ARMS PROCUREMENT COMMISSION

Transparency, Accountability and the Rule of Law

PUBLIC HEARINGS

PHASE 2

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(PAGE 10941 - 11061)

HEARING ON 22 JUNE 2015

CHAIRPERSON: Good morning everybody. I think, maybe one needs to apologise, because we were supposed to start at nine o'clock, I mean, 10 o'clock. By nine o'clock we were sitting in our chambers, waiting for the evidence leaders.

But, because of one or two problems that some of the evidence leaders experienced, we were unable to start at 10 o'clock, as we usually planned. But, I think, we might have to try and make up that time. For that reason, I am going to suggest that we take our lunch break at 1:30 and come back at two o'clock and see how far we can go. Advocate Lebala?

ADV LEBALA: Esteemed Commissioners, we are ready to proceed with our closing submissions. The question is where do we start, Esteemed Commissioners. It is a question I have asked my colleague, Advocate Ngobese, as to where do we begin.

We remind the Commission that we are making closing submissions on the term of reference 1.2, whether the arms and equipment, procured from the SDPP's are being under utilised or being utilised at all. Now, as I bustled with as, with as to where do we start, then I remember what one wise man said that we should try to paint the picture by dealing with the significant and leaving out the insignificant.

Now, this will help to explain to the Commission our challenge, in dealing with this term, as all the five terms of reference have to be taken together. Simply put, Commissioners, we will appreciate utilisation, if we appreciate the reasons why we acquired these capabilities.

Of course, we will do our best to focus on the significant. One of the best ways to start, as I have said to my colleague, Advocate Ngobesa probably is to begin by being right. Now, we need to confront evidence before the Commission.

Now to simplify this chain of our submissions, we would like you to look at our written submissions. Our written submissions are encapsulated in 51 pages. Now, let me direct your attention to the first page of our written submissions.

And by way of background and introduction permit me to start, by reading to you paragraph 1.1. The [indistinct] of these submissions, here on the last leg of the Arms Procurement Commission, after the leading of evidence. We have addressed the aspect that our submissions deal with 1.2 term of reference. The approach:

"These submissions will address evidence led in summary form thus far."

2.2:

"The submission will deal in terms with the following subjects.

2.2.1 Analysis of the evidence led, in respect of South African Air Force witnesses.

2.2.2 Analysis of the evidence led, in respect of South African Navy witnesses."

That is page 2, esteemed Commissioners, of our written submissions:

"2.2.3 Analysis of the evidence of David Maynier, a member of the Parliamentary Portfolio Committee in Defence and Military Veterans."

Now, this approach, I think, will simplify our journey of starting, by being

right. We need to look at the evidence, which is standing before the Commission. Now, this analysis also, will assist us to focus on the main evidence of utilisation.

Now, it means, the focus will only be on the testimony that beseech this Commission's hearings under these topics, Commissioners. Now, we will askew from bothering you, by reading page by page. Now, we will invite you, if need be, if you believe that we are going off tangent and delaying the process.

Because we are confident that only were you confronted with substantial evidence that we do not intend rehashing, you would appreciate the summaries that we will be dealing with. Now, we start on page 2, by taking you through the evidence of the Air Force.

Now, page 2 summarises that when we deal with the Air Force, we will be looking at General Bayne and Brigadier Burger. You will also note that when we deal with the Navy, because we will be taking and the Air Force and the Navy together, we will be looking at the testimony of Rear Admiral Green, Rear Admiral Higgs and Rear Admiral Philip Schoultz.

Now, the Commission has already been told that we will also be dealing with the testimony of David Meynier. Up to so far, if the Commissioners have questions to pose, with our approach, please draw our intention.

Page 3 of our submissions is not important particularly issues that will be dealt by other teams, what has become stubborn and standing before the Commission are the items that were purchased. They are

analysed in paragraph 5. We need not waste time on them.

Page 4, the topic is allegations of under utilisation or no utilisation at all, of the arms and equipment acquired, in terms of the SDPP. Now, that is where we start to confront the evidence. You will remember, Commissioners, that Mr David Maynier informed the Commission that advance light fighter aircrafts are under utilised by the South African Air Force.

We are not going to waste time, by taking you to the records. They are stated before you, at the bottom of the page. He testified that the Hawk aircrafts are under utilised by the South African Air Force. He further testified that he was informed, by the Minister of Defence and Military Veterans that the South African Air Force has placed 12 Gripen fighter aircraft in long term storage.

These air crafts are placed in storage, as a planned activity, in line with the utilisation and budget expenditure patterns floor of the South African Air Force. Hawk and Gripen aircrafts are under utilised, due to the lack of funding.

6.1.5 if one applies the test of the former Chief of the South African Air Force, General Degiano, Hawk aircraft are required to fly 4 000 hours per year. One will see that Hawk aircrafts were under utilised, during 2008 and 2009 financial year, because they only managed to fly only 2 000 hours.

He concluded by saying, or he emphasized the fact that General Bayne did not apply the test of General Degiano to determine whether the Hawk aircrafts are under utilised or not. Now, this is the part of the

criticism that came in as far as the Hawks and the Gripens are concerned.

And this is also what we established that during our consultations with Mr David Maynier, he kept on and amplifying this testimony, as set out in our written submissions. Now, let us look at the criticism by the public, in as far as utilisation of the three submarines and some of the frigates are concerned.

Paragraph 7 is criticism has been levelled by the public, pertinent to the non utilisation of the three submarines, procured by the Navy. The self same criticism has also been raised before the Portfolio Committee on Defence.

Consideration of the public criticism by the Commission, would assist the Commission to determine, particularly whether the three submarines are under utilised or not at all. The criticism is underscored by the following points.

Now, Commissioners will appreciate why we start with the backgrounds of summarising what the criticisms are, hence we started with Mr David Maynier, as far as the Gripens and the Hawks are concerned.

In as far as the submarines and the frigates are concerned, the criticism is as follows. The navy does not utilise the three submarines, because they require repairs, after being fitted with the wrong engines. You have heard this testimony.

For the better part of the Navy Officers' testimony, how they refuted and ridiculed it, these engines were supposed to be fitted into frigates,

not submarines. The repairs will cost the South African Navy a huge amount of money.

Let us not waste time, by referring you to the specific portions of the record. These backgrounds will simplify, when we go to documents and unpacking these testimonies to assist the Commission and to backup our submissions.

The three submarines, are inoperable and kept at the dock, ja, there was a joke that was being made that, I am happy that Dr Young is here, he says they are being given airtime. It means, one or two are being quested. They are being given airtime.

7.1.3, one the submarines SOS is being utilised less than the other two submarines. Page 6, the submarines are inoperable, because of the mechanical fault relating to faulty batteries fitted in them. One of the three, the Amatola, is not utilised, because it has been fitted with a defective engine.

The non utilisation of frigates and submarines is due to the lack of funding. Now, let us start dealing with utilisation itself. We have given you the background of what has been said in as far as the critics are concerned, on utilisation.

Now, let us look at how we will deal with the meaning of utilisation. You will find that on page 6 of our submissions …[intervene]

CHAIRPERSON: Thanks. I am sorry, Advocate Lebala. If you do not mind, the meaning of utilisation, we have seen it. We have gone through your submissions. Even the relevant cases that you have referred to, that we have seen. I do not think it is necessary for you, to

repeat that. Thank you.

ADV LEBALA: I have always appreciated judges. You know, they do not overwhelm them with the law. You give them facts. They assist you with the law. We are now going to take you through the cardinal rules of interpretation. Thanks for drawing our attention that we have appreciated.

What we are seeking to achieve with those pages that deal with the cardinal rules of interpretation, because in the ultimate end, we would like to contend how this Commission should look at utilisation. But, what is critically, as far as this paragraph is concerned, is what we say in paragraph 8.2, Commissioners.

But, for you to appreciate it, let us see what the heading in paragraph 8 says. What does utilisation mean, in the context of government notice 34731 number 926 of 4 November 2011, the one that is the foundational pillar of this Commission.

Paragraph 8.2:

"The meaning of utilisation is at the centre of quandry. The meaning has to be grappled, within the reasonable and responsible manner, lest it becomes crippling. This is so, as so often parties at the centre of the quandry cannot see the solution. It is by holding the book too close to the face, thereby not making out the words."

Now, we will try to show to the Commission, why we believe that both parties, that is looking at the officers and the critics, we should appreciate what utilisation should acceptably mean, in the context of the cardinal rules of interpretation. We are not going through those cases,

Commissioners.

Let us go to page 15, paragraph 9. This is very important. I will be taking you to one or two cases, to appreciate the foundational pillars that assist us to deal with this subject utilisation, in the context of the founding government notice.

The meaning of utilisation in the context of evidence, tendered before the Commission. It emanates from the evidence tendered before the Commission, by the officers of the Navy and the Air Force that the meaning of utilisation is construed differently, by officers, from the one understood by the public, including critics.

The critics and the public are lumped together as the public, for the purpose of this aspect of the submissions. Please, we are not trying to generalise this aspect. But, we are trying to draw bright lines, for you to appreciate, how we will contextualise utilisation, by appreciating what the public says, against what the officers are saying.

The public's perception is that utilisation relates only to physical utilisation. Properly contextualised, Commissioners, from the public's perception, the word utilisation occurs, when the Army utilises the equipment, for the purpose of combat, during the war.

We will deal with specific examples on how utilisation has to be looked at, from the officer's point of view. It starts here. Rear Admiral Green, one of the Navy witnesses, testified on behalf of the whole SANDF informed the Commission that utilisation of assets, within the military context encapsulates the following.

Now, look at it, from where the public's perception, except it

anticipates that these equipment and capabilities have to be utilised for the purpose of combat, during war. I am not going to read the whole paragraph. But, I will hit the main points.

Admiral Green said the utilisation of assets, is planned, in terms of government's audit commitments and Ministerial priorities, which in fact, reflect former. The emphasis is government's audit commitments.

The defence value chain guides the process, in order to achieve the mandate and in doing so, provides the collateral support to the government. The defence value chain starts with the strategic direction process, guiding force development, force preparation and force employment.

Now, even if there is no combat, during war, there is a process that starts to qualify utilisation. It starts with guiding force development, force preparation and force employment. Even when that process is ensuing and engulfing itself, utilisation is taking place.

This process is achieved by unpinning force support. The utilisation of assets is covered in force development, inter alia, by operational testing and evolution and the doctoring development. Where force preparation is the mandate of the service chiefs to be able to provide the Chief of the South African National Defence Force with prepared and supported forces.

It means, when all of those chiefs are sitting and planning force preparation, force development and force employment, that process of utilisation has started, Commissioners. The prepared and supported forces that provide, are provided to the Chief of the Joint Operations,

who employs the forces, as directed by the Chief of the South African National Defence Force.

Joint training to integrate prepared forces is executed, before the deployment. It means, even when they are training, there is utilisation going on. We do not have to see combat, where are arms and equipment are being directed, against a foreign hostile power, or we are attacking or chasing some pirates or some rebel forces.

That process of preparation itself and engulfs and explains utilisation. From this understanding of the value chain, one ought to understand that utilisation is focussed, to achieve an outcome, through the number of outputs.

It is process. It is not something that one could say, it ends up with combat, during the war, or it is demonstrated, by combat, during the war. Assets have to be utilised in life cycle. There it shows that it is a process, Commissioners.

That it ensures that the minimum numbers that are required for force employment are available, in terms of being prepared, as required by the relevant doctrine. The other said assets will be in various stages of maintenance, so that when one asset comes in for maintenance, there is another ready to enter the force and employment cycle.

It means, even when one submarine is standing in the dock yard, being maintained and the other one is coming in, one could talk about, could still address and talk about utilisation. In order to ensure that the asset is ready for force employment, it must have passed through the force preparation cycle.

The concept is known as life cycle management. There is no need for me to go deeper into that now. Page 18, 9.3, let us look at what Admiral Schoultz, one of the Navy officers said. Now, I assure the Commissioners that this is a summary.

We have done our best, because we did not want to go overwhelm you with repeating each and every testimony. This is the summary of what these witnesses are saying. So, we will try by all means to address these summaries positively, to assist the Commission.

I wish I could shorten them further. But, where I could, I will, Commissioners. Rear Admiral Philip Schoultz, one of the navy witnesses, also confirmed the description, given by Rear Admiral Green, during the concept of utilisation of assets.

Now, what it simply means is that definition, it is not static. It is a process. It follows through different stages. Now, Rear Admiral Philip Schoultz defined utilisation of assets as follows. The frigates and submarines are managed, within the operation cycle, which provides for both operational availability, utilisation and maintenance period.

You can see that it is not static, Commissioners. It is process driven. Broadly speaking, the periods within the operation cycle are force preparation periods that is a stage on its own, which includes the safety of readiness, within about this term, SACR process. I am not going to repeat it.

Individual ship training and exercises in Navy, unique multi-ship exercises. Force employment periods, which includes the conduct of operations, other audit commitments and joint and multi-national

exercises, self maintenance periods, where the ship's company conducts routine maintenance, as well as minor onboard reports.

Now, let us pause there, Chair and Commissioner Musi. This has got nothing to do with combat. We are not at war. We are not directing our equipment and capabilities against a foreign hostile power. You can see that it is process driven.

All the stages are part and engulf the operational cycle, which defines utilisation, in the context of the army officers. We note also that where the ship's companies, assisted by the fleet maintenance unit, in conducting maintenance and repair activities, that is still part of the operation cycle that qualifies utilisation.

And docking and essential defect periods, where you inspect the ship and its defects, where a ship or submarine docks and the dock yard carries underwater maintenance now. Let us pause there. That is where the critics come in and say, they have seen some of these submarines and frigates at the dock yard, static.

Now, the operational cycles qualifies to this Commission that this does not mean that there is no utilisation. I think that speaks for it, Commissioners. I am not going to rehash it. At the end of the operation cycle, a vessel decommissions and is handed over to the dock yard for the refit on completion, of which, the vessel will once again enter the operation cycle.

They have seen these capabilities at the dock yards and they say they are not being utilised. I am addressing the context in which the critics look at the utilisation, in this context, Commissioners. During a

refit, major repairs engine, I beg your pardon. During the refit, major repairs, engineering changes and half life extensions upgrades are normally carried out, whereas the self maintenance period could be as short as a week.

Of course, for that week that capability is standing on the dock yard. A refit could be as long as two years. For those two years, it could also be in the dock yard. The SARC process broken down into the following, Chair, we have heard about this. We are not going to repeat it.

The last aspect deals with force preparation, which is also a stage on its own, where the Chief of the Joint Operation, being responsible for the conduct of operations and the conduct of joint and multi-national exercises. That is where one could see the real manifestation of utilisation.

In that case, the armed forces have been given to the Chief of Joint Operations. You can see them in motion. Perhaps that is where the critics start to appreciate utilisation. But, look at where we come from, esteemed Commissioners, from force preparation, force readiness, force employment, up until the Chief of Joint Operations, being given the equipments and the forces.

In this regard, it should be noted that the Department of Defence annual business plan orders a number of vessels that the Navy is to maintain, in terms of operational cycle and what the readiness levels are. You cannot give them all, in other words.

The defence annual business plan informs which ones would be operational, which ones are to be maintained, which one will go through

the cycle. The determination is both the function of requirement and availability of funds.

Now, we start to deal with the analysis of evidence led, in respect of various witnesses. I wish I could underwhelm you here. You have heard these testimonies. I will try to be quick and put my foot on the pedal. The Air Force, the Air Force's first witness was Brigadier General Pieter Daniel Burger.

I am not going to take you through each and everything that he says or that we have summarised. Paragraph 10.2.1, page 20, the evidence of Brigadier General Pieter Daniel Burger talks to the utilisation of the light utility helicopter, LUH Augusta. In brief, General Burger testified as follows.

Please go to page 21, 10.2.1.4. The function of the LUH is divided into two roles. That is primary role and secondary role. Considering the role of the LUH, is to play in South Africa and the region as a whole. The majority of the utilisation of the helicopter is within the secondary role.

The primary role of the LUH is to assist the South African National Defence Force to prepare itself, in order to deter any external hostilities. The secondary role involves the following, supporting the Army, during times of conflict, participating in peace support, peace keeping and enforcement operations. This we see all the times here.

I am not testifying. The navy officers did mention that. If you look at the newspapers and television, that becomes stubborn before all of us that there is always participation in peace support, peace keeping and

enforcing operations.

Humanitarian role both day and night, during peace times. The news, the tv's, to demonstrate this amply. You have heard what the naval officers have said this, Commissioners. Peace time also includes tasks, such as rescues from inhospitable terrain and casualty evacuations in virtually all weather conditions. We spelt weather wrongly.

You have heard this testimony. Page 22, providing assistance and services to government departments in accomplishing their tasks and commissions. LUH provides the following services in assistance to the government departments. I am not going to take you through all of them. They are standing before you, Commissioners, a, b, c, d, e.

Supporting the South African Police Services with rescue missions. Supporting the South African Police Services in crime prevention operations, in order to reduce the local crime rate. Supporting the South African Police Services in maintenance of internal stability. Supporting the Department of Foreign Affairs.

Assisting both local and foreign government departments. The LUH is also utilised in respect of border patrols. The LUH managed to perform the following exercises. You have heard them. You have heard the officers talking about these exercises.

There are also operations amongst page 23, Commissioners, paragraph 10.2.1.6.2 operations. Let us conclude, in 10.2.1.7 on page 24. The LUH's have flown 18 000 hours, since entering service in 2005. The hours flown are more than the hours the Air Force was expecting, considering the fact that the initial plan was to fly 200 hours per air

frame per year.

CHAIRPERSON: I am sorry, Advocate Lebala, it is just on that point. My calculations tell me that the LUH have not flown the expected hours. This evidence has clearly emerged from the testimony of Brigadier Burger.

Because according to their calculation, they are expecting that the LUH should fly 60 000 hours or 40 000 hours for the period that they were delivered, until they gave evidence. From their evidence it emerged that the LUH flew only about 40 percent of the projected hours.

And I think, they went on and then to give reasons why and that that happened. Unless, if I misunderstood that evidence.

ADV LEBALA: Yes. My colleague, I will come to it. My colleague nods and says you are correct. If you want us to take you, directly you to that testimony …[intervene]

CHAIRPERSON: I think, look at the evidence of General Burger and General Pelser. In fact, General Pelser went on to a point of giving reasons why those LUH's did not fly the expected or the projected hours. So, it will not be correct to say that you know, they flew the projected hours. I just thought that, maybe I that would bring that to your attention.

