you are able to hear me now. At the outset, my learned friend, for the witness, read out a letter and it referred to Mr Fanyana Mdumbe for the Commission and this letter apparently comes from the lawyers, Lawyers for Human Rights. Therein, it is noted that there have been previous draft statements, provided to the Commission, by my  
10 learned friend's clients that were apparently clearly drafts and not intended for distribution. The difficulty with that position is that the present witness, Mr Van Vuuren did not attach his name to the joint statement, submitted in January 2013, on behalf of Mr Andrew Feinstein and Mr Paul Holden. So, whilst we have that statement, which is now said to be merely a draft and  
15 not intended for distribution, what we also have from the current witness is a book, which he published in September 2011, together with Mr Paul Holden. It is a book entitled The Devil in the Detail, in which allegations were published that directly concern the Department of Defence. The two authors traverse the various matters, pertaining to the acquisition and the  
20 need for the equipment, under investigation. They also implicate various of the officers that were in the employ of the Department of Defence at the time. In relation to these allegations, which were published and were solely intended for public consumption, the Department of Defence wishes to have the opportunity to cross-examine this witness, on matters that fall  
25 directly within his personal knowledge. This would include the basis for

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publishing those allegations. This would directly assist the Commission, because apart from what I submit, is the ridiculous proposition put on behalf of the witness that only those, who have been corrupted or have corrupted others can give evidence. Apart from that, the Commission

5 would actually be seeking to know and understand what investigation this witness did and upon what basis he saw fit to publish these allegations. That would certainly mean that all the research to which he refers and this is referenced in paragraph 3 of the submission, this morning, would be effectively explored and enable the Commission to follow up his

10 allegations, if there is a basis for them, more efficiently. It is also the only opportunity the department would have to actually place before the witness opposite conclusions, reached by people, involved with these activities and to ask for their comment. So, it is a very important and legitimate means of ascertaining the truth and certainly, a legitimate purpose for cross-

15 examination. The witness has rhetorically asked, through my learned friend, why the Commission would choose to rely solely on the opinions of those who have been corrupted or corrupted others and merely posing the question indicates to the Commission, I submit, that that is precisely the reason why this witness should give his evidence and has no just cause to

20 refuse to do so. His opinions and the reasons for his research, the investigations he undertook, may all be very important to enable the Commission to reach conclusions on vast volumes of evidence that have already been given before this Commission on these very allegations that have already been in the public domain, since about September 2011. In

25 relation to the complaint that the witness has not been allowed access to

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documents and the complaint that such documents have been requested for some time, in correspondence between Lawyers for Human Rights and the Commission, I would like to draw the Commission's attention to another ruling in the Commission of Inquiry, which may be of assistance to this

5 Commission. It is a ruling number two, in Myburgh's Commission into the collapse of Regal Treasury Private Bank LTD and it is a ruling that has been published on the website, which is where I obtained it. It is dated 19 September 2001. In that matter, Judge Myburgh was confronted with the applications of the non-executive directors of Regal Bank. As a matter of

10 fairness and in order to enable them to prepare properly, to give their evidence before that Commission, to access to the full range of documents that the Commission had. Now, then, in September 2001, at that point, it was not yet settled law, as to whether this kind of Commission was an administrative inquiry or not. But, Judge Myburgh analysed the issue and

15 on the authority of Bernstein and Leach, came to the conclusion that where the Commission is simply there, to investigate, to gather information and make recommendations, it does not impact, or determine anyone's rights. As such, it is not an administrative process. The learned judge went on to consider all the grounds, made out, for access to the documents and came

20 to the conclusion that in such an investigation, where there would be a vast number of witnesses, complex facts, expert evidence and a mass of documentation. If a right of access to that full record were to exist, by all persons interested and to be examined before the Commission, it would be a large task of persons and it would be impractical, if not impossible for the

25 Commission to actually proceed effectively and expeditiously on that basis.

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The learned judge made the point that the hearings were open and that all [indistinct] could attend them and so, the evidence to be put to them, should come as no surprise. But, in any event, there was a particular document that they had not had sight of. They would be entitled to request  
5 time before the examination on that document proceeded. On that basis, he found that in the context of the Commission, it was not anticipated that other interested person have the right and time to traverse the full array of documentation, available to the Commission, prior to giving their evidence. I submit that those findings are rational and correct and serve for useful  
10 questions before this Commission. If the Commissioners would welcome it, I could arrange for a copy of the ruling, to be made, [indistinct] I shall do so. The witness has also relied on the Commission, allegedly, having lost the public's trust. Serious allegations are made that there is evidence, it is said, to suggest that the Commission's role is in fact, to discredit  
15 witnesses, who are critical of the procurement, such as the witness before you now. That is indeed, a serious allegation and if there is evidence that would warrant some sort of [indistinct] perhaps to the High Court, then it is required to be brought. But, this Commission, certainly, I submit, would not simply [indistinct] to this witness's submission that he has sufficient cause,  
20 not to give the evidence within his personal knowledge, pertaining to what he has done, because of a suggestion of a loss of the public's trust. Thank you, Commissioners. Those are my submissions.

**CHAIRPERSON:** Thank you. What are the arrangements, next?

**ADV CILLIERS:** I am ready to proceed. I do not know if Mr Moerane  
25 wants to go first, but I am ready to proceed if, if necessary.

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ADV MOERANE: I think, my colleague Advocate Cilliers, can, can go. I will do the sweeping.

CHAIRPERSON: Thank you. Advocate Cilliers?

