Demokratisk och rättsstatlig mognad.
R2K, Sydafrika och den sista Sovjetrepubliken med dess fjollevatten[1]

Av Dennis Töllborg, 2018.

Det här projektet har, liksom min forskning de senaste sex åren, varit möjligt att genomföra endast tack vare stöd från Torsten Söderbergs Stiftelse. Handelshögskolan har bidragit marginellt och motvilligt. Jag har under de fyra månader projektet genomförts, parallellt med bl.a. författandet av en(tre) böcker, bidragit med drygt 250.000 kronor till GRI:s ekonomi. Försök att få besked om vad dessa pengar använts till har misslyckats. I Sydafrika hade det varit möjligt. Och motsvarande agerande från universitetets sida i Sydafrika hade lett till rättsliga konsekvenser. Liksom Black 12.

1. Intro

Sydafrika skiljer sig dramatiskt från Sverige i åtminstone två olika avgörande avseenden; det är en betydligt starkare rättsstat, åtminstone på domstolsnivån, och det är en levande demokrati, ungefär som Hamnarbetarförbundet (med alla sina imperfektioner) jämfört med LO.[2] Vet man inte detta saknar man bildning,

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[1] I juni beslöt GRI:s föreståndare, i sin outgrundliga vishet, att rapporten inte fick publiceras i GRI:s rapportserie för det fall jag vägrade att ta bort jämförelsen med och redovisningen av skojeriet inom Handelshögskolan och Sverige. Hon förklarade vidare att jag förbjöds använda ordet "fjollevatten" för den champagne, som numera flödar på universitetet i dess starka behov av yta när det saknas djup. Skälet var ett ordet, enligt henne, "kränkte medarbetarnas sexuella integritet". Ja, det är sant, citatet är exakt och nedtecknat efter det att jag med gapande mun kontrollerade med henne om hon verkligen sa vad jag just hörde, torsdagen den 14 juni klockan 14.05. Resultatet är – naturligtvis – att rapportens titel fick ändras till den nuvarande. Någon måste ändock ta ansvar, och leva upp till vad professionsetos kräver, även om denne arbetar på ett dårhus.

[2] Se bilagorna 6 & 7, jfr med bilaga 8, för konkretisering av en av de avgörande skillnaderna mellan Sverige och Sydafrika

och kan man inte ta till sig detta älskar man sin navel. Då är man helt enkelt svensk.

Sydafrika är en starkare rättsstat genom världens mest progressiva demokratiska konstitution, ihärdigt implementerad och upprätthållen genom dess konstitutionsdomstol och de domare som formaterar densamma. Det är en levande demokrati, så som bara en ung demokrati – med stöd i en stark tradition av kamp och backad av en stark konstitution med domare enbart lojala mot sitt professionsetos – faktiskt kan vara.

Afrika uppfann inte korruptionen.[3] Sydafrikas apartheid har varit instrumentellt centralt, paradoxalt kanske fr.a. p.g.a. sanktionspolitiken (som konsekvent kringgicks av samtliga fem permanenta stater i säkerhetsrådet), för framväxandet av den omfattande korruptionen i landet.[4] Men det handlar alltjämt om *low-level corruption* – därmed synlig, gripbar och uppenbart i konflikt med den officiella retoriken – och inte om den för demokrati och rättsstat så förödande *high-level/deep-level corruption*, som så framgångsrikt använts för stabilitetsbyggande, kanske särskilt i Sverige.[5] Sydafrika är alltjämt ett heterogent, oroligt, instabilt och dramatiskt land, fullt av motsägelser, makt men också motmakt, fasoner men också stil, fusk men också mod. Och det lider naturligtvis, som varje land, av sitt eget hyckleri. Men detta är transparent, utgör inte normalitet och möts av brett, altruistiskt och medvetet motstånd. En medvetenhet som gör att NGO:s som R2K självklart vägrar ta bistånd från organisationer som SIDA, väl medveten om vilka krav på anpassning det innebär och varför dessa

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[3] Se Töllborg, *Ruinerna hävdar att byggnaden var vacker*
[4] Se van Vuuren, *Apartheid, Guns and Money*
[5] Se Töllborg. *Pams Plats.* För ett exempel på konkretisering, se bilaga 12

krav ställs[6], medan t.ex. en organisation som jag själv medverkade till att skapa, och var både drivande i och vice ordförande för, HRDI, byggde ett behagligt liv för två människor på andra människors ryggar. Och där en av dessa självklart blev hedersdoktor på HGU för denna insats, efter stalinisering av organisationens historia och assimilering av den svenska modellen.[7] Ja, "Det är (alltjämt) märkvärdigt hur många människor, som få tunghäfta, när något allvarligt står på spel."[8]

Det är säkert så att många, särskilt i Sverige, inte delar denna verklighetsbeskrivning, om inte annat så av självbevarelsedrift eller ångest över sin egen ryggradslöshet. De har fel, och de gör fel. Skam över dessa, heder till de som håller rättsstaten levande och demokratin vital i Sydafrika.

Här kommer den korta rapporten om R2K, en organisation som motsvarar vad som var normalitet i Sverige och västvärlden för ett sekel sedan. Ni kanske inte gillar den. Jag bryr mig inte. Vetenskap är trots allt inte en popularitetssport eller en modegenre.

2. R2K

31 augusti 2010 presenterades Kampanjen Right2Know (R2K) i St Georges kyrka i Kapstaden. Den föddes utifrån motståndet till ett förslag om inskränkt yttrande- och informationsfrihet i en ny lagstiftning, POSIB (ung. lag om skydd av statliga uppgifter), populärt kallad "Secrecy Bill". Lagförslaget hade introducerats för parlamentet

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[6] Se för *en* konkretisering, Mosander, *Bland spioner, kommunister och vapenhandlare,* särskilt kapitel 1 och 16 om Jämtin, Freivalds och Zumas dåvarande hustru, senare kandidat som ANC-ordförande och därmed presumtiv president

[7] Se bilagorna 9 och 10 för konkretisering av värdesystemets parasiter och ren stöld

[8] Torgny Segerstedt, *Idag-spalten* 8 september 1934

ett par månader tidigare, juli 2010, som en modifiering av en tidigare (2008) version som fått återkallas då denna närmast varit en blåkopia av apartheidtidens sekretesslag. Alltjämt, 2018, har Sydafrika kvar den gamla apartheidlagstiftningen på detta område, och lagstiftningen är således i starkt behov av förnyelse, men en förnyelse som är konstitutionsenlig. Lagförslaget antogs visserligen så småningom, trots motstånd, av det ANC-dominerade parlamentet, men Zuma vågade aldrig kontrasignera det (ett krav för promulgation i Sydafrika). Det stod nämligen tidigt klart att i samma ögonblick som presidenten skulle genomtrumfa lagförslaget skulle parlamentets och presidentens beslut underställas Konstitutionsdomstolen, och samtliga juridiska bedömare – däribland presidentens egna rådgivare – hade klart för sig att domstolen med största sannolikhet skulle ogiltigförklara lagen.

> Detta är en reell möjlighet i Sydafrika – ett motsvarande initiativ i Sverige skulle, som bekant, inte bara avvisas så som en rättslig omöjlighet, det skulle därtill mötas av breda leenden och hånskratt, och för alltid desavouera den klagandes framtid.

Den nya propositionen var mer eller mindre densamma som 2008 års version – lagstiftningen skulle utvidga myndigheternas möjlighet att sekretessbelägga information och stadgade höga straff för integritetsbärare (vanligen kallade whistle-blowers), aktivister och journalister som offentliggjorde sekretessbelagd information.

En heterogen samling aktivister såg det som centralt att bekämpa lagförslaget, som presenterats i kölvattnet av

Zuma's övertagande av presidentskapet och ANC:s allt svagare förankring hos befolkningen.

Kampanjen Right To Know, R2K, grundades till stöd för den nya konstitution revolutionen skapat – världens i särklass mest demokratiska grundlag, åtminstone såvitt avser rättslig kraft, tack vare Konstitutionsdomstolen och dess ledamöter – med en inverterad variant av hemlighetsmakeriets klassiska need-to-know-princip som tema och namn. I detta tidiga skede var det viktigaste strategiska syftet att sprida kunskap om lagförslaget och dess konsekvenser, och hoppas att detta skulle utlösa motstånd – ideologikritik, om man så vill.

Gruppen enades om ett gemensamt uttalande; "Stoppa förslaget till ny sekretesslag. Sanningen måste få berättas", och kampanjens tema spreds över landet med uppmaning till nationell samling[9]:

"En lyhörd och ansvarig demokrati som kan infria de grundläggande behoven hos vårt folk måste byggas på öppenhet och fritt informationsflöde. Det sydafrikanska folkets kamp hotas därför av förslaget till ny sekretesslagstiftning. Vi har inga problem med att förstå att apartheiderans sekretesslagstiftning måste avskaffas, och ersättas med en ny lagstiftning, till skydd för demokratin. Det förslag som nu skall framläggas för parlamentet för dess godkännande är dock allt för likt apartheidtidens regler. Skyddet för integritetsbärare, s.k. whistleblowers, varpå demokratins praktik vilar,

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[9] 2 augusti 2010. På grund av bristen på formaliserade R2K-strukturer och nätverk i detta tidiga skede, spreds budskapet huvudsakligen över internet och till olika nätverk, fackföreningar och andra etablerade NGO:s i landet, organisationer och sektorer inom civilsamhället (inklusive fackföreningen/arbetarrörelsen). "Uttalandet" antogs senare som "grundförklaringen" av R2K-kampanjen när den officiellt lanserades den 31 augusti 2010.

undergrävs totalt och tillgången till information om myndigheternas praktik stryps. Sammantaget innebär lagförslaget ett så fundamentalt angrepp på offentlighetsprincipen och yttrandefriheten att det står i strid med konstitutionen."[10]

Uttalandet fortsatte att lista en serie specifika "bekymmer" med propositionen. Lagförslaget skulle komma att "skapa ett samhälle av hemligheter" eftersom:

- Inte bara statliga myndigheter utan även offentligägda företag (som motsvarigheter till SJ, Vattenfall et cetera) och enskilda kommuner gavs rätten att klassificera allmänna handlingar som hemliga.[11]
- Under åberopande av "skydd för rikets säkerhet" överläts åt enskilda tjänstemän att diskretionärt avgöra vad som skulle sekretessbeläggas.
- Affärsuppgörelser och annan kommersiell information kan sekretessbeläggas, vilket gör det mycket svårt att hålla företag och regering ansvarig för ineffektivitet och korruption.
- Den som läcker information som är på detta sätt sekretessbelagd kan åtalas, oberoende av om denne är offentliganställd eller ej.

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[10] Samtliga översättningar är gjorde av författaren

[11] I Sydafrika (och världen över, dock naturligtvis inte i Sverige) är det vetenskapliga begreppet för den typ av *high-level,* eller *deep-level, corruption* som kommit att bli NPM:s och den samtida "privatiseringsvågens" mest utmärkande drag *State Capture.* Begreppet, obekant i Sverige med dess nya former av "kollegialitet" och vetenskapligt konsultande som i Göteborgs s.k. Granskningskommission, har sitt ursprung i en rapport från Världsbanken och formats ur det faktum att "privatisering" är en ny form av oegentlighet – poängen med denna nya typ av transfereringar av skattemedel till de priviligierade är ju att det i allt väsentligt alltjämt handlar om offentligt *finansierad* verksamhet. *State Capture* är därför ett synnerligen välfunnet begrepp, naturligtvis obekant bland svenska statsvetare, ekonomer och jurister, präglade som de är av självbevarelsedrift och ryggradslös antiintellektualism. Latour...suck!

• Spridande av information som ännu inte är sekretessbelagd kan också komma att bestraffas. Osäkerheten om vad som är tillåtet och vad som är förbjudet leder till en chilling-effect och självcensur. Yttrandefriheten beskärs allvarligt.
• Whistleblowers och journalister kan dömas till längre fängelsestraff för brott mot lagen än de tjänstemän som döljer, cover-up eller ljuger om de riktiga förhållandena, jfr. *detournement de pouvoir*.
• Underrättelse- och säkerhetstjänstklustret i landet undandras varje form av offentlig granskning.

R2K fokuserade på lagförslagets konsekvenser såvitt avsåg möjligheterna till ett fritt informationsutbyte och möjligheten att för framtiden utkräva ansvar. Som särskilt allvarligt framhöll man att ett genomtrumfande av förslaget skulle medföra bl.a. att

• Tjänstemän inte behöver ange skäl för att de valt att sekretessbelägga informationen (jfr. Handelshögskolans och GRI:s ledning vid arbetet med *Black 12*).
• Statsrådet med ansvar för intelligence skulle få obegränsad makt att själv avgöra vilken information som skall hållas hemlig och vilken information medborgarna skall få ta del av, samtidigt som det saknades ett oberoende kontrollorgan med uppgift att förhindra att information sekretessbeläggs även när det föreligger ett stort allmänintresse att få ta del av informationen.
• Så snart information var sekretessbelagd skulle även läckage av information av stort allmänintresse kriminaliseras. Den föreslagna straffskalan var för Sydafrika ovanligt hård med straff på upp till 25 års fängelse. Även integritetsbärare och journalister, d.v.s. människor som läckte sekretessbelagd information drivna av sitt professionsetos, skulle kunna straffas, trots att

de agerat i enlighet det samhälleliga ansvar konstitutionen och den sydafrikanska revolutionen påbjöd.