ADV LEBALA: Chair, nonetheless, it does not even dilute the interpretation of operational cycle and the utilisation, in the context of the way the officers define it, contextualise and legitimise it. You are confirming what you have heard.

The issue of the figures, it is like looking at art. You would appreciate

them from different angles. I do not want us to delve into this. But, thanks for rehashing it. My colleague actually, has flagged it. We have seen it. May we proceed?

We deal with Brigadier General John William Bayne's testimony. General Bayne's testimony talks to utilisation in respect of Lead-in fighter training, LIFT, Hawk and advanced light fighter aircraft, Alpha Gripen. General Bayne testified as follows.

Page 25, the Gripen, in brief, the Gripen is a, I beg your pardon. Chair, we will definitely deal with this aspect that we have highlighted, just to integrate it with what we have just submitted, in as far as the figures and the numbers are concerned.

But, we repeat, it just does not dilute utilisation, in the context of how the army officers and the navy officers look at it. It is an operation cycle. It goes through stages. You give some of this equipment. You do not give some.

You withhold some. You make some to function. You can put some in storage. Some, you put in a dock. Some fly, some not fly. You know, we have heard testimony of General Shoke, if I am not mistaken, even Admiral Green, even Admiral Higgs and Admiral Schoultz.

They say, you know, you operate this equipment like insurance. Some of them you reserve for the ultimate end, because you do not know when the foreign hostile would assail and attack South Africa. So, some will be stored and will not be used.

Some will be used for a few hours. It could be, they could be flown for 18 hours, instead of 60, 18 000 hours instead of 60 000 hours. But,

that does not mean they do not satisfy the operation cycle that qualifies utilisation. We will deal wit this aspect, if need be, Commissioners.

Brigadier General John William Bayne testified as follows. Page 25, the Gripen, in brief, the Gripen is a supersonic single engine and dual and single seat, multirole combat aircraft. Able to perform in defence surfice attack, which includes both air to ground and air to sea attack and as well as surveillance, which is both reconnaissance and lateral, the laterally gathering of information in the same mission.

It is globally inter-operable. Now, this informs the worth of having to acquire this capability, Commissioners. The Gripen has capabilities, such as defensive and offensive defence features and equipment, such as airborne radar, air to air missiles, helmet mounted displays, HMD, stand off and precision guided munitions, None guided munitions canon, civilians and target imports and anti-shipping missiles fitting for. The South African version of the Gripen was the first to receive a helmet mounted display. Once again, this explains the importance of having acquire this capability.

The Hawk, Hawk is a trans-sonic, single-engine dual seat aircraft, able to perform all the required fighter training missions. Hawk is utilised and shows safe and seamless fighter training, bridging the gap between the Pilatus PC7 and the Gripen advanced line fighter aircraft.

It is also utilised for certain collateral SANDF support. Commissioners, this makes one to [indistinct] why we have to acquire these capabilities. The South African Gripen system consists of 26 aircraft, 17 single seat and nine dual seats.

The Hawk system consists of 24 seat aircraft. The utilisation of Hawk and Gripen this is, this must be underscored. The utilisation of Hawk and Gripen should be measured against South African Air Force staff requirements, which finds credence in the Constitution of the Republic of South Africa, the white paper on defence and defence review of 1998.

We will askew and resist from overwhelming you with the defence review, the white paper and the Constitution, as to why the utilisation of the Hawk and Gripen is so critical. South African Air Force staff requirements gives the best estimated average flying hours for the aircrafts per year and also serves as a base line, to determine the cost and the funding needed, for each aircraft.

We will still show you, the disparities and the distinctiveness, between what we started with, in as far as the testimony of Mr David Maynier, against what the air force officers say, in as far as the flying times and the utilisation of the Gripen and the Hawk are concerned.

The Hawk and Gripen have met all the requirements, set out in the SA staff requirement. Hawk aircrafts have flown over 10 000 major, accident free hours, since 2005. The Gripen aircraft have flown 3 000, 5 000, 3 500 since 2008.

Now, what is remarkable, Commissioners, is this testimony has never been refuted and controverted, except in what the critics have said and we will demonstrate that even the critics have been corrected by the records and the statistics in, as far as the aircraft officers said, in this context.

These hours include completion of 95 percent of Hawk and 80

percent of the Gripen operational test and evaluation (O,T and E) bound to their units for providing the aircraft with air and ground cruise. The main O, T and E for both times, will be completed, before final system and hand over.

What are critical are the percentages of the completions of the operational testing evaluation. The O, T and E are explained as operational test and evaluation, Commissioners. Hawk and Gripen have taken part in many South African Air Force, joint SANDF and multi-national exercises in and outside the Republic of South Africa and specifically SANDF operations since 2005.

The two flight test instrument, FTI aircraft have been utilised for various test programmes and clearances to the South African Air Force test flight and development centre, MTFBC, in Overberg. Operations taken by the Gripen and Hawks include, inter alia, we are not going to go through them, Chair, Commissioner Musi.

They are standing before you at page 28, the Hawk. The operations of the Hawk are also standing before you. The operations of the Gripen aircraft are in 11.1.5 of the Hawk, 11.1.12. Page 29, the Hawk aircrafts were involved in the following exercises.

11.1.14, the ratio of the aircraft utilised so far is, now, these exercises and operations obviously, equate to combat. Utilisation is concrete, Commissioners. It is standing before you. The ratio of the Hawk utilised …[intervene]

COMMISSIONER MUSI: Can I quickly interrupt you? There is one word that features here, which I do not understand. It is the name of the

project, I think. On page 27 of your submissions, 10.1.10 a, there is a word there, which signifies a project that took place during 2010. It relates to the World Cup, the World Cup, soccer cup. What is that word? Is it kgwele or what is it? What is it?

ADV LEBALA: I am sure it is a word in my mother tongue, Commissioner Musi. Kgwele, it is literally interpreted, kgwele, it is a ball, a soccer ball, kgwele. That is why you say [indistinct], a football.

COMMISSIONER MUSI: But, if …[intervene]

ADV LEBALA: If …[intervene]

COMMISSIONER MUSI: But, if it is correctly spelt, there must be g after the k. It is spelt kgwele, which is football.

ADV LEBALA: That is how we spell it, Commissioner Musi.

COMMISSIONER MUSI: Well, you must correct that.

ADV LEBALA: Thank you.

COMMISSIONER MUSI: The correct spelling is k g w e, kgwele, football.

ADV LEBALA: Thank you, Commissioner Musi, we will, but it is written s k e e l e. But, it is, you are right. It is k g w e l e. In my mother tongue, kg is very critical. I see, in other tongues, vh is very critical. Thank you, Commissioner Musi. We will be correct it.

We are in page 29, talking about ratio for the aircraft, utilised so far. We are talking about the Hawk aircrafts. Hawk aircrafts at 95 percent force preparation and five percent force employment. That is the operational cycle I again, the phases of utilisation.

The Gripen at 94 percent force preparation and 6 percent force

employment, the operation cycle, the stages of utilisation. The bulk of the five percent and the six percent for employment was during the World Cup. That speaks for itself, Commissioners.

In paragraph 12, we are summarising now, what the air force officers said. General Bayne concludes, by stating the following in his statement. Clearly the Hawk, that is on page 30, Commissioners. Clearly the Hawk and Gripen systems have been well utilised, since delivery in line with the current security involvement.

Should the security involvement change to one of conflict, then the utilisation of the systems will change, as and when required to defend and protect the Republic in line with the Contitutional mandate. I did mention as I was qualifying, in the earlier pages about the summary of this capability study.

It makes one to salivate, of course it makes one to appreciate that the Constitutional mandate, expected from the South African National Defence force would be met, by these capabilities, in line with their operation cycle that qualifies the utilisation.

Now, we are dealing with the navy, unless there are questions. You have seen operational cycle of the Air Force, that these capabilities, the Hawk and the Gripen systems had been well utilised, since delivery in line with the current security environment.

Of course, we have seen them being utilised in different areas from peace missions, stability inside the country, assisting, demonstrating the internal security. If need be, I have not heard of any instance, where we flexed our biceps that is, that we could use force in under attack, where

these capabilities are being utilised, specifically the Gripen and the Hawk.

But, that does not mean that they have not been utilised. I have requested Ngobesa to verify it with me. We checked as to whether the DRC in Central Africa, in Lesotho, where they had been utilised. We could not find an answer, Commissioners.

But, be that as it may, Brigadier General Bayne, I beg your pardon, General Bayne has summarised it so well, where they are being utilised in line with the operational cycle. Now, let us deal with the navy. We have already summarised what Rear Admiral Schoultz said.

We are looking at paragraph 13, page 30, unless there are questions, Commissioners, before we should. We are actually left with a few pages, under utilisation and then we will be dealing with the debates. We will invite you to debate with us, if need be about the inferences that we should be drawing.

Whether the evidence, tendered by the officers of the SANDF rebuts the allegations of the public and the critics that the equipment, procured by the SANDF are under utilised or not utilised. Now, that is where we will appreciate, why we started the way we started, Commissioners. Unless there are questions, Commissioners, we are going to the navy.

COMMISSIONER MUSI: Can I, can I just ask you this? I see that, as far as the utilisation of the aircraft, the Hawks and the Gripen, they seem to be confined, to exercises and things like parades and things like pass by. They have not been involved in any conflict situation, at all.

ADV LEBALA: I think the officers could qualify it. But, I have read,

without misleading the Commission that, is it in Central Africa, at one time the special force, which was there, was under attack and the Gripens were not sent in.

I learned that when the Gripens came, they managed to repel that advancing force that was assailing them. I have got to be careful not to testify. This is a peace of testimony that has not been led. I am posing myself a question why.

But, I have seen them, Commissioner Musi. I am not a witness, before this Commission. I have seen them, accompanying some of our, on the news, some of our submarines, before they go underground. I have seen them at the Presidential inauguration.

But, whether we were engaged in combat, I do not know. I do not have detailed information. I have got to be careful not to mislead the Commission.

COMMISSIONER MUSI: Yes. We must confine ourselves with the evidence led, before the Commission. I am saying this, on the basis of what you have set out in your submissions. Does that not justify the criticism that we did not need these, because the primary function of the Gripen jet fighter is to fight?

It is to be engaged in warfare. It looks like they have not been engaged in any conflict situation whatsoever. What would be the answer to that, if that criticism is raised?

ADV LEBALA: Chair, but we have heard the, Commissioner Musi, we have heard the testimony that their function is not only to be supportive, during only the times of conflict. There have been instances, where they

participate in support, peace keeping and enforcement of operations. For instance, when you see them flying, take the Presidential inauguration, they symbolise, not only the might of South Africa, but the Constitutional mandate on the, of the South African National Defence Force.

Of course, they participated also, in humanitarian role. They do it all the time. The officers testified about that. I think, the modern war, if I am not mistaken, it is not for literally in physical combat.

Sometimes, even flexing your muscles, I remember the naval officers mentioned this. They said the fact that it is known what South Africa has them, on its own, it is deterrence and assists in projecting our country, not to be taken for granted and no foreign hostile power would try to attack us, knowing that we have these capabilities.

What does that mean, Commissioner Musi? You do not have look at it, by interpreting from the critics' point of view that you utilise them, only when you go to war, during times of conflict. I mean, the participation is all inclusive. Look at these pages of operational cycle themselves.

They explain to the Commission and to all in sundry. There are periods and different stages, when we use them. I understand operational cycle not being static. It is inclusive. The fact that you are using them, in peace times, you could be supporting the Department of Foreign Affairs, is adequate.

The symbolism of them, flying over our skies, if there is an important function. The fact that we also participate in joint trainings, signifies that, you know, they are being utilised. Now, combat, I do not

understand it, to mean that we use casualties, or there should be casualties.

There is combat, even during training, Commissioner Musi. And the officers did mention that they are being utilised for those purposes. Many years ago in Luatle we, I think it was all over the newspapers, if I am not mistaken, there were casualties, which started which enlightening one and bring fresh awareness that even during those exercised, there is ammunition and capabilities are being utilised, in line with the operational cycle phase, that defines, and qualify utilisation.

COMMISSIONER MUSI: I am happy to leave that point, where you say deterrence is quite important and I think the witnesses were emphasising each of deterrence. In order to maintain that deterrence you ought to have them ready. So, preparation, it is also important. In that context, I would understand the situation.

ADV LEBALA: Thank you, Commissioner Musi. May we proceed to the navy? The navy, it is easy, because we dealt with that testimony, myself and Ngobesa had to look at every hair in the nostril of the testimony of the air force officers.

We assure you, it was not free from difficulties. But, we did our best to summarised. We will still come back to it, when we deal with rebuttal, to demonstrate to you that whether the evidence, tendered by the officers of the SANDF, rebuts allegations of the public and the critics, whether this equipment, procured by the SANDF are under utilised or utilised.

We are still coming back, in summarising those submissions. Now,

page 30, the Navy. You heard the testimony of Rear Admiral Philip Schoultz. We wanted to summarise it, better than we did in these pages and we could not succeed.

But, we will do our best to even summarise it further. You know, they say if you generalise you omit. We have got to be careful, not to do that. Rear Admiral Schoultz's testimony, utilisation of frigates and submarines has been addressed. Rear Admiral Schoultz testified as follows, page 31, paragraph 13.3.

The first delivery of the four Meko A200 frigates was made, during 2006. You will remember them, Commissioners, Isandlwana, Spioenkop, Amatola and SOS Mendi. The last delivery was during September 2004. All the vessels were handed over to the South African navy, by the 20th of March 2007.

The submarines, on the other hand, were acquired under project, the project called Wills. The first delivery of the submarines was during April 2006. The last delivery was in May 2008. You will remember, we refresh you, there were three, Queen Modjadji, Charlotte Maxeke and Manthatisi.

Let us start with the frigates utilisation. Paragraph 14, during 2002, the South African Navy recognised that the frigate utilisation, as defined in the naval staff requirement, seek 6-80 or stroke 80, would not be possible, under the South African Navy's then budget allocation.

This is history. But, it will make you, to appreciate the subsequent and the following paragraph, paragraphs. As a result, the new operation profile was proposed for basic sparing, we know what basic sparing

means and the manner in which the frigates should be utilised in future.

This new operation profile reduced a number of days, reduced the sea days per annum and reduced the total mission duration for the four ships, to 131 days per annum. It is still in line with the operation cycle. This reduction does not mean that they were not being utilised.

In essence, the frigates with an annual day cycle, providing for a 27 percent for ops available, 21 percent sea days and nine percent mission deployment. You were overwhelmed with this testimony, Commissioners. I remember, it was also tedious to bring it before you.

Days ops available are days when the ship is out of maintenance and its post maintenance certification is complete and is available for operations, until its next maintenance period. It is standing, it might be standing on the dock, when it does that.

That is where the critics come in that some of them are not being utilised, because they are standing on the dock. Some are even being given airtime? 14.2 on page 472, line 7 to 15 of the record, Admiral Schoultz told the Commission that the project indicator, operational profile means that one must be able to maintain the ship and prepare the ship for a certain number of days of the year.

The ship will be available for utilisation. A certain number of days per year. you must be able to utilise the ship at the sea and you must be able to send the ship on operations for a certain number of days. This qualifies utilisation. Frigates and submarines are managed within an operation cycle which provides for both operational availability, utilisation and maintenance periods. Operational cycle allows for

periods (page 33). When the ship is operationally available during which it can be utilised but also for a period when the ship is not operational available, when it is in a maintenance period it could be standing in the dock. That is where the critics come in and say some of them are static. They are not moving. They are not being engaged and they are not being utilised.

And the evidence controverts that, as you can see Commissioners.

14.3.1 Since their arrival frigates spent 1 932 days operationally deployed, engaged in the conduct of joint or multinational exercises or engaged in other ordered commitments. I have to be careful not to testify. I have seen them going towards West Africa when we were invited by the region to come and assist, because it was said that the pirates were about to move from our east to west coast. I have to be careful not testify.

CHAIRPERSON: I am sorry, Advocate Lebala are you prepared to take the oath? [Laughing]

ADV LEBALA: Hence I mention, I am just anticipating the question.

CHAIRPERSON: Okay. Thank you.

ADV LEBALA: Thank you. 16.5% of 1 932 days was in respect of mission employment. Frigates were involved in 24 operations. 25 joint and multinational exercises and 5 other ordered commitments. The operations ranged from goodwill visits to countries such as Brazil; Nigeria; China; India; Vietnam; Singapore; Tanzania; Mauritius; East and West Coast Patrols. I have just mentioned the West Coast Patrol for the Commissioners.

Let me refresh you. Admiral Higgs and Admiral Schoultz mentioned the East Coast Patrol where the pirates were being repelled. They also mentioned why to the South, we do not have pirates, because they know that the South African Navy will flex its muscles and biceps, by utilising these capabilities. The operations ranged from (we have mentioned the goodwills) anti-piracy patrols in Mozambique. You will remember that they mention them that it was just a patrol not that the pirates were coming towards our region. Rescuing of injured sailors of Tristan Da Cunha, safeguarding of the 2010 Soccer World Cup, drug runner interdiction and the escort of a vessel carrying nuclear waste.

Exercises conducted by frigates ranged from simple procedural exercises to complex tasks force tactical exercises. The exercises performed by the South African Navy involved the following countries: Argentina; Brazil; Frence; China; India; Mozambique; Namibia and Uruguay as well as with NATO spending Maritime Group 1. The exercises were conducted off the South African Coast; South American Coast and off La Reunion in the Indian Ocean.

That is the frigates, unless there are questions? What is clear they go through operation cycles. They have spend 1 932 days operationally and deployed. They do exercises. They have repelled piracy. They have cleared our region from pirates. They even cleared the upper part of the east part of our coast line in North Africa from pirates. They have been invited in the west. Unless there are questions Commissioners we are going to separate authorisation.