ADV CILLIERS: Thank you, Mr Chair. Mr Chair, I had the opportunity to  
5 go through the statement that is presented on behalf of the, of Mr Van  
Vuuren to you and I only wish to record a few remarks on it. First of all, I  
respectfully submit that the statement illustrates a rather arrogant  
approach, by this gentleman. I base it on the following. The first point of  
criticism that he levels against you is that the Commission have been, or  
10 they have been refused access to evidence. Now, I would think that the  
duty of a person with the relevant facts and or documents or evidence to a  
Commission was to provide the Commission with facts and documents and  
evidence. Now, the first point that they raise is that they were refused  
access to documents and facts, obtained by the Commission. Clearly, that  
15 is not the, the way it should be. Any citizen upholding his Constitutional  
responsibilities should be more than willing to make available  
documentation and facts, which are relevant and admissible to a  
Commission, in order to assist the Commission to come to a just and  
proper decision, in, in the end. Now, the ways, as a first point of criticism,  
20 the fact that you did not provide them with access to documentation, goes,  
with great respect beyond my understanding of their approach is. Is their  
approach and that is why, I respectfully submit that it illustrates a rather  
arrogant approach, is that you have now the duty to present them with  
such evidence. They are making the allegations and they should present  
25 the facts that will enable you, in the end to come to a proper conclusion on

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the points that you have to investigate. The second remark, Mr Chair, is the fact that clearly, there, the statement by Mr Van Vuuren illustrates a wrong perception and understanding of legal principals. To illustrate it, let me refer you to the second point of criticism that he levels against the

5 Commission and that deals with the privileged document, the attorney client privileged document that he refers to. Now, clearly, to criticise you for that decision and ruling that you have made, is yet again, beyond my understanding of his approach. That decision was, with great respect, the proper and correct approach and ruling. If he took advice, legal advice on

10 the issue, he would have been advised that that was a correct decision and a correct ruling. It was common cause, at the stage, when you made the ruling, that the document was indeed, privileged, protected by the attorney client privilege and it was common cause that the client did not waive the privilege. On what conceivable basis you can be accused of improper

15 conduct, by making a ruling then that a privileged document, where the privilege has not been waived is inadmissible and should not be relied on, is beyond understanding. But, it is not only a situation where they differ from your ruling, they use the ruling now, to illustrate and or accused the Commission of showing a bona fide attempt, or illustrating a bona fide

20 attempt to disguise the true facts, pertaining to the Armsdeal. That, apart from the fact that it is absolutely and clearly a wrong approach, is a contentious approach. The further issue that, that I wish to raise is that, apart from being legally wrong in the approach, Mr Van Vuuren is also factually wrong in the facts that he alluded to in the statement. All they

25 should have done, was to go and study the rulings, relating to hearsay

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evidence and or interpretation of documents, et cetera, to realise what is stated in this statement is absolutely incorrect. That is not the, the basis of the rulings that you have made. So, with, with great respect, I do not even know whether he deserves respect, but the fact is, the basis on which Mr  
5 Van Vuuren requests you to decline him to testify, is without any foundation whatsoever. But, on the other hand, our approach is the following. Mr Van Vuuren had been provided with a full and proper opportunity to come and disclose and provide any relevant fact and or document and or evidence that he would like to be taken into account for purposes of your report. If  
10 he refuses to make use of that opportunity, our approach is, let it be. Let the record, however, speak for itself. He had been provided with the opportunity and if he declines to make use of that opportunity, let him forever hold his peace, herein after.

**CHAIRPERSON:** Mr Chowe or Advocate Moerane?

15 **MR CHOWE:** Thank you, Chairperson. Chairperson, I would not add much to already what my colleagues have said. Other than to say that the detail for the [indistinct] would have been really have, the statements are based in regarding the management of the DIP or the NIP, I would have liked an opportunity to hear what Mr Van Vuuren has to say about it. Even  
20 have an opportunity to cross-examine him on what he holds to be the correct version. So, the fact that he refused, as he says he declines to give evidence here, it really denies us also of that opportunity, to hear what he would say, if, if confronted with what has already been said before this Commission. So, without any further wasting of time, Chairperson, we  
25 would align ourselves with other [indistinct] who suggest that. Thanks.

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ADV MOERANE: Chairperson, Commissioner Musi, I think we all know that some 15 years ago, the late President Mandela was called to give evidence before a Commission of Inquiry, into the problems that the South African Rugby Football Union. We also know that a few weeks ago,

5 President Mbeki came before this Commission to testify, in spite of the fact, that whilst he was still President, he refused to appoint a Commission of Inquiry into the Arms Procurement decision. The basis on which he had refused to appoint a Commission was that firstly, there was a parallel investigation, by the then Scorpions into the allegations. Also, what he

10 repeated, when he came before this Commission that people who have evidence, regarding bribery and corruption, in regards to the arms acquisition process should come forward and bring the facts. Now, both President Mandela and President Mbeki obeyed the subpoenas and came before the respective Commissions, to assist those Commissions, to

15 discover the truth, about the matters, relevant to the terms of reference, in those Commissions. Both President Mbeki and President Mandela have adopted the attitude that they were not above the law. They believed in the rule of law and when called upon to assist Commissions to discover the truth, they obliged. They could have adopted an attitude that, no, we are

20 presidents. We are the first citizen of the country. We do not have to come before a judge or a Commissioner. But, they did not do that, because they believe in the rule of law. Now, we have Mr Van Vuuren here, who says, amongst other things, there is evidence to suggest that this Commission is following a second agenda, namely, to discredit critical witnesses and find

25 in favour of the State and arms corporations' version of events. As my

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learned colleague came, has stated, this is a very, very serious allegation. In our submission, it has absolutely no basis, in fact, or in law. Mr Van Vuuren states that they provided the Commission with a large volume of evidence and attempted to assist it, by its directing attention to  
5 documentary material that establishes the undeniable fact: The Armsdeal was facilitated to bribery and corruption. This is the issue that the Commission has, is here to uncover, if it is in fact, so. Mr Van Vuuren has been at it for at least, the past three years. Now, when the opportunities present itself, for him, to present that evidence, he runs away, on some  
10 flimsy excuse. He states that the Commission has refused to make huge amounts of evidence public and to quote:

*"We have attempted to resolve this issue, during the 18 months that we participated in the Commission's work and through in excess of 20 letters directed to the Commission."*