Uttalandet avslutades med påpekandet att även landets valda representanter är bundna av de konstitutionella värdena, och att dessa förutsätter en ansvarig, öppen och responsiv regering som garanterar yttrandefrihet och allmänna handlingars offentlighet. Varje förslag till sekretesslagstiftning måste därför fylla sju kriterier, ett inför kampanjen noga utarbetat "frihetstest", för att vara konstitutionsenlig. Dessa är

1. Sekretess kan bara gälla inom säkerhetssektorn, såsom polis, försvars- och underrättelseorganisationer.
2. Sekretess kan bara gälla för tydligt definierade nationella säkerhetsfrågor. Varje sekretessbeläggning måste motiveras av ansvarig tjänsteman.
3. Kommersiell information kan (således) inte sekretessbeläggas, enbart med hänvisning till kommersiella intressen – allmänintresset, särskilt i privatiseringsvågen efter NPM:s genomslag, tar över profitintresset. *(State Capture).*
4. Det måste finnas relevanta kontrollorgan, dessa skall vara oberoende, stå i allmänhetens tjänst och allmänheten skall ha full insyn i dessa kontrollorgans arbete.
5. Integritetsbärare, s.k. whistle-blowers, skall inte kunna bestraffas. Däremot skall obefogad sekretessbeläggning kriminaliseras, jfr. *detournement de pouvoir.*
6. Kontrollorganen måste utses av parlamentet, inte av presidenten, regeringen eller det statsråd under vilket verksamheten sorterar. Kontrollorgan skall ha självständig och slutlig makt att avgöra vad som får sekretessbeläggas och vad om inte får omfattas av sekretess.

7. Varje lagstiftning på området måste innehålla ventiler för informationsläckage som sker i allmänhetens intresse, även av sekretessbelagd information. Sådan kunskapsspridning, i allmänhetens intresse, får inte vara kriminaliserad.

Utskicket blev en fullständig taktisk och strategisk framgång, och fungerade som en katalysator för det som mindre än en månad senare, den 31 augusti 2010, skulle bli den formella lanseringen av R2K-kampanjen. Tre provinsiellt baserade aktivistgrupper bildades omgående – i Västra Kap-provinsen (Kapstaden), i Gauteng (Johannesburg) och i Kwa-Zulu Natal (Durban) – och hundratals olika NGO:s och tusentals individer anslöt sig till uttalandet. De flesta av de centrala mediaorganisationerna och politiska partierna (med undantag för det statsbärande ANC) hakade på.

ANC påverkades direkt. Deras representanter i parlamentet uppmanades redan i september att skjuta upp omröstningen om den nya sekretesslagen. R2K hade då bara existerat i knappt två månader. Än idag (april 2018) har lagstiftningen inte promulgerats av presidenten, och även inom ANC har allt starkare krafter börjat kräva att det, senare i omarbetad form, av parlamentet antagna lagförslaget kastas i papperskorgen och radikalt omarbetas. Detta är dock knappast troligt med Ramaphosa som ny president, med dennes bakgrund och mot bakgrund av det nya kabinett han utsett.[12]

2.1. R2K utnyttjade det momentum man hamnat i, och fortsatte mobilisera. 21-27 oktober genomförde man en första veckolång aktionsvecka över hela landet, fokuserad

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[12] Se R2K Februari 27: *Statement on President Cyril Ramaphosa's new cabinet,* samt Mail & Guardian på samma tema

på protester mot den föreslagna lagen. I Kapstaden deltog mer än 3.500 människor i en demonstration som gick till parlamentsbyggnaden, och parallellt genomfördes demonstrationer och visades filmer i Johannesburg och Durban, allt fokuserande på förslaget till ny sekretesslagstiftning.

Protestveckan fick stor medial uppmärksamhet och en rad R2K-aktivister intervjuades i såväl lokal- som riksmedia. Sociala media utnyttjades flitigt. I slutet av året var R2K landets ledande röst i kritiken av förslaget till ny sekretesslag. En stor del i framgången var det konsekventa fasthållandet vid det sju punkter långa frihetstest man skapat (se ovan), och som varje förslag och varje argument konsekvent kom att prövas mot.

Styrkta av sina snabba framgångar, med över 400 organisationer och 30 000 individer som medlemmar inom tre månader, höll man sitt första nationella möte i Kapstaden den 2 februari 2011, och formaliserade organisationen. Mer än 50 delegater från var och en av de tre etablerade provinsiella grupperna i Kapstaden, Johannesburg och Durban, plus nykomlingar från Östra Kap, antog en uppsättning *R2K Principles* och formulerade ett utkast till konstitution för organisationen. Här beslöts och beskrevs kampanjens vision och dess uppdrag, samtidigt som man byggde en gemensam plattform för organisation och fortsatt handling:[13]

Vision

Vi strävar mot att skapa ett land och en värld där alla har rätt till kunskap. En förutsättning därför är fri

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[13] Se Right2Know Nationellt toppmöte 2-3 februari 2011. Detta och de flesta andra viktiga dokumenten i kampanjen kan nås på http://www.r2k.org.za

tillgång till information och frihet att sprida denna information. En levande, öppen demokrati, med ansvarsutkrävande, kräver lyhördhet för att kunna leverera social, ekonomisk och miljömässig rättvisa. Endast i ett sådant samhälle är människan fri, och kan leva i värdighet och rättvisa.

Uppgift

• Att driva kampanjer för lagar, policyer och praxis som konsekvent försvarar rätten till fri tillgång till information, och därmed evidensbaserad kunskap;
• Att driva kampanjer för ett fritt och pluralistiskt medielandskap;
• Att driva kampanjer till stöd för lokalsamhällenas rätt att få tillgång till information som regeringen och privata aktörer annars ensamma har kontroll över; samt
• Att driva kampanjer till stöd för integritetsbärare, s.k. whistle-blowers, som är så avgörande nödvändiga i varje levande demokrati.

Principer

1. Tillgång till information: Alla har lika rätt att få tillgång till information. Denna rätt har ett självständigt värde och är avgörande för många andra demokratiska rättigheter. Rätten att få tillgång till information måste försvaras och promotas i lag, praxis och politik på sätt som stadgas i bl.a. vår konstitution, artikel 32.
2. Fritt flöde av information: Alla människor har lika rätt till yttrandefrihet. Denna rätt har ett självständigt värde och är avgörande för många andra demokratiska rättigheter. Yttrandefriheten måste försvaras och promotas i lag, praxis och politik på sätt som stadgas i bl.a. vår konstitution, artikel 16.

3. Fri och heterogen media: Medierna har rättigheter *och motsvarande skyldigheter*[14] att få tillgång till och sprida information, skall göra detta självständigt och i enlighet med sitt professionsetos, utan favoriseringar och utan att behöva känna rädsla. Dessa rättigheter och skyldigheter är avgörande för allmänhetens utövande av många andra demokratiska rättigheter. Medias frihet måste försvaras och promotas i lag, praxis och politik på sätt som stadgas i bl.a. vår konstitution, artikel 16. Men media måste också mångfaldigas, så att alla, även de maktlösa, har en röst.

4. Ansvar och öppenhet: Den transparens informations- och yttrandefrihet skapar tvingar fram ansvar för de som fått makt, makt för att genomföra sitt uppdrag att realisera politisk, social, ekonomisk och miljömässig rättvisa.

5. Informerade medborgare stärker demokratin: Rätt och möjlighet till information genererar kunskap och en demokratisk mognad med ett myndigt folk som aktivt vågar och förmår att försvara och fördjupa sina politiska, sociala, ekonomiska och miljömässiga rättigheter.

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[14] Jfr. Sverige och den pågående kampanjen mot Hamnarbetarförbundet, där näringsliv, politik och LO/Metall förenas i sin kamp för försvarande av etablerad position, med desinformation via sociala media och propagandaorganisationer och med stöd från såväl myndigheter (medlingsinstitutet) som domstol och regering. Se som exempel påståendet att Hamnarbetarförbundet vägrade sluta avtal, bilaga 6 a och b med svar till Medlingsinstitutet samt AD:s dom 2018:9 där Sveriges Hamnar fälls för förhandlingsvägran, sedan Hamnarbetarförbundet begärt förhandlingar om ett riksavtal (Förhandlingsplikten är lagreglerad sedan 90 år tillbaka i den s.k. Förenings- och Förhandlingsrättlagen, numera en del av MBL), ett av de två centrala ben den svenska arbetsrättsliga modellen vilar på. I Sydafrika hade Medlingsinstitutets rapport upphävts av Konstitutionsdomstolen, och åtal aktualiserats inte bara mot Medlingsinstitutet utan även mot arbetsdomstolens ledamöter. Se också Handelshögskolans nya värdegrund, och hur de agerar i praktiken. Den offentliga lögnen är dock inte sanktionerad i Sverige, d.v.s. den demokratiska mognaden i Sverige placerar oss bland bananrepubliker och innefattar att vi närmast är att betrakta som en feodal demokrati. Äckligt är ett ord som ligger nära till hands för den bildade, liksom för den som drivs av sitt professionsetos – jfr. för en konkretisering Sara Stendahl och Torgny Segerstedtstiftelsen, hedersdoktoratet till Asha Ramgobin samt stölden av StreetLaw-programmet (bilagorna 9 a & b samt 10).

6. Evidensbaserad sanning, och därmed kvalitet i deltagande och i beslutsfattande, är beroende av rätten till information: Informationen skall vara tillförlitlig, verifierbar och representativ för de data från vilka den härleds, och rätten till information innefattar därför också en rätt att få tillgång till källdata. Information måste tillhandahållas transparent och vara lika tillgänglig för alla, oberoende av partsintressen.
7. Proaktiv spridning av information: Offentliga och privata organ måste sprida information proaktivt.
8. Jämställdhet: Alla människor, oavsett social status, klass, ras, kön, språk eller sexuell orientering har samma rätt till information.
9. Vi måste agera samlat, som ett kollektiv: Rätten till fri information, rätten att få veta, är avgörande för kampen för politisk, social, ekonomisk och miljömässig rättvisa och denna kamp kan bara nå framgång om vi driver den tillsammans.[15]
10. Solidaritet och kollegialitet: Vår kampanj tjänas bäst av att vi agerar samfällt och i solidaritet med likasinnade människor och organisationer, och det såväl lokalt som internationellt.

För R2K-aktivisterna var det tydligt att sekretesslagen var en symbol, en början på makthavares försök att skapa ytterligare hinder för det fria flödet av information. Det var därför viktigt att man slogs för *alla* människors rätt till fri information, inte bara journalisters eller en ekonomisk eller intellektuell elit. Det är en avgörande skillnad mot Sverige, med dess selfies, varumärkesskapande och förakt för bildning och människans *suum*.

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[15] Jfr. åter LO samt den nya formen av "kollegialitet" inom "akademin". Sverige har blivit ett land befolkat av käringar och lett av idioter, ostronlandet.

Det beslöts att det första verksamhetsåret skulle präglas av tre huvudkampanjer[16]:

i. Stoppa förslaget till ny sekretesslag.
ii. Krav på rätt till fri information *nu.*
iii. Skydda medias frihet och arbeta för en pluralistisk media. Följ noga lagstiftningen och varje försök att påverka medias frihet. Arbeta parallellt för mer stöd till media som står fri från privata intressen.