Page 34: Submarines have spent 807 days operational deployed and

engaged also in the conduct of joint Multi National Exercises or engaged in the initial delivery trials and training. Submarines have conducted 60 operations which have included East and West Coast patrols to anti-piracy patrols in the Mozambican Channel. The issue of the submarines are specific. Come to think of it. I am correcting myself. The naval officers said it is these submarines themselves that actually were repelling the pirates. All be it, the frigates would assist two patrol Marion Island, one of which was aborted due to a technical problem and participated in safe guarding Soccer World Cup 2010. We have heard testimony that when the American Vice President was here, our frigates and submarines had to be alert. You can image how much you are going to [indistinct] relationships, Commissioners.

Submarines have also participated in 2006 Joint Multi National Exercises with Navy's of Argentina; Brazil; Germany; India; Namibia; United States of America and Uruguay, as well as NATO Standing Martine Group 1. Most of the exercises were conducted off the South African Coast.

14.6. Considering what that utilisation involves force utilisation it should be noted that the South African Navy has trained some 4 040 personnel; 647 support personnel, 1 191 technical personnel and 2 204 combat personnel. Now remember utilisation also involves force utilisation. Not only force operations, force deployment. Also force utilisation. Rear Admiral Green comes again in paragraph 15. On 15 September 2014 the Commission requested the Department of Defence to provide details of the projected number of days it was anticipated that

frigates and the submarines would spend at sea.

On 24 November 2014 Admiral Green gave the following evidence.

15.2.1 The projected number of days it was anticipated the frigates and the submarines would spend at sea was conducted in terms of the Department of Defence's planning process, which is known as a Strategic Direction Process. The Strategic Direction Process consists of four activities. They are the activities that demonstrate utilisation Commissioners.

Page 36.

I am interested in 15.3.1 that you will find very helpful. Force preparation requires the Navy to ensure that the vessels are prepared adequately for force employment. The Navy should also know what it intends to do with the vessels and how many hours it would normally take for the vessel to be at sea based on empirical data. There is even accountability Commissioners, because empirical data is needed. Force employment at the other hand is directed by the Government. The Department of Defence is using hours instead of days because of the instruction of the Auditor General that the performance of the frigates and submarines should be indicated in hours and not in days.

Look at the transparency and the accountability. A separate entity and organ of state monitors how hours instead of day have to be utilised to satisfy utilisation. When it comes to planning the hours, hours in respect of force preparations are a more manageable figure than hours in respect of force employment, because force employment is directed on the need of Government at that time. The hours are then summated

and then put into the Navy plan for the year. I am not going to take you through the hours. They are standing through you.

Look at paragraph 15.6.1 to 15.7.8, Commissioners. It means from page 37 to page 38. In line with respecting this independent entity of our Government the Auditor General. This accountability of the hours, projected spent at sea by the frigates, since their delivery. We need not emphasise that page 39 at the top. In the force employment that was planned for the year, if the force employment that was planned for the year does not materialise in other words, the need for the ship to proceed on a particular mission or operation is no longer required, then that ship will not go to sea for that reason. The hours would be reduced. There is even accountability, Commissioners.

Admiral Green concluded his testimony by stating as follows: So when you hear the critics and they discussed that the ships have not been at sea or make the intimations that there have been some, some problems or how the turn, or how they turn it that the vessels are not capable of going to sea. That is not true. It is simply that the requirement for them to go to sea no longer exist. It is simply that the requirement for them to go to sea no longer exist. They do not go if there is no need for them to go to see Commissioners.

Now here comes the important aspect, paragraph 18. Whether the evidence tendered by the officers of the South African National Defence Force rebuts the allegations of the public and the critics that the equipment procured by the SANDF are underutilised or not utilised at all.

Commissioners here we have to just summarise. You have heard how the Air Force mentioned how the Hawk and the Gripen are being flown, the hours that they have been flown. At the top. Allegations of underutilisation in respect of Hawk and Gripen Aircrafts were raised by David Maynier.

According Maynier, the Hawks and Gripen are underutilised for the following reasons. Hawks have flown 2 000 per year instead of 4 000 hours during 2009 to 2010 as stated by General Gegiano. The Minister of Defence and Military Veterans told the Portfolio Committee on Defence and the Military Veterans of the South African Air Force has placed 12 Gripen Fighter aircrafts in long term storage. General Bayne, on the other hand, has tendered the following evidence rebutting allegations of underutilisation in respect of Hawks and Gripen. General Bayne adumbrated in his testimony as follows:

The utilisation of Hawk and Gripen should be measured against South African Air Force staff requirement which is underpinned on the Constitution of the Republic of South Africa, the White Paper on Defence and the Defence Review of 1998. He further says: The SAA staff requirement gives the best estimated average flying hours of the aircraft per year. It also gives the baseline to determine the cost and the funding needed for each craft.

Hawks and Gripen have met all the requirements set out in the SAF staff requirement. Hawk aircrafts are flown over 10 000 mayor accident free hours since 2005. Gripen Aircrafts are flown 3 500 hours since 2008. South African Air Force has adequate Hawk pilots to fit the

Gripen. Now, this testimony is not being controverted and the general was not fully cross-examined to refute what he says.

Paragraph 20. With regard to the allegation that 12 Gripen had been placed in long-term storage General Bayne testified as follows: During the first quarter of 2013 the director combat system investigated the possibility of inhabiting 12 Gripen aircraft due to the low allocated flying hours in the 2013/14 financial year.

During the engagement with the original equipment manufacturer SAAB what we came to know as OEM a more effective and less costly process was agreed too, reducing the number of maintenance activities required for storage and making the aircraft readily available. You will remember that we even asked Mr Maynier, as to whether is it not the pertinent style all over the world that some of these aircrafts are put in storage. He did not dispute that, Commissioners.

20.3 The director of combat systems and SAAB agreed on embarking on a rotational preventative maintenance, what we came to be know as RPM programme to better retain fleet integrity. In terms of rotational preventative maintenance, each aircraft is flown at least every 60 days. Director combat system also placed the aircrafts that were identified for rotational preventative maintenance in turns inside revertments to prevent corrosion. External damage to the aircraft to strictly control the environment in which the aircrafts are secured. We remember we asked Mr Maynier that is it not what happens all over the world. We were specific that, to him in saying is it not what the Americans do.

All 26 Gripen Aircrafts will be flown and managed in accordance with the rotational preventative maintenance. On page 1109 of the record, line 126 General Bayne told the Commission that as a result of embarking on the rotational preventative maintenance there are no Gripen Aircraft that are placed in long terms storage, unless there are questions. We are going to the navy. We are dealing with the rebuttal.

Topic is whether the SANDF rebuts allegations of the public and the critics of the equipments procured are underutilised or not utilised at all. The Navy the frigates and the sub marines, page 43:

Admiral Schoultz tendered the following evidence to refute allegations of non utilisation of frigates and submarines. He was specific in dealing with SOS Manthatisi. He says it has been utilised, the critics say it has been utilised less than the other two submarines. That is the criticism. Admiral Schoultz denied that the SAS Manthatisi is utilised lesser than the other two submarines. Admiral Schoultz told the Commission that the Navy operates two or three submarines within the operating cycle. SAS Manthatisi is not utilised currently because it is undergoing a refit. You heard that testimony, Commissioner. The Amatola, the frigate is not utilised because it has been fitted with a defected engine. That is what the critics say.

The navy has purchased a replacement engine with would be installed during the ship's refit. Amatola can operate with one engine considering the fact that the frigates procured by South African Navy are fitted with three engines. This allows the frigates to use the other two engines whilst one of the engines is inoperable. You will remember the

testimony when Admiral Schoultz was showing the difference between the engine and the propeller. He summarised and simplified it so well when he was busy with this piece of testimony. Amatola has done approximately 200 days deployment in the Mozambique Channels whilst using one channel. So I am right. Remember I said that our frigates and both submarines do go towards the upper east of our coast line.

The critics say submarines are inoperable because of mechanical fault relating to faulty batteries fitted into them. The batteries of the submarines have a 7 to 8 year lifespan. Therefore submarines undergo refit every 8 years to replace the batteries. The South African Navy discovered that there was a build-up of gas in the batteries and there, I remember Admiral Schoultz took you into his confidence. At one time he considered to put this testimony on affidavit, but we relented and made it open orally for the Commission as this was found to be confidential. The gas was in the form of hydrogen.

The matter is being address after being reported to the original manufacturer. In any event whether the defect in the battery had been identified or not all the batteries have reached their lifespan and must be replaced. They explained that all these items like any other manufactured item, do have lifespan.

Page 45: Admiral Green has tendered the following evidence to refute the allegation that the non utilisation of frigates and submarine is due to lack of funding, you remember. And some of the critics said that we do not have funds to operate these capabilities. The usuage of the equipment is done in terms of the Department of Defence planning

process which is known as a Strategic Direction Process. The Strategic Direction Process is guided by force deployment development, force preparation and force employment operational cycle, Commissioners.

Force employment requests the Navy to ensure that the equipment are prepared adequately. In other words force employment is directed by the Government. Assets have to be utilised in a life cycle that ensures that the minimum number that is required for force employment is available in terms of being prepared as required by the relevant doctrine.

Force preparation on the other hand gives the Navy a direction as to how many hours will the equipment spend at sea, including how long it would take the Navy to prepare forces in line of the Auditor's General Directive. The Strategic Direction Process assists the Navy to determine how much funding would be needed by the Navy for the particular year for the usage of the equipment. If the force employment, page 46, paragraph 23.5, if the force employment that was planned for the particular year has not materialise, in other words, the need for a ship to proceed on the particular mission or operation (there is a typographical error) Commissioners, it is no longer required.

Then the ship will not go to sea for that reason. Next paragraph, what inference if any should be drawn by the Commission in the light of evidence tendered by the officers of the SANDF? This adverse, the evidence tendered by David Maynier and as well as the criticism raised by the public with regard to the underutilisation or no criticism of arms and equipment. It is manifest by the evidence tendered by the officers

of the SANDF demonstrate that the equipment procured by the SANDF are utilised adequately. This is so as the evidence was never refuted by any person.

It was no controverting evidence brought to the fore through cross-examination. No evidence was tendered to dispute Navy officers evidence except for David Maynier's testimony. David Maynier attempted to dispute the evidence of General Bayne by relying on Annexure DM1 to DM4. Remember we even hackled with you, Commissioners, to bring this testimony before the Commission because you wanted to subject it to scrutiny as to whether is he qualified to talk it or it is relevant.

These annexures deal with a reply to a Parliamentary question. The DOD's Annual Report 2013/2012. The DOD's response portfolio committee on defence and the Auditor General Management Report on the regulatory audit and the performance information of the Department of Defence for the year ended 31 March 2009. In our considered view David Maynier failed to demonstrate that Hawks and Gripen aircrafts are underutilised. This view finds credence on the following considerations.

34.2.1 Although he informed the Commission that he can talk to the allegations of underutilisation of the Hawks, when he was asked by the Commission's chairperson as to whether his personal knowledge of the information contained in annexure DM4, the auditor general management report of the Regulatory Audit and the performance information of the Department of Defence for the year ended 31 March 2009 to 30 July 2009 he responded by stating:

The reason for him to bring the information contained in annexure DM4 the attention of the Commission was that he intended to simply flag it with the hope to assist the Commission. Unfortunately it is not what we have received during our consultation with him. You are aware Commissioners that we did our best to try and bring each and every document. Each and every evidence that Mr David Maynier had.

But, we were taken aback when he somersaulted that he just wanted to flag the Commissions. We spent time with him, persuading him that he should bold to bring whatever testimony he has before the Commission. David Maynier told the Commission that annexure DM1 (a reply by the Minister of Defence and Military Veterans to a parliamentary question 288E was merely brought to the attention of the Commission to demonstrate that there are two versions before the Commission.)

The first version is the Ministers question which is stated in annexure DM1. The Minister states that: The South African Air Force has 12 Gripen Fighter Aircraft placed in long term storage. The second version is that that of General Bayne. General Bayne told the Commission that during the first [indistinct] investigated the possibility… General Bayne simply says that they are being utilised irrespective.

On page 7894 of the record, line 5 to 9. David Maynier told the Commission that the version of General Bayne is different from the one of the Minister of Defence in that General Bayne does not consider the aircrafts were placed in long term storage. That is the basis upon which he talked about the versions.

David Maynier also told the Commission that other than bringing the

two versions to the attention of the Commission he cannot take the Commission any further because he cannot adjudicate between the two versions. However it is up to the Commission to make its own findings without exclusively being influenced by our reasoning in this regard.

Commissioners if there is one witness who we pushed and pushed, whose testimony, we did our best by backdoor or frontdoor, sideways, up down to put it before you was David Maynier's. The record speaks for itself. Conclusion: In the leading case of Julius v The Bishop of Oxford 1885 AC 2014, cited with approval in many South African cases the position is stated as thus.

There may be something in the nature of the thing in power to be done. Something in the object for which it is to be done. Something in the title of the person or persons for whose benefit the power is to be exercised which may couple the power of a duty and make it the duty of the person in whom the power is supposed to exercise that power when called upon to do so.

The leading case resonates the Commission's function to inquire into, to make findings to report on and to make recommendations. We submit that the Commission in discharging its function and have to interpret the word utilisation sensibly. This should be done with due regard to the one hand to the meaning of utilisation by officers from the Navy and Air Force officers and by the public including the critics on the other hand. We submit that grammatical usage is not the only answer, hence we refer to the cardinal rules of interpretations that the esteemed Commissioners have rubbed shoulders with, during their practice years

to the highest court of the offices they occupied. So, we need not have taken you through that.

Even context in our humble submission does not provide an answer. What we simply say is Commissioners. Do not look at the grammar only, because the grammar typological in its totality. Even context do not look at it. Please look at what the critics say without discounting what the officers say. But the Commission is stubborn before, you see, I beg your pardon. The evidence it is standing stubbornly before you. Most of this evidence is not with blemishes Commissioners it is looking into your eyes.

We ask the Commission to have regard to consideration of the language of the rest of all the five terms of reference as set out in the Government Notice 34731 of 4 November 2011. The Commission should also have regard to the matter of the terms of reference. The apparent scopes of the terms of reference. The purpose of the terms of reference and within limits the background of the terms of reference.

You will see in our closing submissions we refer you to page 12 to 13 at paragraph 8.4, pages 12 to 13, paragraph 8.4. You could just flag it and look at that paragraph Commissioners. We refer you in that paragraph to the decision of the Natal Joint Municipal Pension Fund v Endomeni Municipality 2012 (4) SA 493, 19, where Wallace Judge of Appeal mentions the following. This is important for us to close, Commissioners.

The learned Judge of Appeal says, your colleague Chairperson:

In a recent judgment Wallace, J sums up the law on statutory

interpretation in a comprehensive way which renders that necessary to discuss other cases in any detail. He says: The present state of law can be expressed as follows. Interpretation is a process with attributing meaning to the words used in a document that is what they first year students in interpretation of statutes Commissioners. Be it legislation, some other statutory instrument or contract of having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole. That is where we come in Commissioners.

In the light of the document as a whole in the circumstances attended upon it is coming into existence. Please take all the terms of reference holistically. You will appreciate utilisation if you appreciate what underpins the reason why we purchase the equipment. Whatever the nature of the document, considerations must be given to the language used in the light of the ordinary rules of grammar in syntax, purpose of which it is directed and the material known to those responsible for its production. We come in here where more than one meaning is possible are you going to look at the meaning of the officers or the meaning of the critics Commissioners?

Where more than one meaning is possible, its possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or un-businesslike results, or undermines the apparent purpose of the document. Please deal with it businesslike Commissioners. If you find that the critics understanding of utilisation is

businesslike please adopt it. If you find that the Naval officers and the Air Force officers understanding of utilisation is businesslike please adopt it and make sense out of this.

Judges must be alert to and guarded against the temptation to substitute what they regard are reasonable, sensible or businesslike for the words actually used. We trust your discretion on this one. To do so in regard to the statute, statutory instrument is to cross the divide between interpretation and legislation in a contractual context. It is to make a contract for the parties, other than the one the one that they in fact made.

An invertible point of departure is the language of the provision itself read in context and having regard to the purpose of the provision in the background, the preparation and production of the document. I have no doubt that you have heard this opinion many times in your lifetime Justices. I beg your pardon, Commissioners. I do not why this time I am looking at you as judges, I beg your pardon Commissioners.

We have summarised why you need to consider the language of the rest of all the five terms of reference together, you will appreciate utilisation. In this regard paragraph 35.6: The Commission is instructed to consider the words of Wessels, the words of Wessels are echoed by what, I beg your pardon. By Judge Wessels, Wessels, AJA in 1962 Commissioners, have been brought proper complexion in context by Wallace, JA we need not repeat that.

Our concluding remarks are as follows Commissioners. I asked my colleague Ngobesa, how do we conclude it was very difficult, but permit

us to say the following. We would walk away from the Commission with our heads held high, if and only if our submissions are not being contextualised by anyone. We do not wish to live any infamy in the history of our country Commissioners. We want our submissions to remind all in sundry. Remember our futures are secured when our country is strong, of course, military strong, Commissioners, as this has economic and industrial advantages. We are confident that it is not difficult to find a good story from our terms and work we put before this Commission, especially in the area of utilisation of the arms and equipment.

In our considered view the Strategic Defence Procurement Packages intends to define our success as a country and they do so, Commissioners. The Strategic Defence Procurement Packages reminds our country to flex its muscles in the interest of peace within our own borders, stability in our region of SADEC harmony in our continent Africa and global peace. The utilisation of this arms and equipment is clearly a gigantic herculean effort, easily recognisable in South Africa's effort to project its role as a player in the global sphere. Anyone who questions that would insist that we are standing on the sand dunes of the Kalahari Dessert our country plays an important role in global peace in the global sphere.

There is no doubt that the arms and equipment is used not only to benefit our military but it defines the success by our country by the chances we give to others anywhere in the world, especially those who have dreams and determination like us. The canvass is painted with

success stories as to what our military does Commissioners. It is through this arms equipment that our military shines where it can. Finally these closing submissions do not say replace the absolute values and notions of what is right and wrong found in the arms and equipment with the relativistic values of sounding intelligence and arguments; criticism subjecting to scrutiny questioning and questioning.

Equally do not allow the excesses of minor witnesses and flaws of the arms and equipment to obscure the validity of their positive results and successes emanating from the utilisation as set out in the Constitution Act 18 of 1996, the white paper on Defence and the Defence Review.