15 Chairperson, our experience of this Commission has been that the Commission has time and time again, asked the Lawyers for Human Rights to give them a list of documents, which they require, in order to prepare their main presentations. I am, I am not aware of the process, of that process and how it has unfolded. But, our experience is that this  
20 Commission has, at all times, wanted to get to the bottom of any allegation, particularly allegations of bribery and, and corruption. Mr Van Vuuren says that he and others have been refused the opportunity to provide the Commission with crucial documentary evidence. Our, our experience has been that the Commission has encouraged parties to place evidence  
25 before it and if it has supporting documents, to furnish those documents to

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the Commission. The Commission has, on occasion, asked parties to explain what the source of the allegation is, whether it is personal knowledge, whether it is from other sources, so that the Commission can give due weight to that evidence. This is in response, Chairperson to the  
5 second, to the third ground of complaint, where Mr Van Vuuren says:

*“We cannot speak to documents that we have not written.”*

But, what we have seen of the proceedings of this Commission is that the Commission has allowed witnesses to give facts of matters, which they know and also opinions. Two weeks ago, Mr Terry Crawford-Browne was  
10 permitted to give evidence of what he thought were facts and also opinions. I noticed that in the Business Day of the 16<sup>th</sup> of October 2014, there is an article, which appears to have been pinned by Mr Van Vuuren, Mr Andrew Feinstein and Mr Paul Holden, with the title:

*“Do not let fantasies detract from the depth of corruption.”*

15 As part of that article, the following is recorded:

*“For the past week, we saw the Seriti Commission, long the source of controversy, due to its own conduct, being invited to stray from the relevant facts. The testimony of peace activist Terry Crawford-Browne was eagerly awaited, not least because of his Constitutional Court challenge led to  
20 Zuma establishing the Commission. Sadly, what we witnessed was Crawford-Browne unwisely repeating the unsubstantiated opinions of others. The effect was not only that he undermined his own argument, but also, that he has made it extremely difficult, the extremely difficult task of challenging the conduct of the Commission, much harder. There is no  
25 doubt that the events of the past week were watched by the arms*

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*companies and other defenders of the deal with glee. The murder of Chris Hani, a great South African, resulted in bloodshed, amongst the civilian population as the Apartheid beast was in its death throes. The memory of this nightmare means we have a responsibility to discuss these events with*

5 *careful consideration and armed with ample evidence. There was no need to reach into these darkest corners of our history, to prove corruption in the Armsdeal. We respect Crawford-Browne's past contribution to truth seeking in the Armsdeal cover-up. But, we distance our self, ourselves from his evidence and conclusions. He has made it easy, for those, who*

10 *do not want the truth to be found, to say that Armsdeal critic rely on unsubstantiated rumour and can produce no evidence to substantiate their claims. In the uproar, resulting from his fantastical claims, the crucial point must not be lost. We have demonstrated, through our books, writing and the information we have provided to the Commission that there is*

15 *substantial and substantive documentary evidence, suggesting corruption in the arms deal. The Commission either has this information at its disposal or can access it with ease should it wish to do so."*

But, now that Mr Van Vuuren has an opportunity for assisting this Commission to substantiate this documentary and other evidence, pointing

20 to corruption, he runs away. Mr Van Vuuren purports to be representing the public. But, Chairperson, I think the persons, who can genuinely and honestly be held to be representing the public and that is President Mandela and President Mbeki, decided to come and give evidence before their respective Commissions. In the scheme of things, who is Mr Van

25 Vuuren, compared to those gentlemen? We submit, with respect, that Mr

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Van Vuuren should give his evidence and not hide behind a fig leaf of this document that is presented to the Commission. Thank you.

CHAIRPERSON: I am not quite sure, Advocate Sello, whether you want to comment now, or should Advocate Geoff Budlender reply. What do you  
5 prefer, because you are the evidence leader?

ADV SELLO: Chair, probably, just to curtail matters, it might be easier if I commented now, so, when Advocate Budlender replies, he replies to everybody.

CHAIRPERSON: Well, will that be [indistinct]?

10 ADV BUDLENDER: Thank you, Chair, that will be very helpful.

CHAIRPERSON: Thank you.

ADV SELLO: Thank you, Chair. I will, my, my address to you will be very brief, hopefully. Because I, I intend to restrict myself to just maybe two issues that I raised in Mr Van Vuuren's statement. Most people may not be  
15 aware, Chair, that this Commission heard evidence from witnesses, as many as close to 50. I am reliably informed, by the Secretariat. We have worked with various witnesses, who brought different evidence and testimony to this Commission, over the course of over a year, 18 months. I must state, for the record that the approach, which Mr Van Vuuren  
20 suggests, is a strange one indeed, and we have never encountered before. By all witnesses, I mean, from the first witness, Admiral Green, right through to the last witness, before Mr Van Vuuren, Mr Terry Crawford-Browne. The practice has been to meet with witnesses, to understand the area they wish to traverse and that they begin to develop statements. They  
25 collect and provide documents and in, in finalising the document, to the

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extent that we can assist and from information we have gained from other witnesses, we indicate what other documents might assist them that they have not referred to. The process does not start with the Commission or the evidence leaders, giving them the evidence and requiring of them, to tender evidence. That, if it is expected, would be, I respectfully submit, 5 bizarre, Commissioners, because effectively, this Commission would be asking witnesses to come collect evidence from the Commission, put it before the Commission. I do not know, if they will then call it their evidence. If that is not what is intended, then probably, Mr Van Vuuren 10 misunderstands what is required of him. In his paragraph 1 he states that he requires the evidence, in order to appear before this commission. That can suggest that Mr Van Vuuren had certain evidence. However, he needs to have regard to evidence, already before the Commission. I do not know whether it is to ensure that his evidence is corroborated or what the 15 purpose of the exercise would be, before we can establish the original evidence that he claims to have. Chair, if this Commission is required to enquire into, make findings, report on and make recommendations, it can only do so on bits and pieces of evidence that each of the single witnesses is able to provide. None of the witnesses is required by this Commission to 20 place evidence and to produce other evidence before the Commission, submitted by other witnesses, to corroborate their own evidence. That, that would be a [indistinct] process that I submit will lead us nowhere. Secondly, Chair, the millions of pages of documents from official investigations of corruption, by South African law enforcement agencies, 25 that Mr Van Vuuren believes he is entitled to have access to, that request