Det tog alltså bara drygt sex månader från initiativet togs till att skapa en fullfjädrad nationell organisation. R2K hade fungerat som en katalysator, och nu gällde det att konsolidera, för att motverka tendenserna till att en allt mer sluten och maktfullkomlig ekonomisk och politisk elit skulle kunna gömma sig bakom ny lagstiftning och korrupt praxis.[17]

2.2. **Några centrala kampanjer**

2.2.1 Förslaget till ny sekretesslagstiftning

Under 2011 var propositionen till en ny sekretesslag strategiskt prioriterad av kampanjen. Ett antal parallella aktiviteter genomfördes: man bevakade alla utskottsförhör och parlamentsdebatter, skrev remiss och

[16] Man lade snart till en fjärde kampanj, efter flera uppmärksammade repressalier mot whistle-blowers, t.o.m. i form av mord, nämligen Rättvisa åt whistle-blowers. Senare, 2012, skapade man särskilda instrument för att kunna länka whistle-blowers till olika organisationer och för att kunna generera juridiskt och ekonomiskt stöd åt dessa. I Sverige saknas som bekant whistleblowerskydd och varje form av substantiella initiativ till ett sådant, se Töllborg, *Whistle-Blowers, Informanter och Integritetsbärare.* Även Töllborg, *Älska din navel* samt *Pams Plats.*

[17] Jfr Töllborg, *Ruinerna hävdar att byggnaden var vacker*, bl.a. om Seritikommissionen men, för oss svenskar, kanske särskilt den *high/deep-level corruption* som stabiliteten i det svenska samhället bygger på, och vars förutsättning är ett indifferent folk och en intellektuell elit och akademi som fokuserar på selfies och eget varumärke

skickade skrivelser till beslutsfattare, genomförde regelbundna massmobiliseringar runt omkring i landet i form av demonstrationer, massmöten, vakor et cetera samt var hyperaktiva på sociala media och jobbade mot traditionell media. En rad workshops hölls, tillsammans med andra organisationer och tillsammans med akademin. Trycket tvingade till slut parlamentets "andra kammare", National Council of Provinces (NCOP), att hålla nationella utfrågningar om lagförslaget över hela landet, och ANC att aktivera medlemmar för att motverka den växande kritiken. Aktiviteterna gav resultat, förslaget reviderades gång på gång och utsatta deadline's för parlamentet att rösta om förslaget sköts upp gång på gång.

Den 22 november 2011 samlades parlamentet för att rösta om lagförslaget. Tusentals R2K-aktivister över hela landet genomförde protestaktioner på det som senare kommer att bli känt som "The Black Tuesday". Propositionen framlades nu för för parlamentet, och såsom föreskrivs i den sydafrikanska ordningen tillsattes därefter, när, som här, propositionen inte förkastas, ett utskott att granska lagstiftningsförslaget. Till skillnad från i Sverige har sydafrikanska medborgare möjlighet att aktivt följa utskottsarbetet momentant – Sydafrikas demokrati efter revolutionen har ännu inte "utvecklats" till svensk nivå.

Det gedigna arbete, och den landsomfattande aktivitet som R2K genomfört under året i alla dess olika former, både under 20111 och sedan lagförslaget lagt fram till parlamentet för omröstning, mötte starkt gehör även hos andra organisationer och inom akademin. ANC blev allt mer isolerade. R2K och nu även andra organisationer skickade skrivelser till NCOP:s ad hoc utskott för sekretesslagen,

bevakade varje utskottsmöte (vilket alltså är möjligt i Sydafrika) och fick t.o.m. själva göra muntliga presentationer inför detta ad hoc utskott. Parallellt genomförde man en intensiv lobby-kampanj mot enskilda parlamentsledamöter, för att förmå dem rösta för att utskottet skulle genomföra sådana förändringar i lagförslaget att det skulle uppfylla frihetstestets sju punkter. Man vände sig också till det internationella samfundet, såsom ambassadörer, utländska lagstiftare och ledamöter i internationella organ, allt för att öka trycket.[18] Sverige var naturligtvis helt ointresserat. SIDA, än mindre utrikesdepartementet, har inte ens övervägt att stödja en sådan här konkret kampanj, fri från korruption, vägrande att låta sig styras och i dagligt arbete fokuserande på att talk the walk. Vad som skedde och var möjligt i Sydafrika stämde så illa med den svenska självtillräckliga självbilden; här gav vi istället hedersdoktorat och medaljer åt ledare i korrupta projekt, finansierade via svenska skattepengar.[19]

Det sammanlagda resultatet av dessa aktiviteter kom till slut att påverka även inom ANC och särskilt dess ledamöter i NCOP:s ad hoc utskott – nu började även dessa visa en mer beredvillighet att ändra i lagförslaget. Departementet för rikets säkerhet hade drivit en hård linje, men fick allt mindre gehör. Den centrala lagstiftningen för tillgång till både allmänna och privata handlingar, som går mycket längre än vår motsvarande svenska lagstiftning om allmänna handlingars offentlighet, PAIA (Promotion of Access to Information

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[18] Särskilt centralt var OGP, Open Government Partnership, som Sydafrika ratificerat och där organisationens medlemmar bekräftat principerna om öppenhet och ansvarsutkrävande som centrala demokratiska principer

[19] Se https://law.handels.gu.se/forskning/hedersdoktor, Asha Ramgobin. Se även Mosander om Kongo-Khinshasa och Jämtin/Freivalds kramande av Zuma och Face Technologies

Act), och som antagits år 2000, måste beaktas och vid lagkonkurrens ha företräde för sekretesslagen, beslöt utskottet.[20] Propositionen reviderades i enlighet härmed, och det var naturligtvis en partiell seger för R2K.

I november 2012 var utskottet klart och återsände propositionen, efter en rad ändringsförslag, till parlamentet. Fortfarande klarade förslaget dock inte R2K:s frihetstest.

Tidigt 2013 var det dags för parlamentsdebatt och beslut, och i april 2013 antogs lagen av parlamentet. R2K gjorde då gällande att den av parlamentet antagna lagen är konstitutionsvidrig: det handlar bl.a. om straffsatserna för whistle-blowers, reglerna om sekretessprövning samt att enskilda statliga tjänstemän genom lagen skulle få diskretionär rätt att besluta om sekretess.[21]

I Sydafrika räcker det inte med att parlamentet har antagit lagen. Presidenten skall också godkänna. R2K var naturligtvis medvetna, och förberedda, på detta. I Sydafrika är det också möjligt för medborgare och organisationer att angripa ett lagförslag eller en lag genom att initiera en rättslig prövning vid domstol, och det är precis vad R2K, tillsammans med flera av landets ledande professorer i konstitutionell rätt och andra organisationer och jurister, förberett. Zuma vet om detta. Det är ingen hemlighet, och det är heller ingen hemlighet att Konstitutionsdomstolen inte väjer för att köra över såväl Zuma som parlamentet.

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[20] En motsvarighet i Sverige skulle vara en revolution, som helt undergrävde den svenska modellen för stabilitet; belöningar och exkludering

[21] En fullständig lista och redovisning återfinns i R2K Seven Point Freedomtest, november 2012 - http://www.rek.org.za

Jfr. t.e.x. Terry Crawford-Browns framtvingande av en ny kommission kring Arms Deal, en rättslig omöjlighet i Sverige.[22]

Konstitutionsdomstolen har, allt sedan den i början av sin existens underkände ett beslut av (dåvarande president) Mandela själv, med Mandelas nära vän och därtill dennes försvarsadvokat redan på sextiotalet Arthur Chaskalson[23] som ordförande i Konstitutionsdomstolen, den allra högsta respekt i hela landet. Inte minst efter det att Mandela, som fått sitt beslut underkänt, förklarat att Konstitutionsdomstolen dömt rätt, och han haft fel! Konstitutionsdomstolen kan inte avsätta presidenten eller parlamentsledamöter, men den kan både ogiltigförklara lagar som står i strid med konstitutionen och tillsätta egna utredningar rörande allt, även korruptionsanklagelser både allmänt och som beträffande Zumas finansiering av sitt och sin familjs privata residens, Nkandla.[24]

[22] Se Töllborg, *Ruinerna hävdar att byggnaden var vacker*
[23] Det finns en märklig organisation, typisk kanske för just vår tid, som heter World Justice Forum, dit jag själv blivit inbjuden som en av få svenskar vid sidan av Hans Corell – glöm aldrig Sveriges främste symbol för hyckleri och ryggradslöshet som förutsättning för karriär; minns "I only obeyed order" som svar på varför han ljög inför Europadomstolen och regeringens belöning av denna lögn genom att göra honom till FN:s högste rättslige representant för mänskliga fri- och rättigheter, sådant sänder tydliga signaler till samtidens furirer. Vid organisationens möte i Barcelona utsåg organisationen *Arthur Chaskalson* till världsmästare i godhet inom juridiken. Organisationens ordförande förklarade att det var hans kamp för att man måste följa regler som gav honom hederspriset, och man såg hur denne värdige man hörde en kraftig förolämpning. Han reagerade genast och kraftfullt. "Jag hoppas verkligen inte att jag fått denna utmärkelse för att jag skulle anse att man måste följa regler. Jag trodde, tror och hoppas att det var för att jag konsekvent hållt fast vid att man som jurist måste vara lojal mot de värden, varpå reglerna bygger sin legitimitet." Det var något han, som jurist, och Mandela, som politiker, gav Sydafrika, och som de politiska efterföljarna inte levt upp till, men som Konstitutionsdomstolen vårdat och i handling fortsatt visa sig stå bakom. De är helt enkelt jurister alltjämt.
[24] Jfr. Armsdeal, se Töllborg, *Ruinerna hävdar att byggnaden var vacker*

Det är t.o.m. möjligt för Konstitutionsdomstolen att besluta att t.ex. en offentlig utredning eller en särskild kommissions arbete, och slutsatser, såsom t.ex. den s.k. Seritikommissionen rörande Armsdeal, skall underkännas och förkastas, såsom varande konstitutionsvidrig genom att den de facto bara fungerat som ett white-wash-instrument och genomfört ett genuint dåligt arbete (jfr. den s.k. Granskningskommissionen i Göteborg och, såvitt avser Sverige nationellt, Säkerhetstjänstkommissionen). Varje sydafrikansk medborgare har möjlighet att hos Konstitutionsdomstolen anhängiggöra och föra en sådan talan, närmast alltså en slags konstitutionell fastställelsetalan.[25] Motsvarande möjligheter i Sverige, t.ex. beträffande den s.k. Säkerhetstjänstkommissionen eller Göteborgs famösa Granskningskommission, är alltså *naturligtvis* (!) uteslutna. Ett sådant försök skulle i Sverige antagligen inte bara medföra att den klagande, oberoende av argumentens evidens och deras styrka, blev kallad rättshaverist och konspirationsteoretiker; det är sannolikt att personens karriär, ja troligen hela dennes sociala liv, skulle tillintetgöras och möjligen skulle den klagande även omhändertas av män i vita rockar! Med tanke på att det är möjligt, och vanligt, i Sydafrika, så säger detta faktum också något om den rättsstatliga och demokratiska mognaden i vårt land. Vi har helt enkelt valt en annan väg – kubikmeter med fjollevatten och tonvis med medaljer, hederbetygelser istället för heder.

[25] Se bilagorna 4 a&b

Zuma vet alltså i detta läge att signerar han lagen kommer som ett brev på posten en rättslig prövning inför Konstitutionsdomstolen, en rättslig prövning som (a) han och därmed ANC mycket möjligt och rentav troligt kommer att förlora samt (b) att denna rättsliga prövning ger, liksom i Leander-fallet, R2K en scen för att genom media ytterligare massmobilisera. Zuma avvaktade därför, och lagen har faktiskt ännu inte trätt i kraft – Zuma har inte vågat promulgera den innan han nu slutligen tvingats avgå. Inom ANC har, med Zuma's allt minskande legitimitet, en majoritet nu vuxit fram för att lagen måste ändras. Frågan är nu mest hur processen skall kunna dras igång igen. Såvitt jag förstår kan den inte skickas tillbaka till parlamentet för revidering. Parallellt är Sydafrika i starkt behov av en reviderad sekretesslagstiftning – alltjämt gäller Intelligence Act från apartheidtiden, och den står i stora delar i konflikt med konstitutionen. Just nu verkar därför bl.a. underrättelsetjänsterna i ett legalt vaccum, vilket naturligtvis inte heller är lämpligt. Här kommer Ramaphosa att prövas; är han en Zuma eller en Mandela?[26]

2.2.2 National Key Point Act

Förslaget till ny sekretesslag var R2K:s grogrund, men inte deras mål. Målet omfattar, som framgår av deras princip-program, ökade möjligheter på alla plan och alla nivåer för landets samtliga medborgare att få tillgång till information.