Let me conclude by saying Commissioners. Many years ago in a village there were two young men who wanted to test the wisdom of the village wise old man. This wise old man always sat on the river banks weaving. I mean he was old and experienced and very wise. These two young men were growing up, permit me to say this, I think the testosterone was kicking in. They said to themselves 'we wonder why our parents and the village everybody respects this wise old man'. They say they said to themselves, let us test him. Let us see how wise he is. But they posed themselves the question, how do we do it. One of them said, oh okay let us grab a locust and walk to it with it and let us put it in our palm and test as to whether he will find out and see whether it is a locust or not. They did it.

They then walked to this wise man who was sitting on the river bed, weaving and they go to him they and say, 'we hear that you are the wisest in the village. Today we will prove that you are not'. He looks at

them puzzled. He says, what is your story and they say that if you can tell us what is our hand then we will say who the wisest man is. Unbeknown to them he already known that what they were having in their palm as to breathe at one time or other, but he was a wise man. Now that locust had to breathe for it to be alive. One of the boys unfortunately released it and by then the village wise man had already seen by the tail that it is a locust. He said to them, it is a locust and they were puzzled. Then they said okay. Let us see whether he would find the answer whether the locust is alive or not. They asked him, 'is it alive or not?' And he said that one I will leave it to you. You can appreciate a piece of art from different angles Commissioners. We could be the young man or we could be the village wise man. Thank you. That is all our submissions.

CHAIRPERSON: Thank you Advocate Lebala. I see it is 12:45. I suggest that we are going to break at 13:30. Advocate Sebeko?

ADV SEBEKO: Chair I would imagine that my colleague and I would need to take some time to move to the where Lebala and Ngobesa are. Perhaps this might be a convenient time to take the lunch adjournment. Break now and we will come back at 13:30 and kick off. Because Ms Sello will then be kicking off with the terms of reference relating to off sets, et cetera.

CHAIRPERSON: Okay. Thank you. Let us come back at 13:30. We will continue with the topic that they are supposed to deal with until we finish. Thank you. We will now adjourn.

COMMISSION ADJOURNS

COMMISSION RESUMES

CHAIRPERSON: Thank you. Adv Sibeko.

ADV SIBEKO: Thank you, Chair and Commissioner Musi. Following on the approach that was initially adopted, with regard to evidence leaders tendering their submissions on the bases of the sequential appearance of the terms of reference, Ms Sello will at this point kick off with the terms of reference, paragraph 1.3 and 1.4.

ADV SELLO ADDRESSES COMMISSION: Thank you, Chair, Commissioner Musi. In fact, I will be dealing with 1.4, which relates to the Industrial Participation, and that appears in our submissions from page 45 of the submissions. Thank you, Chair. At page 45 we have quoted from the terms of reference.

CHAIRPERSON: I could not hear your first few words.

ADV SELLO: I do apologise, Chair. I was saying, Chair, that at this juncture I will deal with Terms of Reference 1.4, which relates to Industrial Participation, or the offsets as they are described in the Terms of Reference, and that we deal with from page 45 of our submissions. I do not know if the Chair and Commissioner Musi have located the page?

At paragraph 92 we quote directly from the Terms of Reference, and the Commission is enjoined to inquire, according to 1.4, the Terms of Reference, into whether the offsets anticipated to flow from the SDPP have materialised at all, and if so, the extent to which they have so materialised, and if not, the steps that ought to be taken to realise them.

At the outset it is clear from 1.4 that this is a purely factual inquiry,

dependant largely upon those witnesses, or those departments who bore the responsibility for ensuring that the offsets, or the Industrial Participation obligations are discharged by the various obligors. It is common cause that there are two types of Industrial Participation: Defence Industrial Participation, and these were administered by ARMSCOR; and the National Industrial Participation, which were administered by the Department of Trade and Industry.

We will hence forth for convenience just refer to DIP's and NIP's, and those terms relates to the Defence Industrial Participation and the National Industrial Participation respectively. Turning first to the DIP's, the evidence that this Commission heard regarding the DIP's, was given by Mr Barry de Beer and Mr Peter Daniel Burger, both of whom testified on behalf of ARMSCOR.

We deal at page 46 with the basic principle governing Industrial Participation, at what point they are triggered in terms of policy, and the thresholds that were imposed to be achieved in respect of the SDPP. Looking then at the Defence Industrial Participation, there was a 50% stipulated as a threshold for DIP's. The two witnesses dealt extensively with what was required of the obligors in terms of the DIP contracts, and what activities would constitute DIP's for purposes of the SDPP. In conclusion they testified that a total number of 111 companies were included in the DIP business plans, with a combined value of R14.4 billion, and this was in 1999 economic terms.

Mr De Beer's testimony was to the effect that as at the 31st of March 2013, the DIP Obligations were 93.83% complete. As at the 31st

of March 2013, according to this witness, all the obligors had fully complied with their DIP obligations, except for GFC, which at the time stood at 68.28%. We were led to understand by these witnesses that this situation of not fully complying was as a result of a single contractor to the Combat Suite, the MBDA of France, that as of the 31st of March 2013, not discharged its obligations.

The witnesses further testified that in respect of this outstanding obligation by MBDA, the key factor is that this obligation was not critical to the delivery of the equipment in terms of the programs, and that is why it was possible that the equipment could be delivered in full with some of the DIP obligations outstanding. The importance of this is, if we are to remind ourselves, the DIP obligations themselves, were intricately linked to the actual manufacture, design and delivery of the equipment, the equipment that therefore could not be delivered in the absence of the compliance with the DIP obligations.

It is not necessary, Chair and Commissioner Musi, to go through the detail of the evidence of these two witnesses. We submit, it is very clear from the transcripts and the record, and it stands unchallenged and uncontroverted. Our considered opinion is that ARMSCOR has placed sufficient evidence before this Commission to justify a conclusion that the DIP's have been completed at 93.83%, and that the only outstanding one relates to the MBDA. There is no evidence before the Commission to [indistinct] this conclusion, and the evidence that has been tendered by the witnesses, we would say is for the supporting of this conclusion.

That being the case, referring back then to the Terms of Reference 1.4, we would conclude that as far as the DIP's are concerned, the offsets anticipated to flow from the SDPP have materialised significantly, and we would be comfortable and the Commission concluding that they actually have materialised. I say this because during the course of evidence, the two witnesses gave evidence to the effect that ARMSCOR is in continued discussions and negotiations with MBDA, and finalising proposals of what steps MBDA can take in order to meet the outstanding obligation and therefore the shortfall.

As I said, there was no cross-examination of these witnesses, there was no evidence tendered by any witness post their evidence, or even prior, and at no juncture was their evidence challenged. We conclude therefore, Chair and Commissioner Musi, that their evidence should be accepted without qualification.

That then leaves us with the question of NIP's, the National Industrial Participation that was administered by the DTI. Significant evidence was tendered by more than six witnesses by the DTI. There is a lot to extract from the transcripts, but we have confined ourselves for purposes of these submissions to answering the questions that are posed by 1.4 of the Terms of Reference.

At page 48 we deal with the NIP's, and we point out that all the witnesses testified that the NIP's are located within the nine objectives of the Policy Objectives of the DTI. Now, what the witnesses have testified to is the DTI's Programme of NIP's, or police of NIP's, identifies

nine main areas in terms of which the DTI assesses or gauges delivery on DIP's. During the process of negotiation, the IONT considered these nine criteria, and for various reasons, but more particularly for ease of implementation, management and monitoring.

The IONT was of the view that the NIP's as it relates to the SDPP's, should be assessed on only three of the criteria, and these related to investments, exports and local sales. The effect of this view was that bidders would not be eligible for any credits, even if they attained the other six of the nine criteria that have been excluded.

From the evidence of the witnesses, we come to understand that there was a lengthy negotiation on this aspect, and the obligors eventually agreed to the position adopted by the IONT. The IONT introduced further changes to the standard NIP policy, and this was in relation to the awarding, or method of calculation for credits awarded for delivery of NIP's. We know that the police anticipates in certain circumstances the awarding of NIP credits based on a multiplier methodology.

At that point, the IONT suggested that an easier method should be adopted on a ratio of $1 will equate 1 NIP credit. This was done, as we indicate, to simplify the system, but most importantly to ensure that credits are not awarded by some methodology that would result in exaggeration of benefits to the obligors.

According to the evidence of in particular the former minister, Minister Alex Erwin, this issue was debated at length within the DTI, and an agreement was eventually obtained that the system as suggested by

the IONT be adopted. There is evidence before the Commission that the system in fact was adopted, and this is what found reflection in the NIP terms. According to the NIP terms, therefore signed by the Government of the Republic and the obligors, all NIP's would be judged on the bases of three criteria. On attaining the criteria set out, for each US Dollar expended, they would receive one credit. That is what found reflection in the NIP terms, and that is what was signed off together with the Umbrella Agreements.

That this is so, was unequivocally confirmed by Dr Philip Jordaan, explaining that this was a conscious departure from the credit methodology as set out in the NIP policy, and it was effected with the full knowledge and understanding of the obligors. Mr Pillay as well confirmed this position, and during his testimony he stated that the agreements concluded, were clearly on the bases of a one to one credit methodology, and the contract was absolutely clear on this.

What transpired, however, Chair and Commissioner Musi, is that in the implementation of the NIP's, there was a marked departure from the terms of the NIP's. The first departure involved the manner in which credits were calculated and awarded. The DTI introduced a multiplier credit calculation methodology, and we submit that this was in direct contravention of the NIP terms.

The DTI... [intervene].

CHAIRPERSON: Adv Sello, just [indistinct] that issue. You are saying that the introduction of multiplier by DTI was contrary to that of the IONT terms, or the NIP Terms as negotiated by the IONT. But DTI, for them

to deviate from what is contained in the NIP terms, he had to do it, or they needed the consent of the obligors. As I understand the evidence the change that was introduced at that stage, was done together with the obligors, and the obligors agreed to that change and that is why they ended up changing the methodology as contained in the IONT. That is my first point.

My second point, can the IONT, with [indistinct] change Government policy, particular the NIP policy? Take into account the construed members of the IONT, and also take into account how that NIP policy was [indistinct]. If I am not wrong that was done with Cabinet's approval. Can that be changed by three people who are not members of the Executive, if you can also address those issues?

ADV SELLO: Thank you, Chair, and I will address those issues. If I may refer to the testimony of the former Minister of Trade and Industry, Mr Erwin, Mr Erwin consistently made reference to the point as raised by the Chair, which was to contrast the policy of the DTI with the NIP terms. We do not understand exactly the purpose of that exercise. This is so, because what Government policy was, in as far Industrial Participation is concerned, is understood by all, there is no debate on that.

It is not a question of what the IONT desired that we think is important. What the IONT negotiated for, or even desired, is an explanation for how the contractual position that subsequently arose between the Government of South Africa and the obligors arose. So, the role of IONT in this regards should not be overemphasised. If it

played any role in this regard, it probably was to convince the DTI to amend the NIP policy terms, to amend the adoption of the NIP policy in so far as it relates to the SDPP.

As I indicated, there are said to be nine criteria in the policy on which NIP credits are accorded. According to this process, there was a decision, a collective decision both on the side of Government and the obligors that it shall be restricted to three. It was not a departure from the policy as it stood.

Now, IONT did not change the policy of Government, whether or not the Industrial Participation policy would apply in its entirety, was a decision taken by Government, not by IONT. IONT may very well have facilitated the attainment of that objective, but it is the Government that signed the contract, and it agreed, together with the obligors that measurement shall be only on three criteria. It agreed similarly that for purposes of the SDPP's, the NIP's would not use a multiplier methodology. That, we submit, for purposes of this inquiry, not much to do with the IONT, but has everything to do with the actual terms as signed off by the Government of South Africa and the obligors.

CHAIRPERSON: Maybe the last point on that one. Let us assume I agree with you, was Government entitled together with the obligors, to change the Terms of the NIP agreements?

ADV SELLO: As parties to a contract, they are at all times at liberty to change the terms of the contract, should they so desire. The question that arises, Chair, is if the Government of South Africa signed off those NIP terms, is the authority for any minister of the Executive to change

those NIP terms, without the authority of the Cabinet of South Africa. Our view is that that minister would not have the power.

The evidence that has thus far been led, is of a residual power, supposedly located in some or other policy. But, this is what we will say in regard to that view. One, no such policy has been presented to this Commission, to demonstrate that the Minster of DTI, Trade and Industry, would have the power to amend a contract concluded by the Government of South Africa. Secondly, if it constituted an amendment, considering a contract of that magnitude, one would have respected a formal written and signed amendment. None of that sort has been presented to this Commission.

On that bases, therefore, Chair and Commissioner Musi, we argue there was not an amendment in the strictest sense of the word, on the NIP Terms. There was a deviation from the NIP Terms by the Department of Trade and Industry. I hear that Commissioner Seriti says if the obligors and the DTI agreed. We think that the question goes slightly beyond that. If one has regard to the effect of the changes, then one can comfortably conclude on the evidence provided that the changes benefitted the obligors.

The DTI had a contractual obligation to South Africa as a whole, to ensure that the benefit sought to be derived from the NIP's were delivered to South Africa.

COMMISSIONER MUSI: Good. Okay.

CHAIRPERSON: Okay, thank you. Although, there is a difference of opinion there, the DTI witnesses say that the deviations benefitted our

country. I hear you saying, Advocate, that the deviation benefitted the obligors, but [indistinct] with those projects, that is not [indistinct]. They are saying in actual fact they managed to push [indistinct] funding, where it was difficult for the country to get funding. They mentioned the few projects which were undertaken, and where they managed to push some funds, and they said that without this system, we would not have succeeded to push funds in those areas.

But, then I hear your [indistinct]. We have noted it.

ADV SELLO: Thank you, Chair. On that point we want to point out, I do not think there is any evidence before the Commission that says the various projects that were managed by the DTI did not deliver some or other benefit to the country. We are happy to accept that a benefit was derived. The question, however, is the magnitude of that benefit, and how do you determine it. We say you determine it by reference to the terms, or the NIP Terms themselves.

If NIP says credit will be awarded at a rate of one to one, the ratio of 1:1, and if the SDPP's are going to cost the country at that time 29 billion, one would expect that the DTI is able to demonstrate to this Commission that there have been benefits to the country, of the value of no less than 29 billion.

CHAIRPERSON: Let me try, and can I be very straight with you, Advocate, are you aware of the [indistinct], the DIP division which says that as far as their calculations are concerned, you had a benefit of about 14.5 million? I think that from what you said earlier on, we are prepared to accept that they had, so I am sure you are prepared to

accept that figure.

Now, if you probably accept that figure and you then go to DTI, Mr Zimela and Mr Zikode, they came with figures and told us exactly the amounts of money that we invested in this country. They gave us the actual figures. Mr Lionel October also did give us the actual figures, and that evidence was never contested. Now, on what bases can we ignore that evidence, where they actually deal with the actual figures? Unless until now there is something that I am missing, I cannot understand the bases upon which we, as a Commission, can ignore the evidence of those nine witnesses. Maybe you might be in a position to help us and tell us why we should ignore their evidence.

ADV SELLO: Chair, we are aware of the testimony of the witnesses from the DTI. As we indicated, we do not sit here and say no benefit was derived. How the DTI calculates how the benefit was arrived at, is probably an issue that must be looked into, and it is beyond the scope of this Commission. What we can argue, or what we can say is to pose the question whether had DTI confined itself to the DIP Terms as signed, would the benefit have been greater? That question the witnesses have not answered before you.

Mr Zimela returned to this Commission last year, end of 2014, and at 126 we deal with the figures that he provided to this Commission. By way of an example, Mr Zimela indicated the total investment of all products by BAE was R5 billion. The investment by the obligor... [intervene].

COMMISSIONER MUSI: Adv Sello, where are you?

ADV SELLO: We are at 126, our 126. We are quoting from the evidence of Mr Zimela.

CHAIRPERSON: Which page are you?

ADV SELLO: Page 54, Chair, of our submissions.

CHAIRPERSON: Just hold on. Just hold on.

ADV SELLO: Thank you, Chair. I will just refer you to BAE as an example there, being the first item under paragraph 126. From BAE there were total investments of all products of R5 billion plus, and the investment, the direct investment by the obligor itself of R1.9 billion. And BAE gets awarded credits of R15 billion.

Now, we know sometimes the witnesses from the DTI deal in very heavy economic issues, to try and unpack this. We suggest, Chair, that if the methodology agreed to in the NIP Terms were upheld, we would not be having to deal with these very confusing figures, to try and understand what it means for BAE to be awarded R15 billion worth of credit, in circumstances where it invested R1.9, or as a result of the project or projects they introduced, that a total of R5 billion was received by South Africa.

We argue that this whole deviation from the Terms as signed off by Government, is what creates the problem.

CHAIRPERSON: Advocate, the difficulty that I have with that proposition is that they explain that how they get [indistinct]. They explained that, you know, BAE as far as investments are concerned [indistinct]. As far as [indistinct], this is the figure. As far as exports are concerned this is the figure. We are in a position to see exactly what

was the investments that was brought into the country, exactly what was the local [indistinct], exactly what was the exports. Even without taken into account the multipliers that were used, those figures are there, DTI witnesses gave us those figures.

So, I am not quite sure what you mean when you say that we are unable to know exactly how much BAE earned, or other obligors invested in the country, because we do have those figures. Unless if I misunderstood the point that you are making.

ADV SELLO: Chair, no. I think probably that I was not clear. If one has regard to the evidence of Mr Zimela, as we have quoted in paragraph 126, the figures speak for themselves. Now, our view is on Mr Zimela's own evidence, BAE made a direct investment of R1.9 billion, and in the evidence they explain that an obligor could invite other third parties to invest, or to assist in the delivery of that obligation, and the total value of that exercise for BAE is R5 billion. On what bases therefore does BAE end up with credit of R15 billion? That is the simple question we are asking.

We are not taking issue with the figures that they have suggested. We suggest to this Commission that this is the very issue, the exaggerated benefit that the IONT sought to avoid when it negotiated the terms in the manner that it did, that is a ratio of 1:1, and it is on three criteria and no multipliers shall be used. We are... [intervene].

CHAIRPERSON: I am sorry. I am sorry, Adv Sello. Those figures that you were quoting, what figures were you quoting? You were saying BAE invested how much?