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is premised, I think, on complete ignorance as to how this Commission intends to, to deal with that kind of evidence. I do not understand why Mr Van Vuuren assumes that, in order for him to testify, he must first establish, what the investigative journalists had, investigating agencies found and had to say. That is not his evidence. It is somebody else's evidence. He is called upon to deal only with the facts, as he knows them. It could very well be one fact that, when put in front of this Commission, or it could be a hundred facts. But, whatever it is he has, he, we require him to produce before this Commission. As the Commission, the Commissioner previously alluded to this, there has been this consistent reference to refusal to provide crucial documentary evidence and I am referring, in this regard, to what they raise under two. It may very well be a title, but on the other hand, it may very well be deliberate, that the Commission has declared some of the crucial documents, pointing to corruption, to be inadmissible. When one reads the remainder of that paragraph, it is very clear what document is being referred to and what ruling is purportedly being referred to. That is not documents. That is one document. My recollection is, it is part of a bigger document. The portion that was sought to be submitted into evidence is all that we need, two pages. Mr Van Vuuren is a co-author of a book, Devil in the Detail, which runs into something close to 500 pages. It cannot be that one can take 22 pages of a document and extrapolate it to write 500 pages. So, even if that particular document is not admissible, as ruled, being ruled inadmissible, I would like to believe that Mr Van Vuuren has other documents and or other sources that he can rely on and share with the, with this Commission, particularly when, the

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second page of that book, *The Devil in the Detail*, starts off with a quote from the other author, Mr Feinstein and states thus:

*“This is a very important book that reveals significant new information about the Armsdeal.”*

5 It is that new information that we implore Mr Van Vuuren to share with this Commission. Chair, lastly, the statement, I was referred to earlier, by, issued last week on the 16<sup>th</sup> of October, the Business Day statement. It makes it very clear that, according to Mr Van Vuuren:

10 *“They have demonstrated, through our books, writing and the information we have provided to the Commission that there is substantial and substantive documentary evidence, suggesting corruption in the Armsdeal.”*

I do not understand what the difficulty is, with Mr Van Vuuren, to come and unpack that statement that he made, barely a week ago. I am sure the public is much interest, interested in knowing and understanding the exact nature of the so-called substantial and substantive documentary evidence. In the, in the circumstances, if Mr Van Vuuren still refused to assist this Commission. I would like to refer him to a statement, another press statement, he and Mr Feinstein and Mr Holden issued on the 28<sup>th</sup> February 2014. I only have it, actually, on the computer. But, if I must quote Mr Van Vuuren, I will. I am sure that Mr Van Vuuren will immediately point it out, that I quoted him. This is a statement, regarding this Commission and these are their closing comments:

25 *“A number of people, who have been criticised, critical of the Commission are questioning whether they should even co-operate any*

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more. *It is our view that the Commission should be given the opportunity to fulfil its mandate to the people of South Africa, that it should repay the tax payer with the full unsettled truth of the Armsdeal, so that those, who have unwittingly paid for it, will finally know, what has become of their tens*

5 *of billions of rands, some of which, may still be recouped."*

I invite Mr Van Vuuren to do exactly what he was advising of others, who had previously thought of ceasing to co-operate with the Commission. That you, Chair.

CHAIRPERSON: Advocate Sello, maybe you want to respond to this

10 statement. I think, this appears on the last page of page 2, where Mr Van Vuuren would, apparently he believes, that you know, he is looking after the interest of the public and he can gage the South African public moods. He says:

*"It is indisputable fact that the Commission has lost the trust of the*

15 *public, whom it is intended to serve."*

I am not quite sure, what Mr Van Vuuren means by the, by the public. Do you want to comment, before Advocate Budlender comments, because I find this quite interesting?

ADV SELLO: Chair, I cannot purport to understand what exactly that

20 mean, particularly in light of the statement that was made, barely eight months ago. I would like to assume that the public interest that was being referred to is the same public, unless, unless there are divisions of the public and possibly, this statement today, refers to another public, so to speak. So, I, I, anything I say, Chair, would just be conjecture on my part.

25 I have no understand of what that means.

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CHAIRPERSON: Thank you.

COMMISSIONER MUSI: Advocate Sello. Maybe I am taking over as a [indistinct]. But, I am interested to hear, what the basis of this statement is. What basis is there? He says it is an undisputable fact. What is the basis  
5 of this statement?

ADV SELLO: Chair, Commissioner Musi, I do not know what the basis of that statement is. I can only point out that, even in leading or cross-examining any witness, anyone is entitled to start their statement in a similar fashion and claim that it is an undisputable fact. The only  
10 submission I can make, is in claiming it to be undisputable fact, does not, in, of itself make it an undisputable fact. I am not aware and neither has Mr Van Vuuren or anyone, placed any evidence, at least to me, that would indicate that what he claims in that statement constitutes undisputable fact.

CHAIRPERSON: Advocate Budlender, I, I think I am also interested to  
15 know, how your client comes to this conclusion that what he has written here, represents the public. I am interested to, to know that. I know that he has quoted 30 organisations. So, I am not quite sure, is this the total sum of the public that he claims, that you know, he represents all, that he claims that share the same view with him. Maybe in your, in your reply, if  
20 you can just deal with that issue. Then, two, your client has made very serious allegations against us now. He has made very serious allegations against the Commission. So, I would want you, you to deal with that.

ADV BUDLENDER: Thank you, Chair. I will do so. There, there are really four, four matters, which I wish to address. The first is the question of  
25 the failure to give access ...[intervene]

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CHAIRPERSON: Advocate Budlender. Sorry, please can you just talk into the mike. We are just struggling to hear you.