Således har också annan lagsstiftning uppmärksammats. En av dessa är apartheiderans s.k. National Key Point Act (1980), som skapats för att hemlighålla information kring

[26] En i tiden näraliggande värdemätare är hur Ramaphosa agerar mot Fraser, se bilaga 5 a-c

en rad strategiska byggnader och anläggningar och den verksamhet som bedrivs där. R2K uppmärksammade tidigt att ANC-regeringen istället för att avskaffa lagstiftningen utnyttjat samma apartheidlagstiftning för att för själva kunna för allmänheten undanhålla information.[27]

R2K begärde därför, vilket man kan göra i Sydafrika, återigen till skillnad från Sverige, att polisministern skulle redovisa vilka dessa "National Key Points" var, och lämna svar inom 30 dagar (man kan alltså t.o.m. stipulera tidsfrister inom vilka makthavaren skall svara, föreslå det i Sverige, den som vågar och samtidigt vill göra karriär). Polisministern vägrade ange dessa, varförR2K i oktober 2012 in en ansökan till domstol där man under åberopande av PAIA krävde svar.[28] R2K hade framgång i processen, och samtliga s.k. National Key Points blev offentliggjorda. Polisministern och departementet föreslog därefter att lagstiftningen skulle avskaffas och ersättas med en särskild lagstiftning om skyddsområden, Critical Infrastructure Act. R2K har ställt sig kritisk till förslaget till ny lag, som man menar i centrala delar bara är en blåkopia av den gamla lagstiftningen. Här har man samarbetat med en rad centrala organisationer, däribland katolska kyrkan. Parlamentet har nu (2017) antagit lagstiftningen, och en ad hoc committee har skapats, och offentliga utfrågningar skall ske, enligt den sydafrikanska modellen, innan den går tillbaka till parlamentet för slutligt antagande i

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[27] Under perioden 2017-2012 hade regimen Zuma, med stöd av lagen, ökat antalet sådana "national key points" med över 50%. Se Right2Know-kampanjen, "Secret Nation of Nations", Rapport, 17 februari 2013 - denna är tillgänglig på http://www.r2k.org.za/2013/02/17/secret-state-of-the-nation-report/

[28] Se första pressmeddelandet av Right2Know-kampanjen, "R2K kräver en allmän lista över de hemliga "National Key Points", 4 oktober 2012; och sedan påföljande pressmeddelande, "Polisdepartementet vägrar att släppa listan över National Key Points", 7 mars 2013 - båda kan nås på http://www.r2k/org/za

samma eller reviderad form och, möjligen, så småningom promulgerande av presidenten.

2.2.3. Spy Bill

En ny lagstiftning för underrättelseverksamheterna, av R2K kallad Spy Bill, kom 2012 att hamna på NCOP:s utskottsnivå, sedan den antagits av parlamentet. Lagförslaget centraliserar ytterligare makten över Sydafrikas säkerhetstjänster och ger ministern än mer makt, utöver att öka säkerhetsorganens rätt till telefonavlyssning, buggning, avlyssning av elektronisk utrustning et cetera, och innehåller inga regler om kontrollorgan. Lagförslaget är därmed centralt för R2K, även om och i samband därmed fr.a. kanske striden om ny Inspector General of Intelligence blev så mycket mer central.

Under 2014 kom sittande Inspector General of Intelligence att avgå, och skulle ersättas med en ny. Organisationen är det mest centrala kontrollorganet över landets säkerhetskluster, och enligt konstitutionen skall denne tillsättas av parlamentet med kvalificerad majoritet.[29] ANC saknar numera sådan, och majoritetens förslag till ny Inspector General, Cecil Burgess, möttes av starkt motstånd från civilsamhället och övriga delar av parlamentet. Burgess och ANC vägrade vika sig, men det gjorde också övriga delar av parlamentet efter intensivt

[29] I Sverige utses motsvarigheten – närmast motsvarande är SIN, Säkerhets- och Integritetsskyddsnämnden – av regeringen, och dess förste ordförande blev Anders Eriksson, tidigare chef för Säkerhetspolisen. Inte ens i Stalins Sovjet hade motsvarigheten varit möjlig utan ett ramaskri, men i Sverige uppmärksammades detta bara av mig (och SÄPO, som hade mycket roligt åt mitt påpekande om Stalin). Något säger även detta både om den svenska grundlagen, den demokratiska mognaden och ambitionen att få ett fungerande svenskt säkerhetsskydd. Samtidigt skall sägas att SIN numera fungerar, med Romregistret som undantag, t.o.m. mycket bra, efter en mer än trettio år lång ensam kamp av författaren, där Leanderfallet varit symbolärendet, och min avhandling avgörande.

arbete av bl.a. R2K. Konsekvensen blev ett dödläge, kontrollorganet stod utan ledare, och säkerhetsklustret i praktiken utan kontroll och detta i över 18 månader! Till slut röstades Burgess ned i parlamentet, och processen för att finna en ny efterträdare kunde inledas, men gick också den i stå. Först efter det att R2K hotat med rättsliga åtgärder (möjligt i Sydafrika, uteslutet i Sverige) inleddes en ny rekryteringsprocess. R2K lyckades i denna tvinga fram såväl kandidaternas CV som säkerhetsställa en offentlig intervjuprocess. Det var en betydande och mycket viktig framgång, återigen fullständigt utan ens möjlighet till motsvarighet i Sverige.

R2K följde aktivt utskottets samtliga möten och kunde med hjälp av media och sociala media skapa stor uppmärksamhet kring frågan vem som skulle få denna viktiga post. I slutet av 2016, efter 18 månaders vakans, nominerade parlamentet UNISA:s Dr Setlhomamaru Dintwe till posten. Det var en viktig seger, som R2K inser nu måste följas upp genom att bevaka att den nya Inspector General fullföljer sitt viktiga uppdrag i handling. R2K har redan haft möten med den nye Inspector General, och det första intrycket är försiktigt positivt, med en ny chef som aktivt uppmanat R2K att förse denne med ärenden.[30] Det beslöts därför att under 2017 aktivt ställa ärenden under kontrollorganets prövning, och nogsamt bevaka att

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[30] Vilket ger väldigt starka positiva signaler, påminnande mig om när EU:s förste ombudsman, Jacob Söderman, uttryckte samma önskemål till mig. Tyvärr hade Söderman avgått när frågan om VISA:s och Mastercards illegala förbud mot transaktioner till Wikileaks plötsligt infördes, och jag – ensam igen naturligtvis – klippte mina kort och förde frågan till hans efterträdare, sedan de svenska myndigheterna som förväntat "glömt" den befordringsplikt som följer med att samhället tillåtit företag oligopol. Det blev till sluts Islands Högsta Domstol som fick ta de avgörande besluten, när alla andra förskrämt tittade bort inför maktspelet av några av världens viktigaste, ekonomiska, aktörer.

kontrollorganet behåller sitt oberoende och aktivt utövar kontroll över det sydafrikanska säkerhetsklustret.

2.2.3. PAIA

Efter sitt nationella toppmöte 2011 började R2K alltså koncentrera sig på konsolidering – det var viktigt att bygga en rörelse för bred kamp för medborgarnas tillgång till information. Som en parafras på presidentens årliga tal om "The State of the Nation" beslutade man, med början 2013, att publicera en egen årlig rapport; "Secret State of the Nation". Som alla dokument och rapporter R2K producerar är de, naturligtvis, fria för gratis nedladdning. Redan i den första av de årliga rapporterna kunde man konstatera – ungefär som i Sverige, där mer än hälften av alla framställningar om att få ta del av allmänna handlingar avslås, utan stöd i sekretesslagstiftning (jfr. HGU, GRI och Black12) – att endast 32% av de framställningar om information som skett med stöd av PAIA beviljas, medan nästan två tredjedelar antingen ignoreras eller avslås.[31] Rapporterna är viktiga, de är evidensbaserade och gör allt fler medvetna om att ANC och regeringen driver landet från the walk of the talk mot den svenska modellen för stabilitet, talk the walk.

PAIA är en akronym för the Promotion of Access to Information Act. Lagen är oerhört central, från 2000, och saknar motsvarighet i Sverige. Det tog ganska lång tid, och jag var tvungen att först själv granska lagstiftningen, innan jag ens trodde att den existerade. Det centrala i lagstiftningen är att den avser att säkra att “everyone has the right of access to any information

[31] Se rapporten "Secret State of the Nation", 17 februari 2013. Rapporterna följs sedan årligen upp, med nya titlar som t.ex. State of the Nation Report: trends, patterns and problems in secrecy (2014)

held by the State and to information held by another person that is required for the exercise or protection of any rights.” Det uttalade syftet är att skapa ett öppet samhälle, där samhällets medborgare får ett rättsligt instrument för att framtvinga transparens, och därmed möjlighet till ansvarsutkrävande och således hålla demokratin levande. Den skiljer sig på flera avgörande sätt från den svenska lagstiftningen om allmänna handlingars offentlighet, fr.a. genom att den även omfattar privata associationer och genom att om man inte får adekvata svar på sin fråga inom stipulerad tid, max 30 dagar med möjlighet att undantagsvis och bara vid ett tillfälle förlängning med ytterligare 30 dagar, så kan domstol tvinga fram informationen.[32] Sedan är det med denna lag som med alla andra lagar och med Gud – om man inte känner till honom, vet man ju inte vart man skall vända sig. Detta är fundamentet i R2K, både som mål och medel. PAIA och Konstitutionsdomstolen är, enligt min uppfattning, de två viktigaste – och avgörande – *rättsliga* orsakerna till att Sydafrika ännu inte havererat, tillsammans med den tradition av kamp och den uppenbara ojämlikhet som gör att man har ett levande aktivistsamhälle, starkt präglat av lojalitet mot de värden som till slut knäckte apartheideran.

Under 2016 var R2K ordförande i ett nybildat nätverk, ATI Network (Access to Information Network), där man överenskommit att stödja varandra och dela erfarenheter av arbete som bedrivs och där PAIA är ett centralt arbetsinstrument. Nätverket presenterar årligen en evidensbaserad, d.v.s. vetenskaplig, granskning av myndigheter och företags respons på framställningar om information med stöd av PAIA. Tillsammans med bl.a.

[32] Jfr JO och JK:s hantering av informationen de fick rörande försöken att få fram information till Black 12, vilka signaler det och GRI:s agerande sände, och resultatet.

akademin arbetar R2K för att handlingar och dokument, som omfattas av PAIA, för framtiden skall fortlöpande göras tillgängliga på nätet, utan särskilda krav på framställningar. Det vore en demokratisk revolution, inte bara för staten utan för alla maktkonstellationer som omfattas av PAIA, tekniskt möjliggjord genom det kommunikativa paradigmskifte som internet 1998 kom att innebära.[33] "Need-to-know"-principen ersätts med en "Right-to-know"-princip, stärkt av att FN 2016 förklarat att tillgången till internet, och då menas inte bara i teknisk utan även ekonomisk mening, är en mänsklig rättighet. Det är många saker vi människor, fr.a. maktmänniskor, inte ens skulle kunna tänka oss att göra, om vi visste att agerandet skulle bli offentligt och möjliggöra ansvarsutkrävande. Och då tänker jag inte främst på petande i näsan, utan på samtliga Sveriges ledande potentaters inblandning i Armsdel, den största skammen i svensk utrikespolitisk historia sedan baltutlämningen.[34] Vår nuvarande statsminister, Lövdén, spelade där, liksom vid motsvarande scam med Brasilien och — på gång — Botswana, en instrumentell roll.

2.3. Övrig aktivitet

R2K har varit och är aktiv på många olika områden, inte minst i samarrangemang och stöd. Ett centralt exempel är Marikana, Amadiba och Newcastle, till stöd för lokalbefolkningens kamp mot exploatering och mot polisens övervåld. Ett annat är Glebeland, där den ANC-stödjande polisen och ledningen förhöll sig passiva när en våg av politiska mord och misshandel pågick under flera års tid. Man har stött med information, med juridiskt stöd och med krav på ansvarsutkrävande. Samtidigt har SIDA-stödda

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[33] Se Töllborg, *Hegemoniska revolutioner*
[34] Se Töllborg, *Den viktigaste frågan*

HRDI, med deras hedersdoktorat och lismande för makten, varit helt passiva, trots att de stal och alltjämt bär mitt förslag som varumärke: *Mänskliga rättigheter handlar bara om vad du gör, inte om vad du säger eller skriver.* Hyckleriet skapade bara en sak; cynism. Kraven på insyn i den starkt sekretessbelagda upphandlingen med ryssarna om ny kärnkraftsuppbyggnad har drivits rättsligt, och med framgång (när detta skrivs har Ramaphosa precis förklarat att affären är avblåst). Nuclear-deal är den största sydafrikanska affären sedan katastrofen med Armsdeal, där Sverige spelade och spelat en aktiv roll i vad som kom att bli inledningen på en allt mer omfattande korruption inom det statsbärande partiet – Sveriges ansvar är där historiskt och kan aldrig kompenseras, effekterna har gått långt utöver den blåsning på närmare 100 miljarder rand som vi medverkade till, i våra krav på payback för att vi skulle få snurr på försäljningen av JAS Gripen. R2K har spelat en central roll här, och har f.n. ett omfattande ärende anhängiggjort i domstol där den s.k. Seritikommissionen skall förklaras ogiltig[35], en white-wash utredning av svensk modell, dock utan ens tillstymmelse till den elegans som i vart fall brukar prägla svenskt utredningsväsende, när sekreteraren skall prövas inför att bli upptagen i den inre kretsen. Man har, som redan angivits, också givit ut en rad praktiskt inriktade handböcker, med fokus på yttrande-, demonstrations- och informationsfriheten, tagit strid mot RICA (en lagstiftning som ger rätt till övervakning av medborgarna, fr.a. genom IMSI-catchers och programmet Grabber), och fått stöd av FN-kommittén för mänskliga fri- och rättigheter i denna kamp, för fria dekoders när tv digitaliseras (framgång under perioden jag var här nere, de allra fattigaste får gratis dekoders!) och för sänkta kostnader för wi-fi, internet och mobiler, de

[35] Se bilagorna 4a och 4b

viktigaste instrumenten för kommunikation bland befolkningen här nere. I bilaga 3 har jag lagt med ett exempel, men det bär för långt att i en sådan här kortare rapport, som ändå inte kommer att läsas, och där Handelshögskolan bara bidragit med marginellt ekonomiskt stöd, gå igenom allt arbete som man genomfört under den korta tid organisationen funnit. Den intresserade, om det nu finns några sådana i Sverige, kan besöka deras hemsida, http://www.r2k.org.za. Som exempel får det räcka med att lyfta fram att bara under 2016 organiserade man över 93 protester och offentliga möten, 32 utbildningar och deltog i över 63 evenemang som organiserades av syster-organisationer.[36]

Avslutningsvis skall därför bara lyftas fram två kampanjer, omöjliga i Sverige om än lika viktiga hos oss, där R2K spelat en avgörande roll för försvaret för konstitutionen och den sydafrikanska revolutionen, båda paradoxalt och ledsamt nog i strid med de medlemmar i ANC som fostrades av Sverige i Armsdeal, och lärt sig att korrumperas. De två kampanjerna är, dels arbetet för ett fritt, heterogent, av professionsetos styrt och oberoende media, dels det konsekventa och starka stödet till integritetsbärare, en starkt föraktad grupp i Sverige.