ADV SELLO: Chair, at 126, our paragraph 126. There are five subparagraphs dealing with BAE, overleaf GFC, GSC, Thales and lastly Augusta. These are figures we mention at the bottom, at the footnote of that, these come from Mr Zimela's testimony of 21st January 2014.

CHAIRPERSON: I see that, but although I do not quite agree with these figures, we also [indistinct] different figures. If you remember, Mr Zimela had to come back. He came back with an amended ANNEXURE F, because there were certain figures which were problematic and he came back and explain. But, in any event I understand the principle that you are trying to establish. The actual figures are not a problem, we can try and get the information there.

ADV SELLO: In fact, Chair, if you permit me, the figures at 126 are taken from Mr Zimela's transcript of 2015, no, 2014, 24th November 2014, which was when he was requested to appear before this Commission to explain, amongst other things, the figures appearing in the so-called ANNEXURE F. So, this is not from his original testimony in January/February 2014, but from 24th November 2014. These are the latest figures.

COMMISSIONER MUSI: Okay.

CHAIRPERSON: Thank you. We can always try and confirm that at a later stage.

ADV SELLO: Okay. We conclude on that bases by saying that if the figures then had to be accepted, from Mr Zimela, that it would appear that the very exaggerated benefits that the IONT sought to avoid, have in fact accrued to the obligors.

We [indistinct] to take issue with the authority of the department, to deviate from the Terms. We take the position that the parties were obligated to uphold the Terms of the NIP Terms and the Umbrella Agreements, and make the point now that particularly so the DTI, acting as it did on behalf of the South African society, to ensure that South Africa derives the maximum benefit out of this exercise.

There are other issues that arose in the course of the testimony of these witnesses, regarding what we call significant deviation from the DIP terms, and these included payments of upfront packages, which when the testimony of the witnesses are analysed, benefitted the obligors. But, it is very difficult to determine how that benefitted South Africa. Much was made of the fact that DTI had to deviate, in order to ensure that NIP's were delivered. But, the obligors had obligations. We do not believe that in order to hold a contractual partner to a contract, it is necessary to make the deviations so as to facilitate the obligor's responsibility to deliver on its contractual obligations. This is what appears to have happened quite often in the DTI, including the introduction of upfront packages in the delivery of the NIP's.

COMMISSIONER MUSI: If I understand the situation, it appears that the problem that brought about deviations, arises from practical realities implemented in NIP agreements. The evidence seem to suggest that there were difficulties in implementing some of the program, so that then DTI would then suggest to the obligors to invest in [indistinct], where normally they would not have, and where nobody would even go. And in order to persuade the obligors to invest in those areas, they had to

make these concessions and grant them with multipliers. That is one of the rational. And further, what guarantee do we have that if there were no deviations there would have been greater benefit?

ADV SELLO: Thank you, Commissioner Musi. In respect of the first point, in fact, the DIP Terms allowed for substitution of projects. There is a process that is set out in that agreement, and it acknowledges that at some point projects may have to be substituted, either because they are no longer deliverable, or they have proven to be impractical, or they are not of significant value to South Africa. So, that substitution is anticipated in the agreement.

What is not clear, as the extent to which the process of substitution was followed. What we can tell you is that the DIP Terms set out a process and an approval process as well, and none of that documentation has been presented before you. So, we do not have a difficulty with the notion of substitution. What we have a difficulty with, and this is because the NIP Terms do not cater for a change in that regard, is amending the methodology for credits, and it is using multipliers.

Now, we accept that realities dictate over time and have to be taken into consideration. The question we pose is, at that juncture, why did the Government of South Africa no do a proper amendment, following negotiations and amend the Terms as they currently stand? The situation that we have is that because of practicalities that the DTI was faced with, it found it best to simply ignore the terms and work with a system that they considered works best for them.

CHAIRPERSON: Adv Sello, though I do not think it is correct to say they simply ignored the facts, they [indistinct] the obligors. To [indistinct] the obligors, they came to that particular arrangement. It was not a question of simply ignoring the Terms and do as they wish. They had the agreement of the obligors when they implemented the question of multipliers and [indistinct]. In all fairness, I think that should also be [indistinct].

ADV SELLO: I will accept that, Chair. I accept the negotiations that took place between the DTI and the obligors, but we suggest that is not where the process should have stopped. Having them reached agreement, they should have taken it to the Government, to the Cabinet itself and required the Terms to be changed. It was not sufficient just because they agreed due to the practicalities that then the DTI had the power to amend a contract concluded by the Government of South Africa.

COMMISSIONER MUSI: I understand your view, but it is a very legalistic approach, is it not?

ADV SELLO: Legalistic, Commissioner Musi, you say?

COMMISSIONER MUSI: Very legalistic in the sense that it seems to ignore practical realities, that contractors sometimes come across.

ADV SELLO: It is probably indeed a legalistic view, Commissioner Musi, but it is one that accords with the law. It is the only approach to be adopted to binding contracts.

COMMISSIONER MUSI: There is a Professor [indistinct] two schools of thought in law, the one who will be called a positivist, and the other next

our law school of thought. In which do you fall, [indistinct]?

ADV SELLO: I prefer the one that is most inclined towards the Constitution, Commissioner Musi.

COMMISSIONER MUSI: Thank you.

ADV SELLO: Thank you, Commissioner. We just want to point out, and we will say although the witnesses kept indicating that they have always understood that the minister had the authority to change these terms, and to change that which was contracted for and that at all times when a change was necessary they escalated it to the minister's office, the minister himself did not claim that he has such authority.

The authority, the residual power to override whatever happens within the DTI, he explained as a principled approach and policy, which was sufficiently broad to accommodate the application of discretion in adjusting the nine criteria of [indistinct], that obligors were expected to meet in the context of negotiation with IONT. So, we understood his discretion to be [indistinct], and the give and take with the IONT, what does he agree to. Once the terms were signed, he has not pointed to any policy that gave him the power to override those decisions.

The last issue is whether or not we have received data from the Department of Trade and Industry. Our view is that in light of the fact that the benefits, or the credits awarded to the various obligors, were in terms of some system other than that which was contracted for. It is very difficult to test the veracity of the benefit deriving to South Africa, arising from these SDPP's. It is so because the witnesses provided figures which have not been audited. So, the benefit deriving from the

NIP's are as it has been determined by the DTI.

We do make a point in the submissions that there was an issue at some point, and some level of confusion about an independent audit conducted on the NIP's, but Ms [indistinct] subsequently clarified that, that the document relied upon was clearly not an independent audit report, but was an assessment report in respect of one program. We suggest, and we recommend to the Commission that it may be time that all the NIP's arising out of the SDPP's, be subjected to an independent audit. It may very well be that the figures given by the DTI will be confirmed by the audit, but at least South Africa would understand whether for a price of R29 billion of acquiring these equipment and these programs, the requisite benefit has been derived. We are of the view that the evidence before this Commission does not entitle the Commission to arrive at that conclusion. On the premises... [intervene].

CHAIRPERSON: I am sorry, just before you finish that point. What is your legal authority for suggesting that the witnesses, evidence given by about eight or nine members from DTI should not be reliable? Is there any legal bases on which may get to make that submission?

ADV SELLO: Chair, we interpret Term of Reference, 1.4, as to whether, and I will read the question:

"The offset anticipated to flow from the SDPP have materialised."

That anticipation flows from the Umbrella Agreement and the agreement signed on the SDPP. That determination can only be made on the bases of those instruments. We are saying that because the instruments were not adhered to, this Commission is not able to answer

that question. What this Commission has heard are benefits accruing, said to be accruing South Africa through the implementation of some or other projects, but not offsets anticipated from the contracted SDPP's.

Now, I am not saying that you cannot accept the witnesses' evidence, and in fact we are saying there is no other evidence to contradict it. But, that evidence speaks to something completely different from what the question requires of this Commission, and that is so because the DTI did not follow the letter of the agreements to the end. Now, the witnesses... [intervene].

CHAIRPERSON: I am sorry. Can you just repeat that point there, Adv Sello, I am getting a bit lost. If you can just repeat the last point you were making.

ADV SELLO: Indeed, Chair. Taking a step back, the offsets that this Commission must consider, are the offsets anticipated to flow from the SDPP's. We suggest that the offsets anticipated to flow are contained in the Umbrella Agreements and the NIP Terms. Now, if those two instruments that govern the delivery of those obligations, are not adhered to, this Commission does not have evidence before it to definitively answer that question. That is so because of the deviation from the NIP Terms.

Evidence has been given before this Commission that notwithstanding the fact that the parties contracted for assessment based on three criteria, the DTI extended it to nine. We are aware of the practicalities that were argued, but this Commission cannot take into consideration the other six, because those were not anticipated in the

SDPP agreements.

COMMISSIONER MUSI: Correct.

CHAIRPERSON: Thank you, I think I now understand. But then, let me go further. The evidence before us is a clear indication of an investment that they made, it is a clear indication of the sales, local sales that were realised, also export services that were realised. As you rightly pointed out, in terms of the IONT, or in terms of the NIP Agreements, only these three elements would entitle and obligor to claim [indistinct]. If what you are saying is correct, why can we not work with these three elements as contained in the Umbrella Agreement, because the figures thereof had been indicated [indistinct] DTI witnesses?

ADV SELLO: Chair, I do not know if the Commission has all the information regarding that, but if it did, it would have in my view be a mammoth task. It was incumbent upon the DTI to have separated the value based on the three and based on the nine, that would have been an easier exercise for this Commission. The other six criteria were actually, from the evidence of the witnesses, expected to be realised, but no benefit, no credit would be awarded to that.

If the Commission is... [intervene].

CHAIRPERSON: I am sorry. Maybe you did not understand my point.

ADV SELLO: Yes.

CHAIRPERSON: As far as each obligor is concerned, there is a figure which deals with investments, there is a figure which deals with local sales, there is a figure which deals with export sales. Now, I said, my question is, if those three figures are available in respect of each of the

obligors, why should we not look at those figures?

ADV SELLO: Indeed, Chair. No, we would not suggest you should not look at the figures, no we would not. What we would suggest is to the extent like with the example that we made with BAE, where there is an investment of R5 billion and the credit is R15 billion, and that includes things like job creation and the other criteria, then that is a misrepresentation of the offsets that resulted from the SDPP's.

COMMISSIONER MUSI: Thank you.

ADV SELLO: On that bases therefore, Chair, we suggest that at this juncture we are not of the view that the Commission can definitively answer positively that the offsets anticipated to flow, and in this regard I speak of the NIP's from the SDPP's have materialised. Secondly, we would suggest and independent audit to confirm the figures as provided by the DTI. It is after all not the DTI which is responsible for monitoring the delivery of these obligations that will have the last word on whether or not there has been delivery. It is only a third party, independent verification of that data and that information.

As I said, that does not necessarily mean that that audit will differ from what the witnesses have given evidence on before this Commission, it may very well confirm, and for all we know it may very well improve the position as calculated by the DTI. So, our recommendation is to understand exactly what offsets were derived from the SDPP's, in regard to NIP's, would benefit greatly from an independent audit.

CHAIRPERSON: Just the last point from me, as a matter of interest,

why are you not suggesting that principle as far as the DIP's are concerned? Why do you draw and distinction between the NIP's and the DIP's?

ADV SELLO: I do so, Chair, because according to the DIP's, there does not appear to have been any deviation from the DIP Terms and the Umbrella Agreements signed. The evidence before this Commission is that all the DIP's were delivered in terms of those two instruments.

CHAIRPERSON: Let me go back to my question now. If [indistinct] a position to deal with the figures which deals with the three elements, and we work on those figures, can we do that and not necessarily end up asking for an independent audit as you suggested?

ADV SELLO: Chair, if the figures relating to those three criteria were strictly in terms of the NIP's, I would say no. They are no longer strictly according to the NIP terms. I would say there would be no difficulty accepting the figures. The figures that have been presented to you, correct as they may be, are no longer in terms of the NIP Terms. They cannot, because there has been a deviation, there has been a multiplier introduced into the figures. There has been things like up front loading that has been introduced. Quite a number of factors have been introduced to get that result.

Now, whether or not that result is what was anticipated in terms of the NIP Terms, we are saying the Commission is no longer in a position to make that determination. And that is the distinction with the DIP's.

CHAIRPERSON: Adv Sello, I think we do not understand each other, maybe that [indistinct]. Because what I am saying, I am talking about

using the [indistinct] as contained in the Umbrella Agreement. In other words, looking only at [indistinct], looking only at local sales, looking only at exports, as DIP division has done.

ADV SELLO: Oh, okay.

CHAIRPERSON: In other words, leave out all these other criteria contained in the NIP policy, looking only at these three elements like the DIP people have done. If we do have those figures, my question is why should we still go and ask for an independent audit? In other words, if we put the NIP figures on the same footing as the DIP's, will there still be a need for us to get an independent audit?

ADV SELLO: I apologise, Commissioner Seriti, I probably misunderstood the question. This is my last attempt. We suggest that the DIP's were delivered strictly in terms of the DIP terms, including the methodology for calculating benefits and everything. We know as far as NIP's are concerned, multipliers were introduced. Now, if the NIP terms prohibited the use of multipliers, and the figures you are given include the application of a multiplier methodology, then we suggest this Commission is not in a position based on those figures, to answer the question posed, because the question posed can only be answered with reference to the NIP Terms as they were signed.

CHAIRPERSON: I think maybe we have debated this question enough. But maybe let me make this point. Multipliers were only used as far as the credits are concerned, as far as awarding credits the multipliers were used. But, in order to determine whether BAE has invested [indistinct] or not, there is no multiplier there.

ADV SELLO: Indeed.

CHAIRPERSON: You understand that? In order to determine whether the sales of BAE got [indistinct] or not, there is no multiplier. In order to determine whether their [indistinct], there is no multiplier. Multipliers come into the picture when the try and determine the credits that was given to BAE. But, I think we debated this question enough, maybe just leave it. I think we are not on a position to agree with each other on this one.

ADV SELLO: Thank you, Chair. Those are our submissions as far as DIP's and NIP's are concerned. As I understand it, if we follow the logic of the Terms of Reference, having dealt with 1.4, the next issue to deal with is 1.5 and 1.6, and that will be dealt with by my learned friend, Adv Sibeko.

ADV SIBEKO ADDRESSES COMMISSION: Thank you, Chair and Commissioner Musi. I am able to hear the sound of my voice now. We start our submission regarding the paragraph 1.5 of the Terms of Reference, with a quotation at page 2 of our submissions of the evidence of former President Thabo Mbeki. When he was responding to a [indistinct] of questions that were put to him with regard to the establishment of a Commission of Inquiry, amidst various allegations for impropriety in the composition of the SDPP. We take that up as from the middle of page 2 of our submissions, if the Commission has found page 2.

You will recall the background to this was why it has taken so long to establish a Commission of Inquiry such as the present, and it is the

criticisms and opinions expressed by a whole number of people regarding the propriety and perhaps the rationality of the decision to acquire the SDPP. If I may take the quotation from the middle, the end of first page he says:

"One of them...let me explain that it had been inadvertently distributed and really was not part of the record, then indeed, Chairperson, you responded to that, but that one of these questions was about the setting up of this Commission. I do not want to really [indistinct], but at the centre of my argument, Chairperson, about this matter, was that there had been a very thorough investigation by state organs here in which the Government had full confidence. In other jurisdiction and in other investigation like in Germany, [indistinct], in contact with us and asked for legal assistance and this and that and the other. And, in the end they dropped prosecutions against members of the German Frigate Consortium. I do not know where this British enquiry ended up of the Serious Fraud Office, which later took matters that the Advocate mentioned about what BAE Systems might have done. But, I am saying in the end there is this huge volume of work that has been done about this, an enormous number of documents, and I am talking about, Chairperson, and I am very clear about this. I am talking about decisions taken by the Inter Ministerial Committee and decisions taken by Cabinet, and I kept saying and I repeated this in Parliament, that if anybody, if anybody has got any evidence despite all of this investigation that has taken place, if anybody has got any new evidence, I suggest that we should do this by all means. We shall set up a judicial

commission, but where is this evidence?"

We make reference to this passage, Chair, in anticipation of one of the questions that we were called upon to answer, and this is in relation to some of the documents that have been tendered by some of the witnesses with regard to whether such documents are admissible before this Commission, whether this Commission should take these documents into account in its endeavour to advise Government as it would be the outcome of the exercise undertaken by the Commission.

Clearly the point made in the passage is if there is this large amount of opinions expressed, articles written, allegations made about impropriety with the process of the procurement, and whether or not Government made the correct decision in acquiring the various programs in the manner that they did, why are we still saddled with all of these allegations some 15 years after the event? But, what is important is, in the midst of the various allegations, former President Thabo Mbeki made the point, where is the evidence?

We would submit, as we will try and persuade the Commissioners regarding some of the evidence that has been presented before the Commission by some of the witnesses, that indeed if one has regard to the nature of how the Commission operates, why it was established, there is a bases for the Commission to have regard to these documents so that it is then able in the discharge of its obligations, to advise Government if there is any bases for it to come to a conclusion that sufficient facts exist to justify the establishment, or to justify the proper investigation of these allegations by agencies that have the sufficient

capacity to investigate the allegations.

So, what we start by doing as on page 3, is briefly to set out the background of the ramblings and comments that have been made regarding the decision, the very decision to acquire these programs. We set out the criticism that by enlarge relates to rationality, which is one of the Terms of Reference of the Commission, the use of offsets as a selection criteria to award contracts, and whether there was any bases to expand these, what the critics referred to as excessive costs expended by Government to acquire these equipments, during a time when South Africa had no known enemies, nor was it under threat of war. The allegations that have persisted over time, relating to payment by so [indistinct] of excessive amounts to certain of South African citizens, who were seen to be close to politicians who were involved in making the decisions to award the various tenders.

We continued to having sketched what these criticisms where we continue at paragraph 5 of the submissions to say that the Commission offers us a platform, and this is really in the context of what former President was saying with regard to where is the evidence to justify the establishment of the Commission of Inquiry to investigate into these allegations. We say at paragraph 5 that:

"The Commission offers us a platform to interrogate whether the allegations that have been made in various books, newspapers and opinions, offer that platform to have these allegations to be properly tested, and whether having made or properly tested these allegations, whether those allegations make for a compelling argument to justify a

recommendation to be made for proper investigation by competent investigative agencies, with a view of bringing it to a final determination."