ADV BUDLENDER: My, my apologies, Chair. There are four matters, which I wish to address. The first is the complaint of my client, about the  
5 failure to give access to evidence, which I think, may have been misunderstood. The Commissioners will be aware that there has been a series of requests in extensive correspondence and a number of those requests have been refused. What it comes down to is this, that my clients contend, or my client contends and my I just interrupt myself to say, I would  
10 like to say something, which may be helpful to the Commission, after Mr Van Vuuren is dealt with, in relation to Mr Holden and Mr Feinstein. But, my clients contend that, as a matter of, that their original subpoenas, the subpoenas, which were given to them, stated as is set out in, in the paragraph numbered one that the subpoena said that they would give,  
15 would be given access to information, in the possession of the Commission, which was relevant to their request. Their contention is that information, in the possession of the Commission, which supports these submissions that they have made in their books and their articles, is relevant to their evidence and they should be given the opportunity to see  
20 it, because they are going to be cross-examined on those [indistinct]. Their contention is that it, that it is unfair, if the Commission is in possession of information, which supports what they say, for them not to be given access to it and for them then to be cross-examined and for it to be put to them that what they say is not true. So, that is the complaint, which was made.  
25 The second complaint, second matter I wish to raise, Chair, respond to is,

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the issue of privilege. With great respect to my colleague, for the Department of Defence, she is quite wrong on the law. The law is quite clear. Can I read to the Commission, what was said in Andersen versus Minister of Justice 1952 (2) (SA) 473 (W) and the passage is at page 479.

5 This is what His Lordship Mr Justice Price said:

*“Whitmore 3<sup>rd</sup> Edition, Section 2325 makes it clear that where ever privilege document is stolen or lost, the privilege is lost. On the principal that since the law has granted secrecy, so far as its own process goes, it leaves to the client and his attorney to take proper precautions to prevent the disclosure of the contents of the document to third parties and if insufficient precautions are taken, either by the client or the attorney, the privilege is lost.”*

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Now, that is not the only authority in our law for that proposition. It is, with respect, a well established proposition. I do not propose to argue it, here before the Commission. I do not think this is the appropriate point. But, to suggest that my client is relying on a flimsy complaint, I respectfully submit, is simply not right. There is authority for what he says.

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COURT: Just on that point, Advocate Budlender. Are you aware of the ruling that we made last week, dealing with this question?

20 ADV BUDLENDER: Yes. I am aware, Chair. I understand that what you ruled is that the documents may not be used, as proof of their contents. But, that the Commission may use it in a derivative sense to track down sources, which are mentioned. I also ...[intervene]

CHAIRPERSON: Is that ruling contrary to, to that paragraph that you have just read?

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ADV BUDLENDER: I will ...[intervene]

CHAIRPERSON: Or are they not, is it inconsistent with that paragraph?

ADV BUDLENDER: I submit it is contrary to it, because the, the finding in the, upholding in the Andersen case, the passage in Whitmore and as I  
5 said, there are other South African cases and English cases, are that the document is admissible, as evidence itself, not just as a source of, as a derivative source. What weight you place on it, is another matter and that is something which has to be debated. But, it is admissible, I would say that the authority is that it is admissible.

10 CHAIRPERSON: Okay. I head you.

ADV BUDLENDER: Then, the third matter I wish to raise, Chair, is the one which, which you have raised and your colleague have raised, which is the statement about public confidence. Now, I am in a slightly difficult position here, Chair, because I am not here to give evidence and I do not  
15 propose to give evidence and there is no evidence, which I can hopefully give. My client, as you are aware has declined to give evidence. But, can I say this, that it seems to me that the, I think, Mr Van Vuuren would agree that undisputable fact, may be overstated. It is a disputable fact. It is a disputable proposition. But, there, there certainly is, there is a basis for the  
20 proposition that there is public unease. Your, you, Chair, have referred to the statements by a large number of civil society organisations. One only has to read newspaper editorials, to know that that is not the sole source of, of, especially of unease. To say that it is undisputable seems to me, with respect, my client would agree that I can say that is an overstatement.  
25 But, there is a feeling around of public unease. I think that, that is a very

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fair statement.

CHAIRPERSON: I think, it will be fair to say that with certain people of certain organisations. But, then, to put it as it is, here, that it is the entire South African public, I think, that is incorrect. I do not think that, you know, that will be so. I think, one can even go to public and say, you know, this statement represents the views of a minority of four people. But, then, just to try and claim that, you know, this, you represent the views of [indistinct] of four people, I think, that is incorrect. This is the comment I was trying to make.

10 ADV BUDLENDER: With respect, I understand that, Chair. My client certainly has never suggested that every member of the public has this view. But, I think, it is a fair comment to say that significant parts of the public have that view, whether that is the majority or the minority, we will never know, unless we have a referendum, which I think we might have. If, then, finally, Chair, the, a number of the, of my colleagues have referred to the fact that the, my client and his colleagues, Mr Feinstein and Mr Holden have published books on this, on the subject. That of course, is exactly correct. They have published books, they have published articles and that material is before the Commission. The sources for their assertions are stated in painstaking detail, footnote after footnote after footnote. So, the material is available to the Commission. If the Commission wishes to investigate those matters and my clients hope very much that it will do so, the material is available to the Commission. It has to just read the book. Go to footnote 439 and find out whether that is correct. So, the, the suggestion that somehow, by declining to participate further in the work of

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the Commission, my clients are depriving the Commission of the fruits of their labour is, with respect, not correct. The fruits of their labour are there for all to see. They are before the Commission. They are before the public and they are before the parties. What use the Commission chooses to  
5 make of that information, of course, is a matter, which the Commission will decide. But, it can hardly be said that our clients have declined to make the information available. They have made great efforts to make it available.

**CHAIRPERSON:** Advocate Budlender, one issue. Your clients make  
10 certain allegations in their books. They make allegations against in their books. They make allegations against certain people. How are we possibly going to test that, if they do not want to come and testify, so that they can be cross-examined? In order to, to determine the veracity of the statements that they make in those books, are then true. In this letter and  
15 in the [indistinct], I have already been saying that we do have evidence, what, from all of them coming here, provide us with that evidence. Let it be tested through cross-examination. You cannot just simply make allegations against people, in your books and say that I am not going to testify, in order to defend the views that I have, that I have placed in those books. Just  
20 read those books and then, make your own determination. Is that not unfair to those that you are making allegations against, if you do not want to give them an opportunity of testing the veracity of your statements?