Media, d.v.s en fri och heterogen media och en journalistik som drivs av professionsetos och inte selfies och varumärkesbyggande, har alltid varit centralt i ett demokratiskt samhällsbygge. The Right2Communicate är en del i det arbetet som R2K tillsammans med medieorganisationer och akademin driver i Sydafrika.[37] En

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[36] Se bilaga 2 med årsrapporten för 2017
[37] Se Right2Know, "Media Freedom, Diversity and the Right2Know", november 2011. Detta är tillgängligt på http://www.r2k.org.za/wp-content/uploads/2012/12/R2K_MedFreeDiv_DisDoc2011.pdf

fri akademi, lojal endast mot värden och som vägrar behaga och förfalla till ren konsultverksamhet, kan bidra med forskning, kontext och fördjupning.

I förlängningen av 1998 års internetrevolution, och sociala medias frammarsch, har över världen rests krav på olika former av förbud och censur. Så även i Sydafrika. Här har föreslagits en slags mediedomstol, vartill klagande skulle kunna vända sig för att hindra publicering eller klaga på publicering. R2K har, tillsammans med medieorganisationer, tidigt tagit strid mot förslagen, som man underförstått menar skulle användas för att hindra kritik mot fr.a. Zuma och ANC. Samtidigt har man kritiserat den allt starkare kontroll över den statliga nyhetsverksamheten, särskilt den statliga tv:n SABC, som ANC genom sin utnämningspolitik tillskansat sig[38], och att privata media helt domineras av ett fåtal ägarkonstellationer. Statlig media måste garanteras oberoende, och statsmakten måste främja en breddning av mångfalden, inte minst genom att uppmuntra och ekonomiskt stödja fri lokal media. Här har R2K, ofta tillsammans med media och akademin, arbetat aktivt inför utskottsbehandlingen, skrivit remiss-svar, deltagit i utfrågningar samt genomfört demonstrationer, upplysningskampanjer och aktivt verkat för att stödja lokala initiativ till kommunmedia med teknisk kunskapsspridning. Man har också tagit strid för fria dekoder, när tv digitaliseras. TV är en central informationskanal inte minst i Sydafrikas olika township och för de fattiga, och de har inte råd att köpa digitalboxar.

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[38] Jfr. för svensk del t.ex. Kerstin Brunnberg och Lars-Olof Lampers, för att nämna två centrala MUST-intressenter inom svensk radio och tv

2012 gjorde man några delsegrar, och lyckades bl.a. hindra ICASA (South Independent Independent Authority Authority Afrika) från att tillåta ytterligare kommersialisering av den statliga tv;n, och tvingade myndigheten till att, vid digitalisering, garantera icke-kommersiell tv åtminstone 40 % av sändningsutrymmet.

En lång och intensiv kamp har förts för en heterogen och självständig media.[39] En central del av mediekonsumtionen i Sydafrika är televisionen, fr.a. den statligt ägda SABC, som har ett antal kanaler, och för de flesta av de fattigare delarna av befolkningen de enda tillgängliga. Zumatrogna inom ANC har sett det som centralt att få kontroll över SABC, och styra inte bara vad som får rapporteras om och hur, utan också vad som inte får rapporteras.

Antalet hot mot och trakasserier av journalister från polisen och underrättelsetjänsten har ökat, allt eftersom ANC blir allt mer pressat. Polisen förbjöd filmning av deras agerande, och sammanstötningar och våld i anledning av sådan filmning skedde allt oftare, särskilt i anslutning till studentprotester rörande nya avgifter på universiteten. I anledning därav tryckte R2K upp och gjorde allmänt tillgänglig en aktivistskrift rörande rätten till att filma polisen. Man deltog också i en

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[39] Som ett led i denna kamp har R2K fördjupat sitt samarbete med relevanta del av akademin, och också upprättat, tillsammans med jurister, en hot-line för demonstranter och organisatörer. Detta var en del av rätten att protestera (R2P). Hot-linen lanserades i oktober och fick redan inom några månader 58 samtal. Man har också genomfört två workshops om demonstrationsrätten, och stod också värd vid Center for Applied Legal Studies (CALS) symposium vid Wits University (University of the Witwatersrand, Johannesburg). Wits var värd för 2017 års internationella kongress för grävande journalistik, där jag var närvarande och några av oss från Sverige respektive Sydafrika sedan fördjupade ett arbete rörande SIDA, ANC:s kommande val och svensk-sydafrikansk korruption med svenska och sydafrikanska ministrar personligen inblandade

offentlig debatt på temat i Khayelitsha. Här underströks särskilt den begränsning av medias oberoende och självständighet som följde av att polisen och det sydafrikanska säkerhetsklustret, inte minst genom RICA, eftersökte och attackerade journalisternas källor. Ett fall som blev allmänt känt var när en kriminalpolis olagligt, efter att ha fått tillstånd av domstol till avlyssning för vissa telefonnummer, men lurat domstolen genom att ange två andra abonnenter som ägare till numren, följt två journalister på Sunday Times. Det hela avslöjades, och polismannen blev faktiskt fälld (Sydafrika är inte Sverige).

Angreppen på media och journalister ökade under valåret 2016. Mindre radiostationer, som var kritiska mot ANC och storföretag, såsom t.ex. Madibeng FM i Brits, utsattes för hot och en chefredaktör Alide avskedades sedan tidningen publicerat en rapport om tidningens ägares affärsintressen och betydelsen därav i förhållande till behovet av oberoende media. Steven Motalae var en annan redaktör, som avskedades efter att väckt ägarnas ovilja. Risken för en chilling-effect var inte bara överhängande, den var ett faktum.

Parallellt fortsatte krisen vid det statliga tv-bolaget SABC. Dess styrelseordförande Hlaudi Motsoeneng, med nära koppling till Zuma, tvingade bort andra styrelseledamöter som ville SABC skulle stå fritt gentemot det statsbärande partiet, och som reagerade mot att Hlaudi förbjöd rapportering om bl.a. polisvåld. Åtta journalister, varav något av Sydafrikas mer välkända och framstående avskedades, sedan de vägrat gå i Hlaudis ledband. R2K tog på sig en ledande roll i protesterna mot Hlaudi, stödde journalisterna och organiserade inte mindre än 16

protestaktioner vid SABCs kontor i Johannesburg, Durban, Kimberley, Cape Town och Mangaung,

I september genomförde man en stor demonstration mot SABCs allt större beroende av kommersiell annonsering, och krävde att SABCs ledning skulle garantera SABCs självständighet, både mot politiska partier och mot ekonomiska intressen. Motståndet mot Hlaudi Motsoeneng och de som stödde honom blev allt mer spritt och kompakt, och kulminerande till slut i tillsättningen av en parlamentarisk utredning. R2K var en av tre utomstående organisationer som interagerade mot utredningen, och tillsammans ställde man tre oavvisliga krav: Motsoeneng måste permanent avlägsnas från SABC, kommunikationsminister Faith Muthambi avgå och all interncensur på SABCs omedelbart upphöra. Kampanjen för ett SABC fritt från politiskt inflytande nådde under 2016 till slut framgång, och Hlaudi Motsoeneng fick avgå. Zuma genomförde också återigen en regeringsombildning (jfr. Göran Perssons taktik) och kommunikationsministern fick en annan portfölj.

3. Den offentliga diskursen präglas i det s.k. kunskapssamhället av ökad fördumning och ytlighet.[40] Charlataner som Latour har blivit husgud, och kommunikationsdirektörer, normkritik och varurmärkesskapande har ersatt ideologikritik, professionsetos och heder. Sanning är numera irrelevant. Fake news, sanningens relativisering och sociala (och vanliga) mediers, t.o.m. institutioners, fokusering på varumärke och selfies utgör nya hot mot kvalitén i informationsutbyte och kunskapsbaserade beslut, och därmed mot hela idén om den demokratiska staten. Mängden

[40] Se Wikipedias och universitetets nya, fascinerande naiva, samarbete

utdelade medaljer och antalet liter fjollevatten som dricks ökar exponentiellt mot kvalitetsförsämringen och den nya "akademins" beundran av vår tids ostron.

Samtidigt, och trots det nya dumhetssamhällets framväxt med den växande känsla av maktlöshet som sprids, finns motstånd även inom etablerade politiska partier i både USA och Storbritannien. Modiga journalister utmanar den politiska och ekonomiska eliten, med Panamapappren som ett av de senaste mest kända exemplen, båda i kölvattnet av Leanderfallet, Wikileaks och Snowden.

Mod, vid sidan av ett brinnande professionsetos, är numera tyvärr det mest utmärkande draget hos varje samhälles integritetsbärare. För R2K blev det tidigt centralt att stödja samhällets integritetsbärare, s.k. whistle-blowers, och göra det med olika medel. Vikten av att uppmärksamma integritetsbärare, ta deras avslöjanden på allvar och hylla dem kan inte nog framhållas, inte minst som central värdemätare på varje samhälles demokratiska och rättsstatliga mognad. R2K lyfter varje år fram, i sin årliga kalender, integritetsbärare i landet, nominerade av landets egna medborgare (jfr GHT och Årets Holme). Det är ett viktigt instrument, för att motverka framväxten av en kultur som den svenska, som med sina belöningar och exkluderingar som samhällelig metod för att skapa stabilitet är ett inverterat sätt att se på samma integritetsbärare. Rätt typiskt är, ur min egen erfarenhet, t.ex. den fullständiga tystnaden i svensk media kring Årets Holme, som årligen utdelas av GHT den 1 december till minne av Rosa Park; en utmärkelse som ofta uppmärksammas i utlandet, men som typiskt sett förbigås både med samhällelig och individuell tystnad i Sverige. Vår tids rädsla för kvalitet är en produkt av den svenska repressionen, kanske tydligast manifesterad i hur Sverige

jämfört med R2K ser på integritetsbärare. Och denna rädsla, detta ostronliknande nya "ledarskap", urholkar akademins själ och gräver inte bara kollegialitetens grav, utan skapar förakt för medborgarnas försök att bibehålla en grad av demokratisk mognad.

Det är ledsamt med utvecklingen i Sydafrika efter det att Mandela lämnat makten till Thebo och så småningom Zuma. Några ljus i mörkret kan dock noteras;

#Feesmustfall-rörelsen har fortsatt att växa, trots en allt mer kraftfull repression. Ännu har man dock inte lyckats skapa en fungerande samlad organisation.

Oberoende medieplattformar som GroundUp och amaBhungane Centre for Investigative Journalism har fortsatt att växa. Tyvärr är de dock alltjämt otillgängliga för många p.g.a. avsaknaden av fungerande internet.

Fr.a. har parlamentet blivit mer robust, mer demokratiskt, sedan ANC tappat mark. Nu vågar ledamöterna allt oftare lyfta kritiska frågor och utkräva ansvar. De inre motsättningarna i det statsbärande partiet (som det mellan ordförandeskapet/presidenten och finansministeriet) har lett till – som alltid när elefanter slåss – en ökad tillgång till information och har exponerat motsättningar som gör att motkrafterna kan växa sig starkare. Framför allt är det positivt att rättsväsendet i huvudsak, med Konstitutionsdomstolen i spetsen, orkat stå emot och vårda sin självständighet, trots president Zuma:s ihärdiga försök att undergräva densamma. Och till slut föll Zuma, till skillnad från Per, Pam och Stefan. Något säger det om vår samtid i konungariket Sverige. För Sydafrikas del står nu närmast att se om Ramaphosa är en Zuma eller en Mandela. Sverige

har betydligt längre väg att vandra. Men det kan också gå fort – skillnaden, och det som förenar, är bara 1.700 dokument. Ett knivöverfall sänder ett klart budskap, och det skrämmer. Men hindrar mig inte.