We submit that having undertaken this exercise over a period of some two years, the Commission should then come to a position where it says to Government "Well, we have looked at the allegations tendered by this and this and the other person. We looked at these submissions. In the light of the evidence we have collected in this fact finding exercise, our view is perhaps, if the Commission is so inclined, that there is no sufficient bases for this matter to be taken any further, because we found that the allegations as tested do not warrant another investigative agency with the burden of starting what the Directorate of Special Operations and later the Force, were called upon to investigate at various stages in the last 15 years."

We say further that as the Commission has to make a determination of these various arguments and allegations that have been made, what we have called upon to address the Commission, is whether any person or persons within and/or outside the Government of South Africa, improperly influenced the award or conclusion of any of the contracts awarded and concluded in the SDPP, Procurement Process.

We say that in the wisdom of Government in establishing this Commission, while there were these various allegations of improprieties that we will seek to address in the fullness of time, the creators of the Commission saw it necessary to not just go narrowly into allegations of impropriety, but to have the Commission look at the entire [indistinct],

ranging from the rationality of the decision in the first place to acquire these programs within the context of what was the Republic of South Africa in 1994, 1995, which had to deal with issues of reconstruction and development, which had to deal with issues of a diminishing defence budget, with the [indistinct] socio economic climate, that needed urgent attention at the time, to say having regard to all of this, the Commission will then at the end of the day look at a wider range of what the critics have been talking about in their opinions, and in the books that have been written up to this point.

Having stated that by way of introduction, you will see, Chair and Commissioner Musi, at page 7 we deal with the appointment of the Commission and its Terms of Reference. It is not necessary to deal with, that is an [indistinct] matter. That will then bring me to the Approach in the Conduct of Commissions.

Chair, this would probably be one of the controversial aspects that I will begin to address you on, having regard to some of the dates we had during the course of the evidence of some witnesses, in particular Dr Richard Young, and to some extent Mr Terry Crawford-Brown. I seem to recall also that another witness, David Maynier, who sought to rely on documentation he had no personal knowledge of, that he was precluded from relying on some of the evidence he sought to do.

But, Chair, perhaps the best point of departure in dealing with this subject, would be to refer to paragraph 8 of the Directors issued by the Chairperson, which appeared in Government Gazette of 9 May 2012, it is Government notice number 35325, it appears on the Commission's

website documents. Now, paragraph 8 deals with submissions, and it provides as follows:

"Any person who wishes to give evidence, or make submissions to the Commission, shall by a date directed by the Chairperson, file with the secretary and marked for the attention of the Chairperson, a copy and an electronic copy where possible, of his/her submissions, which shall include a statement under oath, by a person who is able to verify any factual allegation pertaining to the issue described and the Terms of Reference, and where applicable (I will restrict myself to paragraph a):

a) Documents which are relevant and support the allegations pertaining to the issues described in the Terms of Reference."

Perhaps, just in passing, Chair, one would say at this point what the Directive seems to suggest is that a person making a submission to this Commission, would also where applicable furnish documents which are relevant and support the allegations pertaining to the issues described in the Terms of Reference. Just by looking at Directive 8 paragraph (a), it does appear that the only constraint regarding the documents that could be submitted by a person making a submission, would be relevance of such document in support of the allegations pertaining to what the issues described in the Terms of Reference.

Conspicuous by its absence from the paragraphs of Directive 8, is any requirement relating to, among others, authenticity of the documentation that is sought to be submitted together with the submission in support of the Terms of Reference, absence, conspicuous also by its absence, is a requirement that a person making the

submission and submitting the documents in support, must disclose the source of the documents so submitted in support of the submission.

Now, we would submit, with respect, that this directive amongst others, ought to inform how the Commission then proceeds to deal with documents that are submitted by the various witnesses in support of their submissions, and where they chose to give evidence under oath, their evidence as well. At paragraph 10 of the submissions, which appear on page 8, Chair, we state that

"It is important to allude to the principles relating to the purpose of the commissions of inquiry, the procedure to commissions and the receipt and treatment of evidence by commissions, in particular in contrast to those of other fora as in criminal courts, civil courts and inquests."

We point out that commissions of inquiry, as is apparent from the name, is meant to be an inquisitorial rather than adversarial exercise. Its focus is an enquiry to establish... [intervene].

CHAIRPERSON: I am sorry, Adv Sibeko, if you do not mind. Which paragraphs are you reading, and where are they, so that we can understand exactly what you are saying?

ADV SIBEKO: Yes.

CHAIRPERSON: I think probably of importance, [indistinct] starts on page 11. These other points made about the nature of the commission of inquiry, we fully agree with you.

ADV SIBEKO: Yes.

CHAIRPERSON: Then maybe, if you can go to page 11, or beyond.

ADV SIBEKO: Yes.

CHAIRPERSON: Of your submissions, probably starting with paragraph 17. These other paragraphs, we have looked at them, thank a lot. We have referred to the law, we are happy with where we are, Advocate.

ADV SIBEKO: Yes, thank you. We would then submit in the light of what has been set out in those paragraphs, together with what I have referred to as paragraph 8 of the Directives, to say that in the light of we have tried to argue in the preceding paragraphs, that it does appear that when witnesses come and give evidence, especially if one has regard that in a commission such as this one, where evidence has been tendered by over 50 witnesses, the majority of whom are either government officials, former members of Cabinet, members of Parliament, sitting in some body or other, that the other witnesses, and perhaps in this instance the other witnesses such as Terry Crawford-Brown would come as someone who has received bits and pieces of information from other critics, et cetera, that he would have had no direct involvement in the procedures undertaken in the acquisition process.

The only other distinguishable witness would be Dr Richard Young, who participated to some limited extent in some of the programs, especially in particular the Combat Suite of the Corvette. His participation was largely centred around that. But, outside of that process, he would have had no direct participation in the process.

So, in instances where, as he testified that he was known to be someone who was challenging the certain decisions relating to the

award of certain components of the Combat Suite, that he became the conduit for a number of people who had information relating to allegation, and I will put that at the highest watermark, allegations of some form of impropriety within the process of the acquisition of the programs.

So, if one accepts the submissions made earlier, together with what appears at Directive 8, that the only constraint that one would have in restricting evidence to be presented to the Commission, is relevance. The evidence is hearsay, the Commission is entitled, in terms of its own rules, to hear that evidence. Documents sought to be relied on, even if the witness is not the author of those documents, the Commission is entitled to accept that evidence, it is upon a fact finding... [intervene].

CHAIRPERSON: I am sorry, I did not hear you. You said even if and then your voice went down.

ADV SIBEKO: I apologise, Chair. The point I was making is, in instances where a witness comes and produces a document to support his/her evidence, and the document sought to be submitted at the time of given evidence, is authored by somebody else or the witness is not even able to say who the author of the document is, if the document is relevant to the Terms of Reference, we would submit that document. It ought to be admitted by the Commission, the Commission will look at it. It is only [indistinct]. The Commission would then determine the weight of the evidence that arises out of that document.

But, we would submit that if it is relevant, in the nature of the Commissions Proceedings and Processes, the document must be

admitted, however, once it has admitted such document, the Commissioners will the grab [indistinct] the issue of what weight to attach to the evidence so admitted. But, the documents can just not be ignored at the point that they are sought to be produced and relied on by the witness. That, we will with respect take care of the submissions as they appear on paragraph 17, dealing with hearsay documents.

What has bedevilled also the further issues of documentation that has been presented before the Commission, is and I am not sure whether it is the famous or infamous Debevoise & Plimpton report, to which confidentially and privilege was claimed. I seem to recall that Adv Hoffmann at the time representing Mr Terry Crawford-Brown, had made and I am not sure whether to refer to it as a claim, that at some point he had spoken to someone [indistinct] who mentioned that privilege on this document had been waved, but there was a submission made subsequent thereto that in fact privilege had not been waved with regard to this document.

What seems to be common cause, however, is the document has been, I am not sure whether public domain or cyber space or what or why, and that having been out there and clearly someone must have put it out there, because had this document been privileged or had the confidentiality that those claiming the privilege would want us to believe, one would have expected that the document would have been guarded in such a way that it would not be allowed to fall in the hands of the public.

However, it does seem from what one reads in at least the seven

books that had been written on the SDPP's, that document has generally been in the public domain for no less than at least three years. Now then, that begs the question whether a document such as the Debevoise & Plimpton report with its claimed confidentiality and privilege, continues to have that privilege even in the light of the fact that it has come to the public domain, and we do not know how, but those who claimed privilege, seemed to have lost that privilege if the authority that was referred to earlier during the proceedings of the Commission, that is *Anderson v Minister of Justice*, if that authority is to be followed and I tried to check if that dictum had been rejected in subsequent decisions and I have not been able, Chair and Commissioner Musi, to find any decision that pronounce contrary to what we have quoted at paragraph 18, where the Judge indicates:

"Mr McEwan contends that when a privileged document has by compulsion been removed from the possession of an attorney or client, it does not lose its privileged character. Admittedly, when such a document is negligently lost or negligently communicated to some other person, the privilege is lost."

I would sumbit, with respect, that in the light of that authority, that dictum, the confidentiality would be lost as a [indistinct].

CHAIRPERSON: Adv Sibeko, [indistinct] this decision... [intervene].

ADV SIBEKO: Yes.

CHAIRPERSON: There [indistinct] to [indistinct]. It is not available for us to reject it, and apparently in our Constitutional Court remands of that issue. Even the Constitutional Court remands on that issue, and that is

the position whether the argument that you are making in aggravating. Fortunately, one of the parts he mentioned, he gave us a detailed legal argument dealing with that issue. The courts in about two, three other cases where the decision, where the courts declined to follow that reason. If that is the position whether that point you are making in paragraph 18, and bear in mind that we have already made a ruling dealing with the question of [indistinct]. We just thought that, you know, let us give the parties a second chance to argue this point.

Maybe we might be in a position to change our minds as far as the admissibility of that document is concerned. But, then I hear you are still dealing with the Andersen decision, which has been declined by several, various courts, including our Constitutional Court. In the light of the Constitutional Court decision, what do you want us to do with that Ferrostaal document?

ADV SIBEKO: Chair, accepting for purposes of my submission, that the Constitutional Court has rejected the dictum in the Andersen case, and for purposes of [indistinct] I will not take issue with that. It does appear that on the bases of that authority, the Constitutional Court being the highest court in the land, the Ferrostaal document would perhaps not fall within the document that would be admissible. I will take the matter no further than that.

COMMISSIONER MUSI: Thank you.

CHAIRPERSON: So, can I suggest that we adjourn for 10 minutes?

ADV SIBEKO: I have no objection, Chair.

CHAIRPERSON: Thank you.

COMMISSION ADJOURNS

COMMISSION RESUMES

ADV SIBEKO: Thank you, Chair. The discussion we had just before the adjournment, would then bring us to a topic I have included, just to get content to the latest submissions, being the legal framework. This is just the regulatory framework for procurement in the country, and I do not believe that we should be unduly detained by what is basically the position.

Perhaps this would then take us to page 20, which deals with the subheading there, dealing with the SDPP Procurement Policies. You will recall, Chair, that between Captain Jordaan and David Griessel, the two of them they spoke about the various procurement policies that were applicable between the DoD family, just shortly before the SDPP's. The short of their evidence is the policies as applied at the time, did not take into account foreign acquired equipment that was largely of the shelf, as was contemplated in the SDPP, and that therefore something that would provide for the intended acquisition had to be put in place.

Chair, this is how your VB100 and KB1000 were then [indistinct] into your MODAC 1, 2 and 3 reports, which sought to give [indistinct] to what was intended, and you will see at page 26 we began to deal with, and just set out very briefly what the MODAC policies were. This evidence is not contentious, Chair, I would submit.

What has a little bit of controversy will be your DoD Policy Directive 4/147. The discussion relating to that document appears as from paragraph 58 page 27 of our submissions. You would recall that

during the discussion of this policy document there was a debate about whether the policy was eventually approved, from the evidence of Mr Steyn, who was the Secretary of Defence at the time, and Mr Esterhuyse, who was the General Manager Aeronautics at ARMSCOR, and a member of the AASB.

The evidence seemed to be that although Mr Steyn had made an inscription in longhand that the policy was approved at the COD meeting of a particular day, I think it was 8th of August, it turned out that no such approval was forthcoming. However, that is notwithstanding. It does appear to be common cause that that document, the policy and what it provided for, was applied generally as if it had been approved. That is the point we make off this document and nothing more.

CHAIRPERSON: Adv Sibeko, will I be right to say that one, this policy document was signed by at least two senior officials in the department? Two, the minister was aware of this policy document. Three, the two people who claimed that this quality document was never approved is Mr Steyn and Mr Esterhuyse, and those two people were in the department and utilised that document. There is no minutes which suggested that either of them ever objected, saying that this document was never approved. They know that the minister also utilised this document.

There is no way to suggest that [indistinct] the minister said that this document was never approved. I am taking all those factors into account. Would it be a fair inference that this document was approved? Will that not be a fair inference, taking all those factors into account, that

it was utilised by everybody else and the minister, who was supposed to approve it, also utilised it? Now, the people who are now complaining, saying that it was never approved, they also utilised the same document?

Mr Steyn, who chaired some of the meetings in terms of this document, never complained at that time. The first time when he complained is after he left the department. Taking all that into account, would it be a fair inference to assume, will it be fair to infer that this document was a valid document which was utilised by the department?

ADV SIBEKO: Chair, as I made the point, the evidence we have is the policy was not approved. However, that is notwithstanding. It was applied within the DoD, firmly on the understanding that it had been approved as it is recorded in longhand by Mr Steyn, when he wrote there that it was approved at a meeting of 8 August, I believe it was 1998. That without any instruction, or communication to the DoD family to the contrary, the people to who that document was distributed in the form that we have seen it before the Commission, must have been entitled to assume that the [indistinct] on the document was true and correct, meaning it communicated the idea that it had been approved. But, the evidence as we have it from these two witnesses, and perhaps forget about motive and the fact that they never complained while they were applying the document, the submission we make is why it had not been approved, on the evidence of these two witnesses, it was applied as though having been approved.

So, if your question, Chair, is should we infer it was approved, I

would with respect submit that in absence of any minute demonstrating approval of that policy... You will recall, Chair, that that policy was intended to be approved by the Council of Defence. We have no minute that the Council of Defence approved the policy. What we do have is evidence suggesting that it was accepted, pursuant to the distribution of the document as inscribed by Mr Steyn that this is the policy that was to be applied.

So, my response in a long [indistinct] manner would be, without formal approval that would not have been approval of that policy, however, it was applied as if it had been approved. Everybody accepting what appears [indistinct] the document, hence I say, Chair, I take it no further than that, simply to point out what appears to be an anomaly, that is all.

CHAIRPERSON: Lastly, will I be right to say, if you say that the CoD was supposed to approve this document, that the members of the CoD applied this document? Those who were supposed to approved it, applied it. Now, if that is the position, will it be right for me to say one can reasonably infer from those facts that this document was approved, unless if it [indistinct] evidence, unless there is all this credible evidence which suggest that it was not approved.

ADV SIBEKO: Chair, if the question put to me is perhaps to suggest and answer that, there was some tacit approval by those in authority, it is very reluctantly, Chair, and very reluctantly I would say the people who were supposed to approve the policy, the Minister of Defence, Deputy Minister of Defence, Secretary for Defence, and the other two

members of the CoD and various members of the DoD family in the process of evaluating the various bids et cetera, applied the document on the bases of what Steyn had written there "Approved" at the CoD meeting of a particular date.

And if you assist with me [indistinct], the application of the policy by the various members of the DoD family, including those who are members of the CoD, would it mean some kind of tacit approval, or perhaps approval by conduct? Chair, as stated earlier, I would reluctantly concede the point, however, with the proviso that it does appear that in the manner in which the department operated, and as a requisite of the requirement of transparency in procurement processes by Government, there ought to be written approval, as in formal approval by the CoD, as the document itself states that it will be approved by the CoD. So, that is as far as I can take it, Chair.

CHAIRPERSON: Thank you.

COMMISSIONER MUSI: Thank you. Does it not look like, you know everybody seem to have accepted that this document was approved, is only *ex post facto* that people now say that it is not approved, because you cannot find the minutes? It could be that the minutes were lost or misplace. How do we approach that? Should we accept that everybody who was involved in the process accepted that this document was approved and acted on that bases? So, there was tacit approval.

ADV SIBEKO: Commissioner Musi, I believe we are singing from the same [indistinct], safe to say. In the absence of objective and direct evidence to demonstrate approval, as required by the document, we

only have Steyn and Esterhuyse's evidence regarding the approval, but as I pointed out already, I accept that everybody applied the document, and perhaps reading from the inscription by Steyn, assumed or accepted that the document had been approved, when there is no minute of the Council of Defence confirming the approval.

I would submit that if there was such a minute, the minute would have been produced. And we have had no evidence before the Commission that the minutes of that meeting that was supposed to approve the policy, was lost or could not be found after diligent search. What we do know is the evidence that is before the Commission.

As I pointed out, the purpose of raising the issue, the matter, was not to take issue with it, it was simply to point out that there was this document, there was this requirement and there appears to have been [indistinct]. However, notwithstanding the apparent omission, it was accepted by all involved that this is how we were going to go about the procurement process as envisaged in this document. That is how everything unfolded, going forward.

So, whether it was tacitly approved, as I have reluctantly sought to agree, it was applied. It is on the bases of the principles set out there in that we would then look at what we believe to be allegations of improper influence that the Commission would want to look into, and test whether on the bases of evidence that has been presented before the Commission, there is a compelling argument that can be made whether an in depth investigation by another agency of these allegations can be recommended.

CHAIRPERSON: I am sorry, Adv Sibeko. I heard you and Adv Sello fell into another agency investigating, another agency investigating. For me to understand, what do you mean by that? Which is the other agency which must still be investigate, and what should they investigate?

ADV SIBEKO: Chair, as you would have noticed from the submissions made earlier with regard to the Commission processes, we made the point, or we sought to make the argument that this Commission is a fact finding body, which has to collect information. It is not making a determination of any issues between the parties or persons referred to, either in the allegations or the impropriety and so forth.

What the Commission is doing is collecting information on the bases of which it would then provide advice to Government, on whether these allegations that have been tested are such that they could be investigated further, for a proper determination of the issues raised in the allegations to be arrived at.