**ADV BUDLENDER:** Chair, this, the, the statements which are made, are  
in every instance, supported by a reference to the source of the  
25 information, whether it is a newspaper article, whether it is a document

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produced, during the investigations, whether whatever the nature of it is. In every instance, the source of the allegation is laid out, for all to see. So, it is open to the parties that are affected to say that is not true, for the following reason or to acknowledge that it is true and for the Commission's

5 staff to investigate those matters. But, it is not as though these are bare allegations, which are made. They are allegations, which are made on detailed, painstaking references, which are available to all to see. Whether the parties and whether the Commission wish to test the correctness of those allegations, by going back to the sources, that is for them to decide.

10 But, it cannot, with respect, be fairly said that the information is just laid out and, and that are, we will not justify it. They do seek to justify it and of course, if they were to give evidence, the justification they could, would give. It is the justification, which is in the documents.

COMMISSIONER MUSI: Can, can I, can I find out, what about the

15 submissions that have been made to the Commission and it now stands that Mr Van Vuuren is not part of those submissions, it is Mr Feinstein and Holden? What about those submissions and understand by those submissions, are merely draft form and cannot be used for purposes of this Commission? How do we treat that?

20 ADV BUDLENDER: Chair, my I just take an instruction on that? Chair, the, the, I am instructed that the documents, submitted on behalf of my clients, fall into two categories. They are draft statements, which were submitted and those are referred to in the letter, to which my colleague, the evidence leader referred, were [indistinct]. Those were not intended for,

25 they were drafts and not intended to use. Then, there was also a

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submission, which was, which was made last year. I understand that is the document to which Commission Musi is referring. I do not have an instruction. I will have to get an instruction. May I do that and get back to you in writing, in due course?

5 COMMISSIONER MUSI: Yes. I follow that. But, but then, your client, Mr Van Vuuren, has not made any submission whatsoever. Are we to rely exclusively on his books?

ADV BUDLENDER: Yes, Chair, Commissioner Musi. He, he has not made, he has only made a draft statement. He has not made a  
10 submission. But, he invites you to read the books and, and assess their, their reliability, if you so choose.

CHAIRPERSON: Just on. I am sorry. Advocate Budlender, why is your client scared to come here, give evidence and be in a position to defend the allegation that he makes in his book? The very simple [indistinct] will  
15 take only two, three weeks, rather than getting council to come and argue the fact that he cannot give evidence. Why is it difficult for him to come and testify about the books that he has written and defend the allegations that he is making in that book? Why is that so difficult?

ADV BUDLENDER: Chair, he is not scared. He has explained in his  
20 statement, which I read, what his reason is, which is that he believes that this is an unfair and flawed process and he does not wish to participate in it. Of course, I appreciate that people would, some will agree and some will disagree, as to whether it is unfair or flawed process. But, his, his view is and he is genuinely of the view is, that this is an unfair and flawed  
25 process for the reasons, which have been given and for the reasons, which

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are set out in all the correspondence, which has passed over the last year and a half. Under those circumstances, he does not wish to participate in it.

CHAIRPERSON: The last one, from me. What I need, are you in a  
5 position to demonstrate that some of the things that he says in this letter, are factual incorrect?

ADV BUDLENDER: I am sorry, Chair, I missed the first part of what you said?

CHAIRPERSON: If you are in a position to demonstrate that some of the  
10 facts that he states in this letter that, that the issues that he says in this letter are incorrect. For instance, he once alleged that there is 240 boxes of evidence, which we have not touched and that, well, on that point, he is totally incorrect. We have been saying and even in a press statement, we have seen that they are referring to the boxes, which the Hawks or  
15 Scorpions had of evidence, as they have said which we have not touched. You will not be in a position to demonstrate that on that point, they are incorrect. Now, my question is, if at all, we are in a position to demonstrate that, on two, three issues that the reason is that they are incorrect, will that affect his, his position, as far as testifying is concerned, or not?

20 ADV BUDLENDER: Chair, the, the, I, that, I may need to respond to that in writing to take a careful instruction. But, can I say this, that the complaints that there are large volume of documents, which have not been examined by the Commission and its staff, have been made repeatedly, in correspondence, addressed to the Commission and never disputed in the  
25 answer, which we received from the Commission. But, I, I would have to

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take an instruction on, on the question, which, which the Chair asked me.

CHAIRPERSON: Advocate Budlender, you are right. We have never responded to that. It has always been our belief that we are here to investigate and not to report to them. We have always had that dispute, for  
5 the past two years with Lawyers for Human Rights, who are of the view, believe that we need to investigate and report to them. We said to them, now listen, we are not going to report to you and I do not want to tell about the investigations that we are making. Your function is to come to the Commission and give us the evidence and not the other way around. It is  
10 true. We said to them we are not under the duty to give you information, which you do not have, in order for you to investigate. We want you to come and testify before the Commission, about issues that you are, that you know of, not that we must give you evidence and information, as you said, so you can investigate. This reason [indistinct] we have been adding  
15 on which you have been relying for the past two years. One of the [indistinct] I mentioned, we are giving them thousand and thousands and thousands of documents. Out of all of the witnesses, out of 51, 52 witnesses, who have testified here, we have made sure that they get the copies of those documents, of, of those statements that are mentioned that  
20 those witnesses rely on, we have all made them available to them. That should be very easy for them to come and testify, particularly, if they are going to rely on their books. But, then, I think, this is the last say for me, for me, on this point, before we make a ruling. Advocate Musi, Judge Musi?