Bilagor

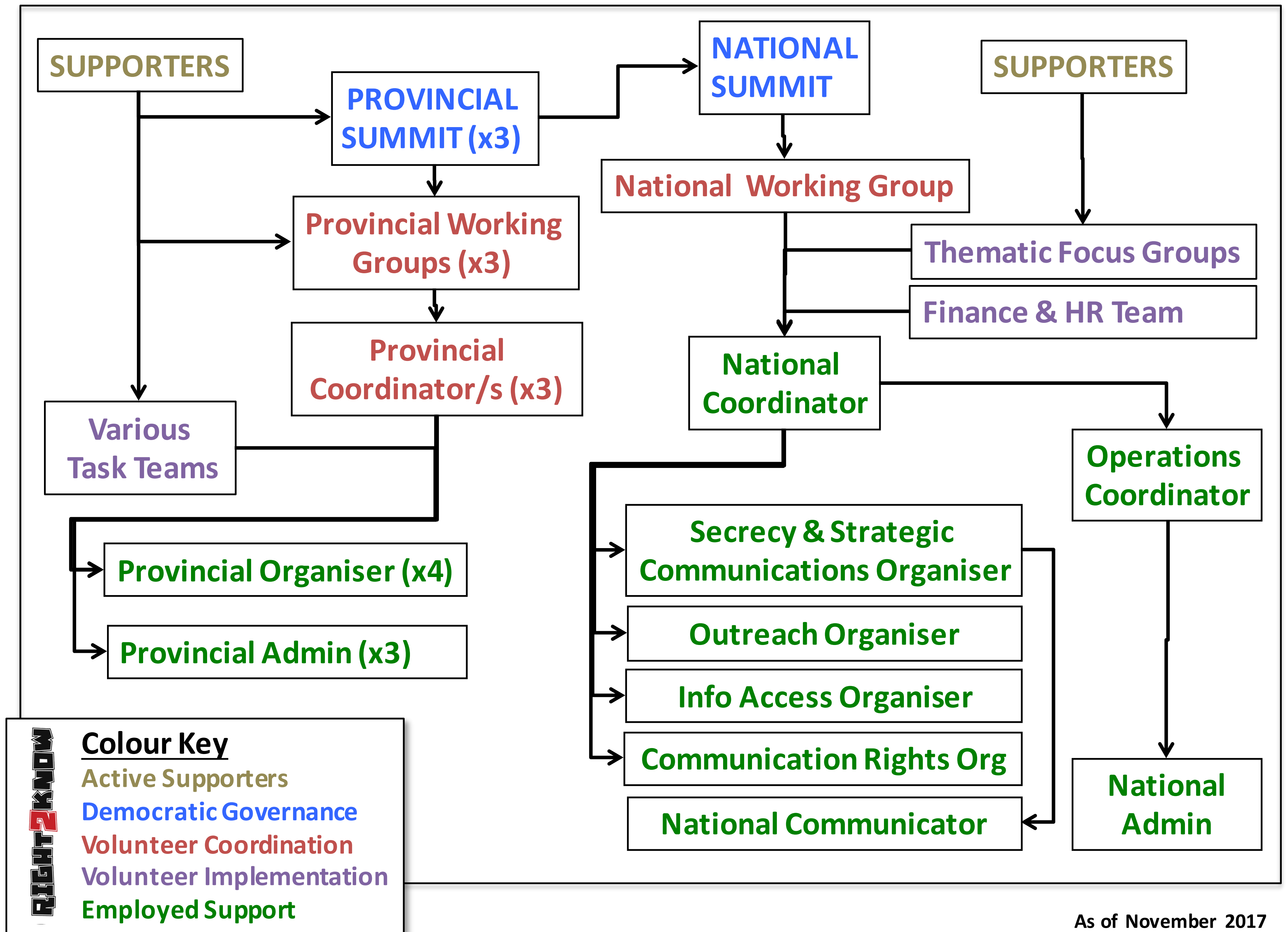
1. R2K Organogram
2. R2K Senaste National Report (2018, avser 2017)
3. Exempel på handbok, här hur tvinga fram öppenhet och ansvar hos lokala kommunen

4a. Stämning med begäran om att Seritikommissionens rapport annulleras

4b. Sydafrikas konstitution

5. a-c Om Detournement de Pouvoir från Underrättelseorganens chef, och vad som händer i Sydafrika till skillnad från Sverige
6. Om Medlingsinstitutet och den svenska lögnen
7. Om Sören Öhman och den svenska inkompetensen och flatheten. S.k. High-, eller deep-, level corruption och den inkompetens som är så starkt sammankopplad därmed
8. Om hur Sydafrika ser på domartillsättning och hur man förhindrar den svenska modellen
9. Street Law, skapat av DD för snart 20 år sedan, stoppas av juridiska institutionen och särskilt Sara Stendahl, nu stulet av samma personer
10. Asha Ramgobin, erbjöds och mottog muta från SIDA, vilket gjorde att jag lämnade den organisation jag varit med att skapa. Resultatet var att man retuscherade bort mig från foton och hela historieskrivningen. Samt att Sara Stendahl och Handelshögskolan gjorde Asha till hedersdoktor, sedan hon lurat miljontals kronor av svenska skattebetalare för att berika sig själv och sin pojkvän
11. Ekonomisk redovisning

12. Icke ekonomisk redovisning, trots länsstyrelsens underkännande och upphävande av beslut där Rolf Wolff tilldelat sig själv en miljon, ännu icke redovisad



As of November 2017
For more see https://tinyurl.com/R2K-activist-induction

8th National Summit

9 -11 March 2018, Berea, Johannesburg

SUMMIT REPORT

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Our Vision

“We seek a country and a world where we all have the right to know – that is to be free to access and to share information. This right is fundamental to any democracy that is open, accountable, participatory and responsive; able to deliver the social, economic and environmental justice we need. On this foundation a society and an international community can be built in which we all live free from want, in equality and in dignity.”

Our Mission

- To coordinate, unify, organise and activate those who share our principles to defend and advance the right to know.
- To struggle both for the widest possible recognition in law and policy of the right to know and for its implementation and practice in daily life.
- To root the struggle for the right to know in the struggles of communities demanding political, social, economic and environmental justice.
- To propagate our vision throughout society.
- To engage those with political and economic power where necessary.
- To act in concert and solidarity with like-minded people and organisations locally and internationally.

1. Introduction

The Righ2Know Campaign held its 8th National Summit at Stay City in Johannesburg from 9 - 11 March 2018. The Summit comprised delegates elected at Provincial Summits held in Gauging, KwaZulu Natal and the Western Cape as well as members of the outgoing National Working Group and a number of guests from supporting organisations (see Participants List in APPENDIX 1)

Delegates considered the 2017 Organisational Report[1] and assessed the progress made since the 7th National Summit in March 2017[2] as well as the challenges and opportunities facing the campaign in the coming year. Delegates accepted the 2017 Audited Financial Statements[3] and 2018 Budget .

Delegates then developed and adopted a set of Resolutions that will serve as the Campaign's strategic Framework for the coming year (See Section 2 & 3 below) and elected a 2018/19 National Working Group (See Section 4). The Summit Programme is included as APPENDIX 2.

The Campaign has emerged from the 2018 National Summit united, strengthened, and recommitted to defending and opening democratic spaces for people to access information, express themselves and organise to hold power to account and realise the R2K vision of a democracy "that is open, accountable, participatory and responsive; able to deliver the social, economic and environmental justice we need. On this foundation a society and an international community can be built in which we all live free from want, in equality and in dignity."

2. Resolutions on Campaigns

Our right to know faces challenges on many fronts and while we are resolved continue to wage a multifaceted campaign, we realise the need for greater focus to achieve more impact. We therefore adopt both primary and secondary resolutions with the intention of dedicating more energy and resources to realising our primary goals for 2018/9.

2.1. Securitisation & Surveillance

1. Continue to mobilise against RICA and other surveillance laws, including demanding an end to SIM card registration.
2. Demand that the Secrecy Bill must be scrapped.
3. Campaign against state surveillance of protesters.
4. Demand accountability from watchdog bodies like the Information Regulator and Inspector General of Intelligence.
5. Continue popular education on surveillance and digital security.
6. Produce short leaflets on other forms of surveillance such as biometric databases and CCTV

Secondary:

[1] See 2017 Organisational Reflection: http://www.r2k.org.za/2017-report
[2] See 2017 Summit Report: http://www.r2k.org.za/2017-summit
[3] See the 2017 Audited Financial Statements: http://www.r2k.org.za/2017-afs

1. Call for a complete reform of the security agencies and an end to the securocratic project.
2. Pressure telecoms companies like MTN, Vodacom, Cell C and Telkom to push back against surveillance and protect their users' right to privacy.
3. Engage regulatory bodies on the misuse of personal information by private companies and political parties.
4. Produce popular education on how to take action when your personal information has been misused.

2.2 Right to Protest

1. On popular education, we resolve to expand our popular education on the Right to Protest beyond our current urban nodes by:
    a. By continuing to strengthen our role within the R2P project to align our popular education efforts; and
    b. By building relationships with other structures (in our provinces and nationally) to increase the footprint of our popular education
    c. We resolve to continue to popularise and promote the use of the R2P hotline

2. On advocacy, we resolve to:
    a. Conduct further research on possible amendments to the RGA and an advocacy campaign in that regard.
    b. Contribute research on the impact of municipal bylaws on the right to protest in R2K networks.
    c. Strengthen relationship with current partner organizations engaged in work around the right to protest (notably the SJC)
    d. Campaign against brutality by police and private security in protests

3. On mobilisation, we resolve to:
    a. Establish Right to Protest Response teams in each province with a mandate to:
        i. Support local structures and others with Section 4 meetings;
        ii. Assist with referral to the R2P network for legal and other assistance arising from protest actions;
    b. Build our capacity to offer support on marshalling protest action and observing protest actions especially to highlight abuses by security services.

2.3 Access to Information

1. Strengthening our support for local community struggles related to participatory democracy, including trainings for our comrades on using access to information tools. We will continue to mobilise against non-compliance to PAIA requests.
2. Campaign to protect our personal information and right to privacy, including challenge the non-performance of the information regulator and ensuing the personal information of social grant recipients is not abused.
3. Strengthen our participation in the Unpaid Benefits Campaign (UBC) to ensure transparency and hold the financial sector accountable for money stolen from workers, including through continued participation in the Rosemary Hunter case against the Financial Services Board.

4. Undertake a focussed campaign to demand open meetings and participatory processes to advance local government accountability. This may include litigation.
5. Bring the processing of the land audit to finality and use the information to inform how we think about the land issue in the country and how we support those organisations fighting for land.

Secondary:
1. Strengthen our relationship and work with coalitions and allied organisations.
2. Continue to campaign with My Vote Counts for transparency in political party funding in the run-up to the 2019 elections.
3. Continue to expose the continuities between Apartheid and post-Apartheid power and corruption including promoting the People's Tribunal on Economic Crimes, challenging the Seriti Commission outcomes and supporting the SAHA case against the Reserve Bank.
4. Continue vigilance against a secret Nuclear Deal.

2.4 Right to Communicate

2.4.1 Media Freedom & Diversity

1. Continue to defend media freedom and oppose laws that seek to limit freedom of expression including the Cybercrimes Bill, Film and Publications Amendment Bill, and Hate Speech Bill.
2. Commission research into the democratisation of the media and telecoms sector using the State Capture Commission and other spaces to expose elite domination and corruption. We strive for a just migration to Digital TV, an end to STB corruption, ICASA's broadcast licence allocation that advances media diversity, and an end to the abuse of government advertising allocations.
3. Launch the 'love your community media campaign' to mobilize communities to engage and transform their local community media and campaign for public funding. Each province should support an ongoing relationship between community organisations and their radio station in at least one community.
4. To confront patriarchal practices and forms within the media (media representation, freedom of expression issues, and supporting women in the media).

2.4.2 Access to Telecoms

1. Campaign for Free Basic Data Now! That is a 2MB/s uncapped connection on mobile networks as the next step to realizing free universal internet for all.
2. Engage municipalities to expand access to free high speed internet in public and communal spaces.

Secondary:
1. Continue to promote Zenzeleni as a model of the 'internet from below'. Campaign for access to unused GSM spectrum and ensure at least one R2K community launches a Zenzeleni network.
2. Campaign to ensure that the proposed wholesale open access network (WOAN) is free of corruption, nonprofit, publicly accountable, has a mandate to advance the right to communicate, and includes user advocates in the board.