So, where... [intervene].

CHAIRPERSON: Adv Sibeko, please help me. I thought 1.5 says that this Commission must make a factual finding. That is my understanding of 1.5 of the Terms of Reference, that we must make a factual finding. Now, the question is, if you say that we must make a recommendation that another body must investigate, which is that other body which must investigate, in the light of the fact there has been four, five investigations in this country in the past 15, 18 years of the same allegations? That is why I was asking that if you say that we must make a recommendation that another body must investigate, which body are you referring to?

Which other body must still investigate, and must investigate allegations made in this regard? That is all I am trying to find out.

ADV SIBEKO: Perhaps in short, Chair, is that if there is a criminal investigation that has to be embarked upon, that is the kind of factual finding that the Commission will be called upon to make. If the Commission arrives at whether or not there is evidence, factually, to suggest that some person in Government, or entity outside Government influenced the award, or conclusion of the contracts or tenders, that is the factual finding that the Commission is called upon to make at 1.5.

CHAIRPERSON: So, in a trial when you make a factual finding that Mr A was drunk, will I be right to say that from there what we should do we must recommend a criminal prosecution, and not an investigation?

ADV SIBEKO: Indeed. I would submit so, yes.

CHAIRPERSON: That is why I was asking you, you know, because I thought you were saying that we must get another body to investigate, and I said to myself, you know, everybody else in this country seems to be investigating [indistinct], I am not quite sure which other body could still investigate the same issues, because the said investigation has been going on for 17 years. We need to make some factual findings [indistinct].

ADV SIBEKO: Yes.

CHAIRPERSON: Well, will that be the correct position?

ADV SIBEKO: That would be the correct position, Chair. Thank you. I think when one comes to these allegations of improper influence, one should set out, or maybe one should submit at the outset that on the

evidence that has been tendered by non-DoD/DTI Government witnesses who had given evidence before the Commission, the evidence of the witnesses would be regarded as [indistinct]. One thing has been clear, and it is this, none of those witnesses was prepared to state on oath that any of the members of the Inter Ministerial Committee of the Cabinet may have been bribed to make the decisions, one, to recommend the award of the tenders to the successful bidders and conclude the contracts that were eventually concluded, pursuant to the recommendation to award and the decision to conclude the contracts.

So, in the absence of any such evidence relating to perhaps bribery, or fraud in respect of at least the members of the IMC and Cabinet, in [indistinct] Terms of Reference at 1.5 relates to, it seems to us the issue of whether the contracts so concluded would have to be cancelled, so as the Terms of Reference does seems to suggest, does not arise. Because as has been suggested and submitted by, among others, Terry Crawford-Brown, the fraud [indistinct] unravelled this, everything, the issue seems it does not arise at this point, and the Commission would perhaps not need to go to seek to answer that question.

But, dealing with what we say allegations of improper influence in the Lift/Alfa Programme. We say that in this section we seek to attempt to address the question whether any person or entities were in a position to influence the selection f the prime contractor, which would in this instance be BAE PLC, in terms of which the Hawk was eventually appointed the winner.

Chair, there is the whole controversial evidence that was tendered, perhaps to a large extent by Mr Steyn, who was the Secretary of Defence at the time, and by enlarge what he seemed to suggest, that the Airforce was inclined to move with the MB339FD, because among others the cost of the firing head was much less than that of the British Hawk. The acquisition of that program would have less negative impact on the defence's budget, than would the impact had by the acquisition of the Hawk.

Now, this whole thing begins to unravel at the time when a report is made with regard to responses to the RFI, and it does appear then that the MB339FD might possibly be the front runner at that stage. We referred to the minutes of the joined AASB and AAC, where we begin to see the birth of the visionary approach from the Minister of Defence at the time. This is reflected as from paragraph 65 of our submission at page 30.

COMMISSIONER MUSI: I am sorry... [intervene].

CHAIRPERSON: Adv Sibeko, will I be correct to say the question of the two options started much earlier, even long before the minister made his statement? By the time the minister made this statement, the visionary approach, the two options were already on the table. Will that be a correct exposition of the facts?

And then, secondly, in that the question of the two options came as a result of the request from South African Air Force that the [indistinct] option exercise must be done. South African Air Force, not the Minister. Will that be the correct position, because once you start by

mentioning that it started with the visionary approach, it sort of gives a wrong picture, because you might be suggesting that the [indistinct] options started at that stage. According to my notes it started much earlier, and it appears to have been started by the South African Air Force, they are the ones who requested the non-cost options to be put on to the table.

If I am correct by analysing the evidence in that way, will your statement still be correct?

ADV SIBEKO: Chair, as I understand the evidence, the visionary approach seems... Well, perhaps to take a step back. With the consideration by the Air Force of the two tier/three tier training, [indistinct] of the service, the two tier as I understand it, was informed at the time by the budgetary constraints. However, I seem to recall reading the transcript now, I think it was [indistinct], who at the time when the issue was discussed, the Air Force people have been told that word from headquarters, or head office, was that they should not be concerned about budgets, and that they had to do what was best for the Air Force, and the issue of the three tier system was back in place.

Now, when the RFI's were issued, you would recall that the RFI's for the Lift Programme went out much later than the other programs, because the lift was brought into the SDPP much later. But, it is after the receipt of the responses to the RFI's, and you will see it in the submission, that as the joint AASB meeting of AASB and AAC meeting of 30 April 1998, I made a note thereof at paragraph 65. In the footnote there is reference to the minute of that joint meeting, and you would see

that at 65 I said:

"...minutes of the joint AASB/AAC meeting of 30 April 1998, reflect at paragraphs 8 and 9 thereof, that the project team presented the meeting with an affordability analysis of lift contenders. The minute reflects without cost considerations, the selection process was biased towards the higher performance category of aircraft, which are significantly more expenxive to acquire, operate and maintain. Et cetera."

At paragraph 67, referring still to that same minute at paragraph 9, it say:

"...it reflects that the Minister of Defence, at the time the late Joe Modise, cautioned the meeting that a visionary approach should not be excluded, as the decision on the acquisition of anew fighter trainer aircraft would impact on the RSA defence industry's chances to be part of the global defence..."

It carries on that way. So, we would submit with respect that having looked at the affordability analysis arising out of the evaluation of RFI responses, and because it seemed apparent at that point that issues relating to budget, regardless of the diminution of the Defence's budget, seemed to be second, because with the passing of time, it seems that when issues of cost were raised, both the Minister of Defence and the Deputy Minister, kept on saying to those who rose the issue of the budget, Government will take care of that, they should not worry about the budget, and that in fact, the business plan that was proposed at some point, I think by BAE, would excite the Minister of

Trade and Industry, because it seemed that with the Industrial Participation that was proposed, that would take care of some of the concerns regarding the budget.

But, it does appear that going forward, the visionary approach seemed to influence how this evaluation was conducted, because the issue of the non-cost option and the cost option, was eventually undertaken to demonstrate that if cost is an important consideration in terms of the accepted value system for the evaluation of the various programs, the outcome would be different than if cost were not to be an important consideration.

Now, that then begs the question whether in your compliance with transparency, cost effectiveness and so forth, whether a factor which does not expressly fit in to the approved value system and there appears to be no objective bases on which that factor would be included in the evaluation process and how it could be evaluated, it then begs the question whether that does not constitute a deviation from the accepted procurement process.

COMMISSIONER MUSI: Can I just say something in relation to two aspects that my [indistinct] to cause some confusion? This thing about the two tier system and the three tier system, there seems to be confusion around this. If you have listened to the evidence, the Government proposed the two tier system for budget considerations. It is the Air Force that rejected that and they insisted on the three tier system. You will remember General Hector who testified in this Commission, he said actually he prepared a memorandum where he

argued for a three tier system, and it is on the bases of that memorandum that there was a [indistinct] to the three tier system. That is where the lift came in, at the insistence of the Air Force.

Further, the other point, this idea or being biased towards the higher performance [indistinct] of aircraft, the evidence is that that came from the Air Force. I just wanted to make those points clear.

ADV SIBEKO: Commissioner Musi, The issue relating to the two tier and three tier, at the point where we are now, I would submit, does not arise. That is a debate, or consideration that was looked at by the Air Force at the time when it sought to replace its aging fleet. However, the budgetary constraints would have put the Air Force at some constraint in spending on the bases of, you will recall and I accept, that originally the Air Force sought a three tier system, because that is how it was accustomed to train its pilots.

But, as I make this submission, once we passed the stage of whether it is the two tier of the three tier that will be adopted by the Air Force, the Lift Programme comes in late in the [indistinct]. So, at that point, and the submission I make is, the RFI's then go out, there are responses thereto. Once the responses to the RFI's are analysed, the issue of affordability arises in respect of the various aircrafts that are put forward by the various suppliers.

The evaluation team makes its affordability analysis and presents the analysis to say the selection that includes cost, for cost effectiveness clearly it would have a bias, or be inclined towards perhaps lower performance category aircraft. But, if the cost is not a

consideration, of course we can have the best, and that is what the project team in April of 1998 presented to the AASB and AAC meeting. The visionary approach is then articulated at that point, where cost should not be the important consideration. This carries on as the evaluation of the program is after the responses to the RFO. It carries on to SoftCom.

But, the point I was making earlier on was... [intervene].

CHAIRPERSON: Advocate Sibeko, I do not quite follow you, when you say it takes on, onto SOFCOM, what things are pointing to SOFCOM?

ADV SIBEKO: The issue of the two options. You will recall, when, I think it was Dawie Griesel, when he was giving evidence. You will recall when the issue of the costed and non-costed option arose and a direct question was put to him, as to how the non-costed option arose.

He says he was instructed to submit a non-costed option [indistinct], by Mr Chippy Shaik. So, once the visionary approach has taken seed, I would, with respect submit and perhaps, to give context to this is that, because the Minister of Defence, who chairs the COD is also a member of the MINCOM, perhaps he had some insight, from what the MINCOM was thinking, with regard to funding, funding of programmes, et cetera.

Because you will recall, when the Secretary for Defence lamented the issue, relating to the absence of a budget, as he was tasked on, to doing, before the acquisition of the type of the SDPP's, the response of the Minister and to some extent, the Deputy Minister of Defence was, do not worry about the budget. The government has discovered.

So, perhaps, had he shared the vision of this visionary approach timorously, it would have assisted people like Pierre Steyn perhaps, to come along with the visionary approach.

COMMISSIONER MUSI: Was not, was not General Steyn part of what meeting where discussed, where the visionary approach was discussed. He was part of that meeting. But, did he raise an objection?

ADV SIBEKO: Commissioner Musi, he did not raise an objection. But, I would submit, his conduct throughout, when the issue of the two options was discussed is very akin to what one might call, opposition to what was the popular view of the visionary approach.

While he may not strictly have objected to it, his view that he had, the views he expressed over time, at the different meetings was that the MB 339 was the cheaper option. Or perhaps, without giving evidence, as the, as the accounting officer of defence at the time, thinking through his cap of the Exchequer Act, et cetera, and the principals of Section 217, relating to transparency, cost effectiveness, et cetera, he articulated the view of the cheaper aircraft, when the vision was, no, cheap might not necessarily be best.

If one has regard to the benefit that the expensive one will bring to the country, it would be prudent it would seem according to the version of the approach, to go with the more expensive.

CHAIRPERSON: Advocate Sibeko, I agree with you. But, then, the fact that the cheaper is not always the best, it is not what the Minister said. Even Mr Steyn that is what he said, even Mr Steyn that is what he said.

I think, it would be wrong to find, tie it up, that part with the visionary approach. I think, it was accepted in the, in that round that the cheapest is not always the best. Having put it in its proper context and if I am not wrong, even the MODAC that is what it said.

It says on, application of tenders will not necessarily be based on the lowest price, but on value for money and industrial development goals. So, I think it will be wrong to try and ascribe all that, the fact that you know, the cheaper is not always the best, to the visionary approach.

I mean the people are, it seems to have been accepted that, you know, in the Army that was the position. In fact, I remember Deputy Minister Ronnie Kasrils, when he testified, he said something like, you know, it was well known in the Army that die baas is altyd reg. Mr Steyn confirmed it.

So, I think it will be wrong to try and tie up this question of visionary approach, to the fact that you know, it is because he wanted to achieve the, maybe he wanted to say that the cheaper is not always the best.

COMMISSIONER MUSI: But, here is another, here is another battlefield. This visionary approach seems to have been accepted by Cabinet. They then preferred the Hawk over the Aeromacchi. It is part of the fact that the Aeromacchi was cheaper.

They gave reasons why we opted for the Hawk, instead of the Aeromacchi that was cheaper. So, what happens, what happens is this will, let me confirm, they need, I mean the members of the Ministerial Committee confirmed.

They accepted the ratio, the analysis, the selection of the Hawk and

that is why the Hawk was selected. So, who [indistinct] who here now?

ADV SIBEKO: If I may refer to what appears at paragraph 67. That, even before we get to the articulation of further reasons why the Hawk was chosen over the MB 339, it does appear that the motivation of the visionary approach and for one moment put aside cost.

It appears that this visionary approach includes issues like the defence, the defence industry's chances, to be part of a global defence market and partnerships of international defence companies, in that case, the European companies. Now, the point I am making is, once you have an approved value system for evaluating the different offers and the visionary approach is not part of that value system or the visionary approach cannot be quantified in some measure that it would be concluded in the value system.

That constitutes a deviation to the procurement process, which we are, or which the evaluators were required to fill, for purposes of submitting their outcomes to SOFCOM, as it then ran and for it to consolidate and present to ASP, right up to Cabinet, as the [indistinct] has unfolded …[intervene]

CHAIRPERSON: I understand that, Advocate Sibeko. But, then, what you say to this and I think there is evidence, which has been led before this Commission, which says that, you know, that evaluation systems, they are just to assist, those who are making a decision about the position.

They are tools to assist the Minister and his Cabinet colleagues, to make a decision. They are not bound by that. They are not held by

that. That is what I said to about this from other witnesses. That is the first thing.

Then, two, at the Inter Ministerial Committee level, all those factors were known to them. They knew about the two options. Those were debated by them, according to their evidence. They took a certain decision, knowing full well about the full facts, surrounding Aeromacchi and the Hawk.

They then presented their recommendations to Cabinet, the Cabinet, after being fully briefed, by the Inter Ministerial Committee then took a final decision, knowing all those facts. I mean the question, the fact that the Hawk was much more expensive than the Aeromacchi, it was not leading to, it was not leading from anybody.

It was not. Now, where does that then, if one takes all these factors into account, where does it put you? Your argument that you know, the cheapest option should have been [indistinct].

ADV SIBEKO: Chair, I must apologise for the imprecision, in which, I, my submissions come out. I am not advocating that the cheapest option ought to have been chosen. The submission we make is, if in terms of Section 217 of the Constitution, an organ of State, in acquiring goods or services has to follow a system that is fair, transparent, cost effective, et cetera.

And the organ of State puts in place processes for acquiring goods or services, such as a candour process. If the organ of State elects not to follow that process, it deviates from that, it is not following a process as prescribed in 217. Now, the proposition I made earlier is the following.

There is an approved value system. This approved value system is to be applied, by the various teams in evaluating the different tenders, by the different suppliers. When making their tender submissions, the different suppliers accept that their tenders will be evaluated, in accordance with their approved value system.

Their approved value system is applied. In the course of applying this approved value system, then an instruction is given to say, while we accept that in terms of this kind of process, you are supposed to follow, this approved value system, please keep in mind that government is considering to be part of a global defence market, through partnership of other sorts.

Now, that is a consideration that cannot objectively be quantified, during the course of the evaluation. How this is eventually achieved, is on the basis, we believe, of the costed and non-costed option, which we submit, is a deviation from the principal of a system that is fair, transparent, et cetera, et cetera.

CHAIRPERSON: Let us assume, for argument's sake that we agree with you. We agree with your submission, what are you suggesting then?

ADV SIBEKO: Chair, the direct answer to the question would be, if the prescribed system is not followed, the subsequent award is invalid. But, what one also has regard to, issues of the MODAC that the final decision lies elsewhere, at Cabinet.

To the extent that it may be submitted that Cabinet, in its wisdom, in considering the recommendations made, one must accept that they are

aware of the value system that was applied. They are aware of the, when these options were presented to it, they were aware of all antecedent processes that were taken.

And that Cabinet, or even the IMC were not bound, by the recommendation made, assuming for purposes of argument. But, the only one option was presented to the, as recommended to the IMC and it is the option that would not enhance the RSA defence industry's chances in being …[intervene]

CHAIRPERSON: I am sorry to interrupt again, Sir. Let me go back to my question. My question is, assuming we are agreeing with your submission, in that they were wrong, by bringing in a consideration, which was not part of the value system, assuming that we agree with you. What should happen?

ADV SIBEKO: Chair, as I indicated, the resulted, resultant contracts, would have been invalid, if it did not comply. But, the question is, is there anything that can be done, 15 years down the line? I would submit, with respect that the Constitutional Court has indicated that, at times and Oudekraal, and the judgment to both.

Yes. I would say, perhaps on the basis of the authority in Oudekraal, that what is unlawful, may over time, be rendered lawful, because it had not been challenged. We would submit, with respect, the Altar case, also presents a similar kind of scenario that where it is just difficult to unscramble the egg, the unlawfulness may just be left as it is and we continue, as if it was lawful. Okay. So, nothing really can happen to that.

COMMISSIONER MUSI: Maybe there is another way of looking at it. It must come in the form of recommendations and recommend that in future, this type of situation should be avoided and strictly to the approved value system. Maybe …[intervene]

ADV SIBEKO: I agree fully, Commissioner Musi, because ours is a Constitution of State and we need to do things, in accordance with what the law says, we should do. There is a whole debate, relating to the visionary approach, which I do not go into, at this point.

After the debate, we have heard what the Chair and Commissioner Musi. I guess we have got to a point where the answer would be, if is the contract lawful or not, in the circumstances, of the submissions we made. I have made the submission.

Chair, Commissioner Musi, what then follows, within the context of the LIFT programme, you would recall, at the time when, I think it was Deputy, the former President Mbeki, when he was cross-examination, by on behalf of Lawyers for Human Rights, when they were still participating in the proceedings.