25 COMMISSIONER MUSI: Maybe, maybe, maybe, you know Advocate

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Budlender has not been present in these proceedings and you probably would not know of some of the things that have happened, during the hearings. The complaint, for instance, about witnesses not being allowed to rely on documents, of which they are not authors, is not correct. The

5 Chairperson made a ruling, that as far as documents are concerned, he is going to treat matters on a case by case basis. If you, you were to read the evidence of Dr Gavin Wood, you will see that his evidence, in fact, consists of submissions, wherein he relied on documentation, in order to draw inferences. That was [indistinct]. We, we another example is the

10 evidence of Mr Terry Crawford-Browne. He, he was allowed to refer to all sorts of documents, some of which were, are actually inadmissible. But, he was allowed, in order to facilitate the leading of his evidence. He was allowed to do that. He referred to newspaper articles, as a basis for some of his allegations. So, it is not correct that the witness would not be

15 allowed to, to use documents, of which they are not the authors. The, the other point I needed to, to draw your attention to, just a minute, is that the dispute this Commission has been having with Lawyers for Human Rights over, over production of documents, one of the issues is this. We pertinently asked the question, for what purpose you need the documents.

20 The answer is for purpose of our investigating, the very terms of reference that the Commission is there to investigate. It is there in, in one of the correspondence. How do you then expect this Commission to, to agree that its powers should be served by another body, or, or a prospective witness? How do you expect that to happen? Then, lastly, here is a

25 statement, in paragraph 4, the last sentence or the last part of one

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sentence in paragraph 4:

*“The Commission has called only two people to testify of dozens, who have been directly implicated in impropriety.”*

Apparently it is accepted that those witnesses, who are implicated, I mean,  
5 those people, who are implicated, they have already been called. He does  
not know that there are others to be called and not only two. There are  
many others, who still have to be called and in fact, were called already  
more than two, or the people who were implicated. I am just drawing this to  
your attention, you know, Mr Budlender, because you have not been part of  
10 this, these proceedings. Thank you.

ADV BUDLENDER: Thank you, Chair, Commissioner Musi. May I  
respond briefly? I, I hear what the Commissioners say. I do not want to, it  
seems to me, it is not proper for me to enter into a debate, now, about the  
contents and meaning of each of the rulings, which was given by the  
15 Commission, during evidence in chief of certain witnesses and during  
attentive cross-examination of certain witnesses. The, the record speaks  
for itself. Similarly, the correspondence speaks for itself. Yet, certainly, the  
attempts, which have been made, to obtain access to documents, the  
reasons, which have been given for the request for access, the assertions,  
20 which have been made, as to how the process is taking place and, with  
respect, the failure of the Commission to dispute that, that is not a matter,  
requiring the Commission to report to our clients. It is a matter of the, of,  
our clients have never contended that they, the Commission is under an  
obligation to report to them and they would not make that contention. What  
25 they say is, where the Commission is operating in that particular manner

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and where it is placed before the Commission and the Commission is asked to either change its, its process, or to, or to address it, the Commission has not said this is not correct. So, we, the, we have been entitled, with respect, to assume that what is in the letter is correct. But, 5 the correspondence goes over a period of 18 months. I have got a thick wallet and I have read it. With respect, it speaks for itself. It will be addressed another time, if necessary. Then, the, come to the, we come to the final page really, the, the question of access to documents is a question of fundamental fairness. Our submission is this, our clients are required to 10 give evidence and to be cross-examined, by parties, who are alleged to have been involved in impropriety. Those parties will deny, one assumes, any impropriety and they will cross-examine our clients, to attempt to show that what our clients are saying, is not the truth. But, if the Commission has documents in its possession, which show that our clients are, in fact, 15 telling the truth, then our clients are entitled to those documents, in order to defend themselves, against the attack, which will amount during cross-examination. It is fundamentally unfair, we submit for that not to be done and I repeat, the initial subpoena served, that our stated, an undertaking was given that our clients would be given access to information, which is 20 relevant to their evidence, that is information, which is relevant to their evidence. But, Chair and Commissioner Musi, with great respect, it seems to me, we are going somewhat in circles and I do not waste your time, by repeating what I have said. I think my client has spoken for himself and made his, his position clear.

25 **CHAIRPERSON:** Thank you. Unfortunately, I do not believe that your

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client has, has any justifiable reasons for refusing to, to testify. There was, the points that you raised to me, they do not justify his action and therefore, I will, for the last time, I want to appeal to your client to reconsider his position. We want to give him the last opportunity to  
5 reconsider his position, because we feel that, if at all, what he has been saying all along is correct, that will greatly assist the Commission.

ADV BUDLENDER: Sure, my client respectfully declines. My, my client respectfully declines. He hears what has been said, but he respectfully declines.

10 CHAIRPERSON: Thank you. In that case, then I think, we will have to do what needs to be done. The regulations are there. The law is there. The law will have to take its course. We will decide in due course what sort of action we are going to take. But, then, I can assure you, that we are going to try and put into motion the process of the law, in order to deal with,  
15 deal with your client's refusal, despite having been properly subpoenaed to testify before the Commission. The last thing, before, before we finish, Advocate Budlender, you know, we do not want to waste other people's time and money, by coming back with Mr Holden, if at all, he is going to take the same attitude. Is it possible for you, to try and get his statement  
20 and find out exactly what, what his attitude is going to be, when he is supposed to testify, so that, if, at all, he is going to raise the same point that Mr Van Vuuren has raised, which I suspect he is going to do. Then one can make a ruling and one can make a ruling now, if you are going that way, we should be ready. Otherwise, it will mean that tomorrow, we must  
25 come back here, go through the same process and end up, probably giving

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the same, the same ruling.