3. Resolutions on Building the Right2Know

We remain committed to building an organisation that 'walks the talk' - a campaign that practices democracy, transparency and accountability in our own organizational conduct.

3.1 Campaign Structures, Relations, Internal Democracy, Enabling Activism

1. R2K draws on a range of expertise across the Campaign and must work to strengthen synergies between the work of National Focus Groups, PWGs and provincial Focus Groups. National Focus Organisers and newly appointed Campaign Organisers in KZN and Gauteng should lead in this regard.
2. Acknowledging the weakness of national focus groups, we resolve to review and strengthen active participation in these structures by bringing more comrades and organisations into active participation in these structures, ensuring our Leadership Development programme builds capacity for participation, and that Focus Groups meet more regularly.
3. Close attention must be paid to operationalising the new roles of Provincial Community and Campaign Organizers (in KZN and Gauteng) to ensure the new division of work enhances synergies across national/provincial and coordinating/focus structures.
4. More must be done to enhance the quality of activism across the Campaign, especially in PWGs. We must strengthen our commitment to the Activist Code of Conduct to enhance accountability and ensure we all 'walk the talk'.
5. We will reflect on the 'coalition' nature of R2K to ensure we draw more on the strengths of both individual and organisational participation.

3.2. Combating Patriarch

1. As we strive to be a feminist organisation, we would continue to focus on creating a friendly space for women internally. This work will entail engagement with both men and women to understand patriarchy and feminism as well as women's only work. A budget should be provided for this at National level.
2. Formalise provincial focus groups with a convenor in each province and we will explore employing a combating patriarchy national organiser as part of the staff review.
3. In order to institutionalise this work properly, we resolve to strengthen the communication between the provincial chapters and National Feminist Team
4. We will have a national workshop on how to confront patriarchy in all our legs and programmes.
5. To continue to make R2K a safe space for women and the LGBTIQA+ community through gender sensitising workshops and raising awareness about our sexual harassment policy.
6. We will invest in leadership development for R2K women to strengthen their voices, but also resolved to do Gender Training with all the incoming NWG and Provincial leadership in the next three months before the next MTR.
7. Embark on popular education, exchange visits, camps, participatory research for women, gender sensitisation workshops for everyone at R2K around combating patriarchy.
8. We will strive to have womxn represent at least 50% of leadership at all levels of decision-making.
9. We will continue to collaborate with other women's organisations and LGBTIQA+ organisations to fulfill our resolutions.

Secondary:

1. Conduct gender representation audit across the provinces.

3.3 National Solidarity Network (Outreach)

1. Through work in our focus areas, we will continue to strengthen and grow the National Solidarity Network networks in the six provinces where R2K has no democratic structures. We will provide practical support on protest, access to information, media and strategy.
2. We will conduct popular education and training in each province, with at least one access to information training and one right to protest training per province.
3. We will prioritise the building & capacitating of both the national and provincial outreach focus groups, to better ensure integration of work and activism at both national and provincial levels.

Secondary:

1. The outreach budget will be divided between a travel budget and a programme budget, and increased to reflect this change.
2. We will encourage outreach networks to participate in R2K national actions.
3. Provincial outreach will focus on expanding R2K networks within the rural and peri-urban areas within the structured provinces.
4. We will explore the option of setting up R2K structures in Limpopo and Free State. The outreach Focus Group will conduct mapping of the political, geographic, organisational and social landscapes in these provinces to report to the NWG by the mid term review so that this can inform the campaign's decision.

3.4 Local struggles

1. Assist local communities to hold local government accountable and transparent through participatory democracy by strengthening and sustaining existing relationships with grassroots organisations.
2. Ensure R2K activists representing organisations/structures regularly report R2K issues to their constituencies and report their organisational/local struggles to R2K.
3. Provincial Focus Groups and local struggles in each province must work together to do information gathering and produce popular education.
4. Each Province to identify at least two new grassroots organisations that we can work with and with whom we can build solidarity.

Secondary:

1. Use our networks to assist local struggles to connect with partner organisations, chapter 9 institutions and other role players working on similar issues.
2. Increase visibility of the Campaign in grassroots organisations and communities informed by struggles.
3. Continue to consolidate and maintain a database of support organisations, local struggles and individuals to document their respective struggles, areas of experience and their constituencies.
4. Link community struggles to community media to ensure that communities own their community media.
5. Encourage local struggles to tell their stories through the R2K tabloid and social media.
6. All new organisations and activists must receive R2K orientation within at least two months of joining.

3.5 Leadership Development & Popular Education

1. Conduct continuous leadership capacitation education and training at three levels, addressing the capacity needs of activists, National leadership, coordinators and staff
2. Connect National Focus Group work with provincial Focus Group work by conducting popular education to enhance all activists understanding of the work of Focus Groups
3. Produce popular education and training material that reflects on/and strengthens local community struggles

3.6 Finances & Staffing

1. Ensure induction and training so staff and activists who either account/administer funds meet their oversight and administrative responsibility and can ensure financial accountability.
2. We will continue to strengthen the democratic oversight of our finances including ensuring each Province discusses their monthly financial report at their PWG meetings and Provincial Coordinators receive SMS notification on withdrawals and regular access to Bank account statements.
3. Revisit Salary Bands and Remuneration policy to review the percentage gap between top and lowest (full-time) staff and ensure we respect the equal work for equal pay principle.
4. Continue to explore the establishment of an 'activist solidarity fund'.
5. Reviewing staffing needs and component across the campaign. (Combating Patriarchy Organiser and the Research Coordinator)
6. A task team with a rep from each Province including staffers who are in charge of fundraising should review our fundraising strategy to report at the MTR.

4. Electing the 2018/9 National Working Group

The Summit elected the following comrades to serve on the 2018/9 National Working Group:

1. Alison Tilley,
2. Biko Chisuvi,
3. Carina Conradie,
4. Cleopatra Shezi,
5. Dale McKinley,
6. Gcina Makhoba,
7. Ghalib Ghalant,
8. Mhlobo Gunguluzi,
9. Mshengu Tshabalala,
10. Muzi Mkhize,
11. Ngazini Ngidi,
12. Sinenhlanhla Manqele,
13. Wendy Pekeur.

ENDS

APPENDIX 1: Summit Participants

KZN Delegates

1. Asha Moodley
2. Bandile Mdlalose
3. Blessing Nyawo
4. Daniel Byamungudunia, KZN Coordinator
5. Gcina Makhoba
6. Muzi Mkhize
7. Ngazini Ngidi, KZN Coordinator
8. Nomalanga Buthelezi
9. Ntokozo Mlangeni
10. Precious Mazibuko
11. Thami Ngidi

Gauteng Delegates

12. Aduma France
13. Aubrey Lengane
14. Charles Dlovha
15. Eunice Manzini, GP Coordinator
16. Faku Hulu-hulu
17. Gregory Motlatle
18. Jebe Sikhungo
19. Lebo Mabala
20. Lebo Mokoena
21. Moloko Mashangoane
22. Mshengu Tshabalala, GP Coordinator
23. Rendhani Muvhango

Western Cape Delegates

24. Alison Tilley
25. Ann October
26. Biko Chisuvi
27. Carina Conradie
28. Janine Ogle
29. Joyce Malebu, WC Coordinator
30. Khaya Xintolo, WC Coordinator
31. Nokuthejwa Bulana
32. Pupa Fumba
33. Sharone Daniels
34. Unathi Ndiki
35. Wendy Pekeur

Outgoing National Working Group

36. Cleo Shezi
37. Dale McKinley
38. Ghalib Galant, WC Coordinator
39. Jake Dube
40. Mhlobo Gunguluzi
41. Sine Manqele
42. Siviwe Mdoda
43. Thabo Maile, KZN Coordinator

R2K Staffers

44. Bongani Xezwi, Outreach Organiser
45. Busi Mtabane, National Communicator
46. Emma Chademana, National Operations Coordinator
47. Janine Julisen, National Administrator
48. Katelego Sepotokele, National Communication Rights Focus Organiser
49. Lazola Kati, KZN Campaigns Organiser
50. Mark Weinberg, National Coordinator
51. Mluleki Marongo, National InforAccess Focus Organiser
52. Moeketsi Monaheng, Gauteng Administrator
53. Murray Hunter, National Secrecy Focus Organiser & Communciations
54. Noma Mbayo, Western Cape Administrator
55. Ntombi Tshabalala, Gauteng Community Organiser
56. Phezu Ntetha, KZN Administrator
57. Sithembiso Khuluse KZN Community Organiser
58. Thami Nkosi Gauteng Campaign Organiser
59. Vainola Makan, Western Cape Organiser

Summit Guests

60. Adi Mistryfrost, CIVICUS
61. Basetsana Koitsioe, CALS
62. Bongani Mzants, R2K
63. Busisiwe Zasekhaya, Right2Protest
64. Caroline Ntaopane, Womin

65. Dugan Fraser, Raith
66. Farai Savnhu, MVC
67. Ferial Adams, R2K
68. Hassan Logat, Benchmarks Foundation
69. Jabu Mtsweni, Earthlife Africa
70. Jane Duncan, MPDP
71. Jayshree Pather, R2K
72. Julie Reid, MPDP
73. Kgomotso Mofutsanyane, R2K
74. Lebogang Ngobeni, Womin
75. Linda Jacobs, R2K
76. Lindiwe Kubheka, LCMF
77. Luke Jordan, Grassroot
78. Mathews Hlabane, AIDC & SAGRC
79. Melanie Muelles, SWB
80. Michael Seema, VDCR
81. Mthandazo Ndlovu, Oxfam
82. Nkulueko Malusalila, CSVR
83. Nosipho Ntshanguse, R2K
84. Oupa Lehulere, Khanya College
85. Pauline Makgai, VPCR
86. Refilwe Mashaba, NPA
87. Sandile Nombeni, EEO/MACUA
88. Shauna Mottiar, CCS
89. Simon Delaney, R2K
90. Virginia Magweza, OF
91. Willie Currie, R2K
92. Zahira Griniwood, MVC
93. Zingi Ngwane, PFSAQ
94. Zodwa Rannyadi, PFSAQ

ENDS

APPENDIX 2: Summit Programme

<table>
<tr><th colspan="2">Friday 9 March: FORMALITIES OF SUMMIT & LOCATING R2K IN CONTEXT</th></tr>
<tr><td>9h00</td><td>Registration</td></tr>
<tr><td>9h30</td><td>Welcome, Ground Rules Programme</td></tr>
<tr><td>10h00</td><td>Context Panel: Reflecting on the socio-economic & political context
The balances of forces today, continuities and discontinuances of Zuma/Ramaphosa regimes, and prospects for building people's power - Oupa Lehulere
How deep is the rot? Repressive & democratic institutions of the state and key challenges/priorities for advancing state accountability - Alison Tilley
The place of women in SA today and prospects for fighting patriarchy. - Virginia Setshedi</td></tr>
<tr><td>11h20</td><td>TEA</td></tr>
<tr><td>11h50</td><td>Table Narrative Report</td></tr>
<tr><td>12h50</td><td>LUNCH</td></tr>
<tr><td>13h50</td><td>Breakaways on broad strategic issues:
How do we understand democracy? Representative, participatory, constitutional, capitalist.
What are key characteristics of SA today? What do we need to build/support and what Who/what do we need to challenge?
What is the state of Civil Society in SA?
What is the strategic orientation of R2K'?</td></tr>
<tr><td>14h50</td><td>Strategic Report Backs</td></tr>
<tr><td>15h40</td><td>TEA</td></tr>
<tr><td>16h10</td><td>Table Financial Report</td></tr>
<tr><td>17h00</td><td>DINNER</td></tr>
<tr><td>18h30</td><td>Discussion on Leadership</td></tr>
<tr><td>19h30</td><td>CLOSE FOR DAY</td></tr>
<tr><th colspan="2">Sat 10 March: DEEPENING STRATEGY, MAPPING WAY FORWARD</th></tr>
<tr><td>8h30</td><td>Election of 2018/9 NWG</td></tr>
<tr><td>9h15</td><td>FRAMING PANEL 1: State of the Right to Know in SA
Securitisation - Jane Duncan
Participatory Democracy - Ghalib Galant
Communication Rights - Willie Currie</td></tr>
<tr><td>10h05</td><td>Commission on Focus areas</td></tr>
</table>

	1. Secrecy 2. Protest 3. Access to Information & Participatory Democracy 4. Media Freedom/Diversity 5. Access to Telecoms
11h05	**TEA**
11h35	**FRAMING PANEL 2: Building the Right2Know** ● State of Local struggles - Carina Conradie ● State of broader civil society - Dinga Sikwebu (TBC) ● State of internal democracy & activism in R2K - Siviwe Mdoda
12h25	**Commissions on Building R2K** 1. Campaign Structures, Relations, Internal Democracy, Enabling Activism (in PWGs and FGs) 2. Combating Patriarchy 3. National Solidarity Network (Outreach) 4. Local struggles 5. Leadership Development & Popular Education 6. Finances & Staffing
13h25	**LUNCH**
14h25	**Contentious issues from commissions (part 1)**
15h40	**TEA**
16h10	**Contentious issues from commissions (part 2)**
16h45	**Report from Contentious issues commissions**
17h15	**CLOSE FOR DAY**
19h00	**SOCIAL**
Sun 11 March: READY FOR ACTION: ADOPTING STRATEGIC FRAMEWORK	
8h30	**Presentation of Resolutions**
900	**Adoption of Focus Resolutions**
10h15	**TEA**
10h45	**Adoption of Building R2K Resolutions**
12h15	**Closing acknowledgements**
13h00	**CLOSURE, LUNCH, DEPART**

ENDS

ACTIVIST GUIDE

Local government transparency & accountability

The objects of local government are:

- to provide democratic and accountable government for local communities;
- to ensure the provision of services to communities in a sustainable manner;
- to promote social and economic development;
- to promote a safe and healthy environment; and
- to encourage the involvement of communities and community organisations in the matters of local government.