Reference was made to some of the agreements that were concluded, by BAE with the United States Department of Justice, relating to the payment of certain commissions to certain people, relating to the acquisition of, or the sale of aircraft to South Africa. I would submit that the acknowledgment by BAE to that foreign agency, would seem to suggest that there may have been something untoward, in the acquisition, or participation in …[intervene]

CHAIRPERSON: Advocate Sibeko, if you do not mind, maybe let me

tell you, we could not find such information. The US department said that that investigation had nothing to do with the South African acquisition. They said it had nothing to do with the South African acquisition. I think, BAE, also, in their papers and in their submission, it is what they are saying. So, I am not sure, whether that proves the point that you are trying to make. Maybe if you care, before that, Advocate Sibeko, which point are you trying to make? Let us assume you know, that happened in the US, let us assume you are correct. It happened there, the, as well as that, what impact does it have on our investigations?

ADV SIBEKO: Whether any entity outside of government influenced, it is, it has that relevance.

COURT: Now, if at all the US Justice Department says to us that we have never investigated the South African, the South African procurement where does that prove the point that you are trying going to make?

ADV SIBEKO: Chair, in terms of evidence that would have been brought before the Commission, the issue was raised, politely, at the time, when Deputy President, former President Mbeki gave evidence. If I may refer the Commissioners to paragraph 77, of the submission. This is a summary of the charging letter, against BAE, issued by the US Department of Justice, with which BAE eventually concluded, a plea agreement.

You will see in the quotation, reference is made to the JS39 Gripen aircraft. In the middle of that quotation they say:

"Respondent's subsidiary, BAE System operations LTD and Sub-AD, Sub-4, a time as the contracting and paying of vehicles for Gripen International KB, in 2005 Sub-AD, assumed the marketing responsibility for new campaigns from the respondent. Although respondent continued from 2005, to support marketing efforts, in relation to South Africa, the Czech Republic (et cetera)."

It says:

"From 1995 to 2004 a written request, also known as general respondent's requests were approved by the department for Sub-AD to marked JAS 39 Gripen aircraft, which incorporated US defence [indistinct]. US defence services were provided, modify the aircraft, et cetera. The countries and years approved were Hungary in 1995, Poland and Czech Republic, 1996, Chili and Philipines, 1997, Brazil and South Africa."

And it goes on.

"From 1998 to present, respondent exported the Hawk trainer aircraft to the following six countries."

South Africa is one of the countries, included in that quotation. Now, in the light of what appears here, Chair, while it my be stated, as you have pointed out that the Justice Department did not investigate the South African sale, it does appear, when BAE submitted the plea agreement. It must, by definition, have incorporated the South African …[intervene]

CHAIRPERSON: Advocate Sibeko, we hear what you are saying. Just telling you the information that we got, from the evidence we have got. I was not speculating, just telling you the information that they gave us.

Earlier on, when this information was revealed, during the Commission, we made the point that we would check with the US Justice Department what the true position is. What I am telling you about is not what we heard from somebody else, but then, this is what we heard from the US Justice Department.

So, I am not being sure, you know, what they are trying actually to make, because BAE, even in their submission, they denied that the [indistinct] filed with the US related to the South African acquisition. Maybe, let us get to the next point.

ADV SIBEKO: Chair, the submissions made in, in this regard were made on the basis, largely, of the evidence that was available to us. In the absence of any evidence to the contrary, it becomes difficult in making closing submissions, to even speculate about what the Americans said …[intervene]

CHAIRPERSON: I understand that. We noted that as such. We will make a determination as far as that is concerned.

ADV SIBEKO: Is there any indication, before I continue, Chair, as to the time, until which we should be proceeding today?

CHAIRPERSON: Advocate Sibeko, [indistinct] we started late today. We submitted that, and we have not discussed with you, telling you on how we intend to proceed. You know that tomorrow morning, there is one group coming, before Dr Young comes in.

We agreed that we will finish with you, as far as this point is concerned. Then, tomorrow morning, Advocate Sello will address on the question on job opportunities, that is between 9:30 and [indistinct].

The course of [indistinct] that you have made, we must finish with it today, before we go home.

We can break for five minutes and when we come back, we will have to continue with you, until we finish. You do not mind, where is [indistinct] yes. We are ready, keep that in mind, when we come back and when we proceed. Thank you. Maybe, let us adjourn for another 10 minutes. Thank you.

(COMMISSION ADJOURNS)

(COMMISSION RESUMES)

ADV SIBEKO: Chair, Commissioner Musi, the next topic deals with allegations of improper influence in the submarine programme. Now, in the light of the discussions we had earlier, with regard to the Debevoise and Plimpton reports, the submissions made, as on paragraph 80 to end of 83 on page 40, that we will skip. It will then take us to paragraph 84, on page 40.

There, in summary, Chair, might I remind you of the evidence, amongst others of Mr Barry De Beer, with regard to non-compliance, by some of the suppliers with the DIP requirements. An opinion that was sought from as arms or legal, which opinion seemed to suggest that the non-complying tenders had in terms of the applicable policies, ought to have been disqualified.

You will see, Chair, that in respect of the issues that were raised, with regard to non-compliance, some of these appeared from the JIT report. But, the evidence we rely on largely, is that of Mr Barry De Beer, who gave such an extensive [indistinct] on the various policies that applied,

in respect of the DIP requirements of each, in respect of each bidder.

The Armscor opinion, with regard to the non-compliance seems to suggest that the bidders must be disqualified and at best, perhaps, invitations had to be re-issued, but this was not done. It appears that SOFCOM, using whatever authority it had, to condone the non-compliance, gave an instruction that the non-compliant bidders now be disqualified.

They must be evaluated and further information had to be sourced. It begs then the question, ought these bidders, who did not comply, have been disqualified, in terms of the rules and if they were not disqualified, what is the effect eventually, of the contract awarded and concluded?

We would submit that, to the extent that the eventual award of the tender had, or suffered from certain deficiencies, as we have described. There does appear to have been, have a non-compliance with the prescribed rules and it must follow the same fate, as we submitted earlier.

However, the contracts have been executed and there is nothing that can be done, in the circumstances. Chair, that would bring us to page 43, dealing with allegations …[intervene]

CHAIRPERSON: The question of what is failing.

ADV SIBEKO: Let me come close to the point, Chair. Because that brings us then to, I am advised that someone must prescribe berocca, so that the rest. The next topic on the allegations of improper influence, Chair, you will see that at paragraphs 88 and 89, we deal with similar non-compliance with DIP requirements and especially with regard to the

GFC bid that it was allowed for further evaluation.

Notwithstanding that, it had not complied with imperative DIP requirements. We say, rather than at 89, disqualify the GFC bid, it was allowed for further evaluation by SOFCOM. We submit that a similar [indistinct] as submitted, with regard to the GFC bid, should apply with equal force, in respect of this programme.

As from paragraph 90, Chair, we make reference to the allegations, regarding the improper influence, in the award of the combat suite, as described by Dr Richard Young, in his evidence. Perhaps, just take it a step back, that the allegations, regarding that programme that the Corvette platform itself appeared largely based on the German reports that were the subject matter of some controversy earlier in the Commission proceedings.

We, you will recall, Chair, that when Colonel Du Plooy came to give evidence also. He seemed to rely, or at least that the DSO in looking at the allegations, also seemed to rely on the same documents and that there were, he lamented the issue, MLA's properly executed by government.

It seemed that the investigations, the joint investigations that were sought to be conducted, were somewhat blocked and perhaps certain facts could have been revealed by the joint investigations that have been proposed. However, the Germans, for reasons that have been articulated, decided to stop the investigations.

And perhaps it goes of their statute of limitations and perhaps to the extent that insufficient evidence, at the time, or they did not have

sufficient evidence, at the time, to continue with their investigations. It is not apparent and one cannot speculate, what assistance they would have received, had the mutual legal assistance requests been executed.

But, on the basis, purely, of the documents, as are before the Commission, we would submit that the Commission is free to look at the document and evaluate the reliability of the evidence, set out therein and make its findings, as to the veracity of the allegations, emanating from them. Those would be our submissions, with regard to the allegations, relating to the Corvettes.

You would see, Chair, thereafter it is the docket that my colleague so dealt with. She will, during the course of the morning tomorrow, deal with, or she, she advises me that she has to deal with the issues that have been proposed to be dealt with tomorrow morning, now, Chair. It seems she is in a position to deal with the aspects of the terms of reference that she had omitted to deal with earlier.

In the absence of any further issues that the Commissioners would direct my attention to, those would be our submissions on this aspect.

CHAIRPERSON: Thank you. Advocate Sello, how long do you think you are going to be?

ADV SELLO: Thank you, Chair, Commissioner Musi. It should not be longer than 10 minutes, Chair.

CHAIRPERSON: 10 minutes. Good. Thank you. Then let us keep it relevant and short.

ADV SELLO: Thank you, Chair. I think, the appropriate place to start again, is the terms of reference. In this regard, it is under 1.3. The

terms of reference require the Commission to enquire into, whether the job opportunities, anticipated from the SDPP have materialised at all.

If they have, to what extent and if not, what steps ought to be taken? Chair and Commissioner Musi, following from the position we have assumed, in regard to term of reference 1.4, we believe if the agreements and the facts, relating to the SDPP are taken into consideration, 1.3 is actually a misnomer of some kind.

The, neither the NIP terms, nor the DIP terms anticipated job opportunities to flow. As we indicated, the, in terms of NIP's, the obligors would be, are judged on three criteria. Now, the nine criteria, established by the Department of Trade and Industry include job creation.

But, for purposes of NIP's that was not an issue to be measured, by the NIP terms. So, as far as NIP is concerned, there were no job opportunities anticipated to flow, from the SDPP. However, we know that evidence has been led, on job opportunities.

Out there, in the public, there is an oft quoted figure of 65 000 jobs. The first time this figure, I think, was, came into the public domain was in Parliament, where it was expressed. Regard being had to the terms of reference of this Commission, we believe that the expression made, in Parliament, regarding 65 000, does not even, of itself, create an obligation on the SDPP's to create 65 000 jobs.

That is our starting point. Secondly, we have heard from Armscor, DIP witnesses, Mr De Beer and Mr Burger, that at no juncture were the 65 000 jobs intended to mean 65 000 actual permanent jobs. Armscor

explains this concept of 65 000 jobs, through a system of calculating man hours.

So, if jobs are created, and the man hours, relating to those jobs, reach a particular figure, that is how we would get to the 65 000. Turning then to NIP, the DTI, which actually, in terms of the NIP agreement, had no measurement of jobs created, because it was not a measurable criteria.

We note in DTI submissions and in the evidence before the Commission that the total jobs saved, or retained, amounted to 13 190. These are defined as jobs that would have been lost, had there been no involvement with the obligors and total direct jobs, amounting to 13 690.

Now, if one has regard to the evidence of Mr Zimela, which to, which, according to us, remains uncontroverted and which we have argued earlier today, NIP terms, concluded with the defence obligors did not include an obligation to deliver on job creation. We agree with him on that.

Now, for the Commission to determine, whether job opportunities, anticipated to flow from the SDPP have materialised, it will be an almost impossible task. Because there is no specified threshold, against which you must measure the actual jobs delivered.

So, in those circumstances, we would, as much as there is no measure for actual jobs created, because none was agreed to, in the NIP terms. The figures given by the DTI, there is no basis to gainsay them, save to point out that what is not before the Commission is exactly how the jobs retained or the jobs saved are calculated.

The numbers provided by the witnesses and reiterated in the DTI's submissions, we in truth, have no basis to challenge and unless there is any further clarification required, that would be our submissions, as far as job opportunities are concerned.

CHAIRPERSON: Thank you. Maybe, let me just make one point. Remember Advocate [indistinct] in his opening statement, he said something, to the effect that the gate that we use, in order to determine, whether the undisputed jobs have been created or not, is a figure of 65 000. That is what he said. He said it is because this is what the Minister promised the nation, at the time when he made announcements. That is view is wrong. It is incorrect to me.

That view is incorrect. I will tell you why I say so. When you have evidence, which says that the figure of 65 000 came as a result of estimates that were made from the business plans and in actual fact, at the time, when the initial estimates were made, some other equipment was included.

The maritime helicopter was included. According to those estimates, the maritime helicopter was supposed to create almost 2 500 jobs. They took into account that figure of 2 500 jobs, when they made the estimate of 65 000.

Two, at the time of the initial estimates, the quantity of the average age was recorded as 61. The estimates were made of the males that you are going to appoint is 61 years of average age. We now, but in actual fact, we have contracted for only 30 years. The initial estimates indicated that the average age project will produce about 4 558 jobs.

But, then, we know that, you know, we did not actually get the 61 units that were initially expected would only fit. So, if you take those two factors into account, it cannot leave you on the 65 000 that was initially anticipated. That figure must reduce.

I just thought that let me just mention, because you know, I do not want to leave the wrong impression here. That you know, what you, we are bound to what Advocate Abubeka said, on that day, when he said that you must, you must measure the normal jobs created that gave that 65 000 estimate, mentioned by the Minister in Parliament, unless, if you disagree with my analysis, Advocate Sello.

ADV SELLO: Chair, I do not disagree with your analysis and if anything, I add that, according to the evidence of the DTI, the number of jobs created, in terms of each project, as stipulated in the business plan, earlier we had a discussion about substitution of projects. Each time the project is substituted, it calls for a new business plan.

Those figures just keep changing. Now, the point I was making is, whether or not, zero jobs were created or the numbers given by DTI is a matter that really should not detain this Commission for a very long time, because it was never the responsibility of the obligors, in terms of the NIP terms to deliver those jobs.

Now, if the Minister would have preferred for the SDPP to deliver 65 000, that would be his personal, that would be his personal preference. But, that then, does not make it an obligation on the SDPP's to deliver 65 000 jobs.

CHAIRPERSON: I think, I agree with that, but now I unfortunately

support our terms of reference. We will have to live with it.

ADV SELLO: Naturally.

CHAIRPERSON: Any other point that you want to make?

ADV SELLO: Chair, unless there are other issues that arise from this issue, I believe that, that is what, those are our submissions in respect of the job opportunities or …[intervene]

CHAIRPERSON: Yes …[intervene]

ADV SELLO: Item 1.3 of the terms of reference.

CHAIRPERSON: Thank you. And what is the position tomorrow morning? Who starts tomorrow morning?

ADV SELLO: Chair, if my understanding is correct, tomorrow we are scheduled to kick off with Advocate Mphatha and Ms Ramagaga, would be dealing with 1.1 of the terms of reference. As I understand things, Dr Young would then follow. I had been expected to deal with this issue at nine o'clock this morning.

But, I was instructed by the Commission to deal with it now, so that one falls away. The Chair had originally suggested that in view of the fact that I might have to deal with job opportunities tomorrow morning that we start at nine, instead of half past nine.

So, now that this is out of the way, I guess the only outstanding thing is for the Commissioners to decide the starting time for tomorrow.

CHAIRPERSON: Tomorrow we are hearing only two parties. That will be the team leader of [indistinct] and Dr Young.

ADV SELLO: I am not sure if it is for tomorrow, but I knew that was for the morning part of tomorrow, Chair.

CHAIRPERSON: Let me find out from Advocate Mdumbe at the back. Tomorrow, is it Dr Young and the team, which is [indistinct]?

ADV MDUMBE: Yes, Chair. Those are the two parties that we [indistinct] allocate tomorrow.

CHAIRPERSON: Then, from there, what is the agenda?

ADV MDUMBE: We are, unfortunately in a predicament here. I did mention this to the legal representatives of some of the opposite fence that we have been informed that the venue and the alternative venue that we use, in Centurion, both the venues would not be available between Wednesday and Thursday. So, tomorrow we will hear the oral presentations of Dr Young and Ms Ramagaga and Advocate Mphatha. Then, we will adjourn. The hearings would resume on Friday, on which date, Chairperson and Commissioner Musi, we will hear the closing arguments of the Department of Defence, Armscor and DTI. Thereafter, all the other participants, who also wish to make presentations on that day. I suppose, Chair, if we do not get to help everyone on Friday, we will then continue next week Monday.

CHAIRPERSON: Thank you. So, in other words, tomorrow we will hear only submissions from two parties. Then, from there, we go to Friday, because we will not be sitting Wednesday and Thursday. Then Friday, we are going to deal with the Armscor, DTI, the Ministerial Sub-Committee, Advocate Malan and we will try and do everybody on Friday. Those that we are unable to do on Friday, then we will have to do them on Monday. So, from tomorrow, Wednesday and Thursday, we are not sitting. We will sit on Friday, try and [indistinct] on Friday. Those that

cannot be on Friday, then we will finish them on Monday. If at all, there is a need to sit on Saturday, we are prepared to consider that, just to, to be, make sure that we can accommodate everybody. Advocate Cane, I see, you are looking at me. I thought you wanted to make a point.

ADV CANE: Thank you, Chair and Commissioner. It does not hurt me that if it would assist the Commission, it may be appropriate for me, to commence tomorrow afternoon, if there is time available, which could meant that I could finish early and then I [indistinct] day. But, I will leave it in your hands.

CHAIRPERSON: And Advocate Cane, I will not bind you. If you can start tomorrow, it will depend on how, what time do we finish with the team, with the evidence leaders and Dr Young. If at all, if there is time, we would allow you, if you start tomorrow. But, then if we do not finish early with these two groups, then unfortunately, you know, you would have to go to the Friday. Maybe, what we can do, on that Friday, there will be too many parties, you can start at 8:30.

ADV CANE: I am in your hands. Let us see how it goes Friday. You know that I am prepared to start tomorrow afternoon, if that suits you.

CHAIRPERSON: Thank you. I think, that is the position then. Advocate Sello, are you suggesting that tomorrow we start at 10.

ADV SELLO: Alright. Chair, it is not my place to suggest anything. I am just pointing out that because the Chair had decided I deal with this matter tomorrow morning, he brought forward the start time to nine o'clock. Now that that point has been dealt with, you know, the Chair is at liberty to determine whether the start time is still nine o'clock.

CHAIRPERSON: Thank you. I think, let us start again at nine o'clock. In the light of what Advocate Cane is saying, maybe it might be better if we start at nine o'clock and we see if we can accommodate her even tomorrow.

ADV SELLO: As it please, Chair.

CHAIRPERSON: And then, the case is adjourned, until tomorrow morning and we will start at nine o'clock. Thank you.

ADV SELLO: Thank you.

(COMMISSION ADJOURNS)