ADV BUDLENDER: Mr Chair, I am grateful for the opportunity to address you on that. I did want to do that. I am also instructed to represent Mr Feinstein and Mr Holden, who are on the Commission's programme for this

5 week. The position, as far as Mr Feinstein and Mr Holden are concerned, is the following. Firstly, with regard to subpoenas, Mr Holden has not received a subpoena. He is in London, where he lives and he has received no subpoena. Mr Feinstein has received a subpoena in London, where he lives and on his behalf, my attorneys asked permission, whether it

10 contends that the subpoena obliges Mr Feinstein to travel to South Africa to give evidence and if so, on what basis the Commission asserts that it has extraterritorial powers? We have received a short answer from the secretary, which is, with great respect, not really an answer. It simply states that the subpoena is valid. But, it does not address the question of

15 whether the Commission's process runs outside South Africa. Mr Feinstein has been advised that the Commission does not have jurisdiction outside South Africa and that it does not have powers of compulsion, over persons, who are outside South Africa. I have also been instructed to inform the Commission that, in any event, Mr Holden and Mr Feinstein associate them

20 fully, associate themselves fully with what Mr Van Vuuren has said and with the position, which he has taken. So, for all of these reasons, Chair, I have been instructed, respectfully, to inform the Commission that Mr Feinstein and Mr Holden will not be travelling to South Africa and appearing before the Commission, as indicated, on this week's programme.

25 CHAIRPERSON: Thank you. I will tell you what we are going to do. If I

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understand these technical issues that they are raising, they are neither here nor there. The main thing is that they are not going to come and testify, because they associate themselves with the statement by Mr Van Vuuren and if that is the position, I think we will have to sit back and wait  
5 and serve the subpoena again, on them, at the right time and the right moment, so that we can take similar action against them. So that, you know, it must be clear that they have not testified, because they do not think that they respect this Commission, that they respect the law, that they are not willing to comply with any of our, of our requests. So, that is why I  
10 am trying to find out, that it is the main reason that they associate themselves with this statement and if that is so, we will try and serve the subpoena again with them. To avoid having to reserve the subpoena, may I see if we can get a single statement, signed by them, saying that they are not coming, because of these issues and if we serve a subpoena on them,  
15 then maybe, we might be in a position to deal with their cases. We will deal with the case of Mr Van Vuuren, at the same time.

**ADV BUDLENDER:** Thank you, Chair. I will take an instruction on that.

**CHAIRPERSON:** My fellow Commission has got a different view. He says that, seeing that you say they associate themselves with this  
20 statement, then there might not be a need to issue another fresh subpoena. We can deal with the case of Mr Van Vuuren, together with their case, at the same time.

**ADV BUDLENDER:** Well, as, as a legal question, with respect, the, if the Commission, if one of the routes, it seems to me the Commission has two,  
25 two routes open to it, in this situation. One, we can we have, the witnesses

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have declined. They have been invited to give evidence. They have declined to give so, they have given their reasons and we move on. The other is to say, the witnesses have declined to give evidence and we wish to proceed under Section 6 of the Commission's Act. If the latter, then, with respect, there cannot be any process against either Mr Feinstein and Mr Holden, because they do not, on any basis, fall under Section 6 of the Commission's Act. That is my submission.

CHAIRPERSON: And I agree with you. That is why, I thought, maybe this can be done by agreement, if at all, it is only a legal issue. But, then, at all, you know, we are, there are [indistinct], things need to be done, according to the book. We will do that. But, I will have to go back and from then, try and decide how we are going to get hold of Mr Holden and Mr Van Vuuren. But, then, you are wrong about that it is supposed to be, but then, as far as Mr Feinstein is concerned, I understand you to be saying that he associates himself with this document, so we do not need, any need for us to come back here on Wednesday, because when he comes, it is going to be the same issue.

ADV BUDLENDER: That is true, Chair, subject, yes, on the, on this, on the merits, if I can call it that, he associates himself with what Mr Van Vuuren has said. But, he does contend that the subpoena, which has been delivered to him, does not compel him to appear though.

CHAIRPERSON: So, let me then understand what you are saying. You say he associates himself with this document. But, then, he will not be coming down, because he does not want to testify, but because the, in fact, the summons that was served on him, or the subpoena that was served on

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him?

ADV BUDLENDER: There are two reasons, Chair. There is a reason that he is not under any compulsion to come, under legal compulsion to come and there is a second reason that he does not wish to participate.

5 CHAIRPERSON: Thank you. We will go back and try and decide on what the, what needs to be done. Then if I understand Mr Holden, the 22<sup>nd</sup>, it will be a waste of time, if we come back here. So, we need to take a decision on how we are going to deal with both of them. But, then, I think, my initial gut feeling is that we are going to try and serve them with  
10 the subpoenas again, so that, you know, they can be given the same treatment that we are going to give to Mr Van Vuuren. I think, we are going to now adjourn, because our whole week is gone, the witness that thought will be coming, gave us a lot of evidence about corruption, they are no longer interested in giving us that evidence. So, we will have to adjourn  
15 until ...[intervene]

ADV SELLO: Chair, according to the schedule, it is until the 10<sup>th</sup> of November, which is when we expect to lead the evidence of Mr Shamin Shaik.

ADV CANE: Sorry, Chair, may I intervene? It is Ms Cane, on behalf of  
20 the Department of Defence. We understood that Admiral Green had been scheduled to give evidence on one further issue on the 3<sup>rd</sup> of November.

ADV SELLO: Chair, if I may and Commissioner Musi, my learned colleague, Ms Cane is quite correct. I, I had my time table wrong. Mr Feinstein would have been followed by Admiral Green and one witness  
25 from the DTI, both of whom are recall witnesses. Each is to deal with

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specific issues that have been raised and, I think, maybe for cross-examination. Where, based on the issues they have been recalled for, we had anticipated that they would both be a, both be one day witnesses, which means that we should be able to dispose of the witnesses, at the  
5 same time. That would be on the 3<sup>rd</sup> of, the week of the 3<sup>rd</sup> of November and then, the following week of the 10<sup>th</sup>. Only then, do we have Mr Shaik.  
Do I have my time table right now?

**CHAIRPERSON:** Advocate Sello, I am not quite sure what you mean, when you say it will be on the week of the 3<sup>rd</sup> of November, which, which  
10 specific day?

**ADV SELLO:** The very 3<sup>rd</sup> of November, Chair, to be precise.

**CHAIRPERSON:** The 3<sup>rd</sup> of November. Thank you. We will adjourn until the, the 3<sup>rd</sup> of November and we will start at the normal time of 10 o'clock.  
Thank you.

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**(COMMISSION ADJOURNS)**