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8 1.3 How are our municipalities structured?
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14 1.6 When and how can we participate in local government decision making?
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This handbook was produced by the R2K Access to Information focus group with funding from Heinrich Boell Foundation

How to use this guide

The full text of these documents are available at **r2k.org.za/localgovt.**

Local government is a vital part of the South African state. As the part of government that is closest to the people, local government is tasked with fixing some of the most basic challenges we face as a country, including inequality and the legacy of apartheid. The constitution and other laws say clearly that local government must be open, responsive, and accountable. Sadly this is often not the case.

On the eve of the 2016 Local Government Elections, R2K is pleased to produce this Activist Guide to help you understand the policies and practices that can help make local government more transparent and accountable.

Right2Know Campaign, July 2016

Using the 'pledge' in this guide

Pledge proposal

This guide also tries to help you develop a pledge that your community can get candidate councillors to commit to if they want you to vote for them.

We've included a blank pledge on the last page of the publication. It has not been filled in so that you and your community can choose the pledges most important to you. Throughout the publication we include proposals of what the pledge could include.

Glossary

- **Executive:** the implementing part of a council - either an Executive Mayor or an Executive Committee.
- **IDP:** (Integrated Development Plan) a holistic long-term guiding document produced by all municipal departments in consultation with communities.
- **Quorum:** the minimum number of members which must be present before a meeting can proceed and make decisions
- **Recall:** In politics, this is the withdrawal of an individual from a position.
- **Referendum:** A public vote to decide on an issue, where people vote for or against a proposal

Laws & regulations

- Municipal Structures Act 117 of 1998: establishes various kinds of municipalities and details their powers and functions.
- Municipal Systems Act 32 of 2000 (MSA): details the principles, mechanisms and processes for how municipalities work
  - **Municipal Finance Management Act 56 of 2003 (MFMA):** this creates the rules for how municipalities must manage their finances and spend money responsibly
  - **Municipal Supply Chain Management regulations (MSCM):** these explain the rules for municipalities when it comes to tenders and contracts
  - **Promotion of Access to Information Act 2 of 2000 (PAIA):** this law is meant to ensure that people can access any information held by the state, and certain kinds of information held by private bodies

1 Understanding **Local Government**

1.1 What do we need to know about the mandate and powers of local government?

Before 1996, South Africa's local government was fragmented and made up of racially segregated institutions that had no real powers and provided unequal services to different communities. In an effort to fix these imbalances, advance social justice and deepen democracy, South Africa's new Constitution provided for the following:

Every part of South Africa is governed by a municipality: Section 151(1) of the Constitution introduced "wall-to-wall municipalities". Hence, South Africa's local government is a collection of municipalities.

Municipalities are independent from provincial and national government: Sections 151 (2-4) give local government "autonomy" - the power to make independent decisions. Although national and provincial governments may supervise the functioning of local government, they can only interfere under special circumstances.

Municipalities are democratic and developmental: Section 152 (1) (a-e) and Section 153 say that local government are responsible for deepening democracy by fostering citizen participation and prioritising the provision of basic needs and social and economic development.

Local government only has power to implement some public services: Schedules 4B and 5B of the Constitution say what each sphere of government is responsible for. It's important that you understand what your councillor and municipality can do so you don't waste time and effort knocking on the wrong doors.

Developmental duties of municipalities

A municipality must:

- structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- participate in national and provincial development programmes.

1.2 How is power structured in local government?

278 MUNICIPALITIES IN SOUTH AFRICA

3 TYPES OF MUNICIPALITIES

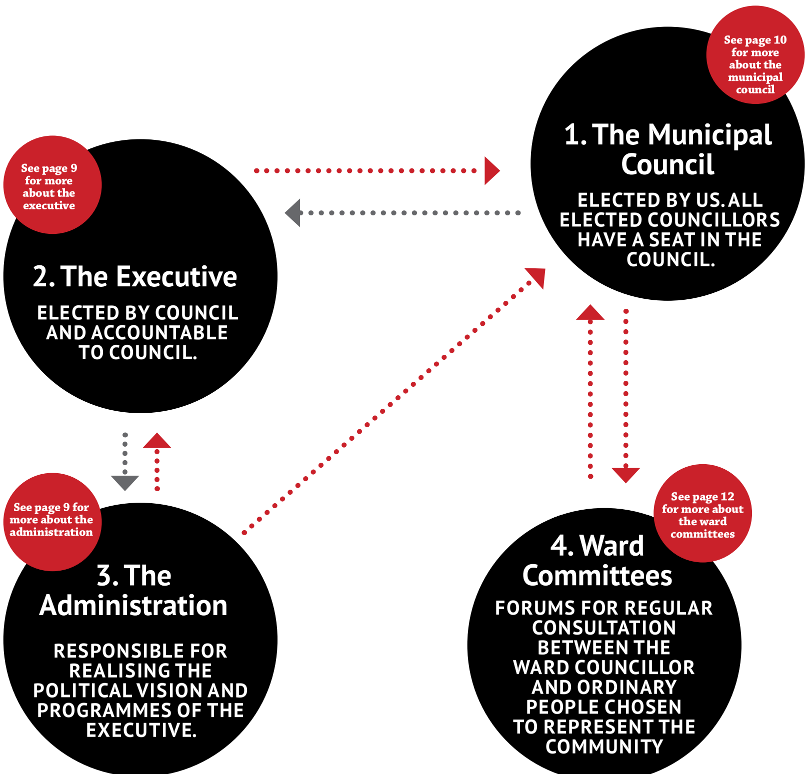
(Separated by our Constitution[1])

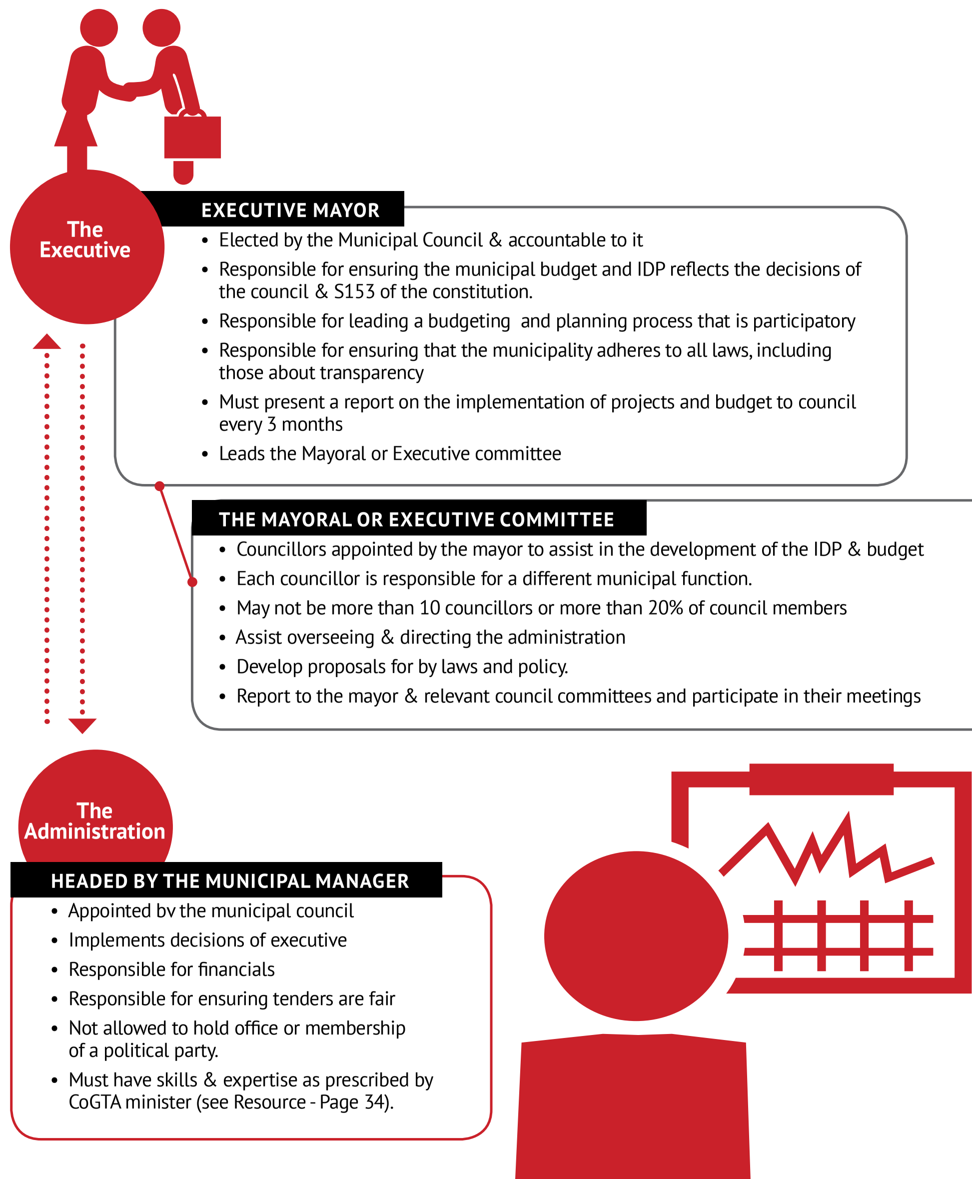
1. Metro municipalities *(type A)*
2. Local municipalities *(type B)*
3. District municipalities *(type C)*

1. Section 155 (1) a - c))

1.3 How are our municipalities structured?

We can think about our municipalities as having 4 parts:





1.4 Local government structures

The Municipal Council

OFFICE OF THE SPEAKER

- Elected by the municipal council
- Responsible for convening council meetings at least once every 3 months
- Must ensure that councillors follow the Code of Conduct (pg 14). This can mean launching an investigation when suspicions or complaints are raised
- Supervises ward committee elections and responsible for their functioning of ward committees

THE MUNICIPAL COUNCIL

- Makes decisions on the municipality's programme & budget. This must prioritise the provision of basic services (pg 35)
- Holds the executive to account
- Oversees the provision of services by holding the administration to account
- Is divided into smaller committees that focus on different topics. The exact topics are different in every municipality, but all should have a finances committee and a public accounts committee.

NOTE: VERY SMALL MUNICIPALITIES DO NOT HAVE A SPEAKER, ONLY A MAYOR

In local government elections we have two votes:

The PR councillor is not elected directly. We vote for a political party, which in turn receives a number of seats in the council proportional to their share of the vote. Political parties select the persons who fill these seats based on internal rules and priorities.

Ward councillors are persons chosen by you specifically to represent your ward. Ward councillors do not have to be affiliated to a political party. Anyone can be elected as ward councillor if they register as candidates. In theory, ward councillors can be recalled.

ALL COUNCILLORS, REGARDLESS OF THEIR TYPE MUST FOLLOW THE MUNICIPAL CODE OF CONDUCT (PG 35)

In rural areas, "traditional leaders" have major power over the people who live on the land under their control, and whose authority overlaps with the local municipality structure. At times, traditional leaders are part of the municipal structure. This situation in the rural areas can lead to conflict between municipal leadership, which is democratically elected, and traditional leadership, which is not democratic.

1.5 What about ward committees?

Ward Committees are meant to enable community participation in local government, but they are often a source of frustration because they are abused by political parties. Ward Committee elections must consider the need for diverse interests and women representatives.[2]

To learn more about how Ward Committees should work, see the Resources section for a Handbook that describes ward committee elections and functions.

2. Guidelines for the Operation and Establishment of Municipal Ward Committees (Department of Provincial and Local Government

Pledge proposal #1

Open and representative ward committees:

Ask your ward councillor to commit to:
Inviting the IEC to administer your ward elections procedures

Community involvement in ward committees

Although the IEC officials supervising the ward committee election at Thembelihle were known ANC members, the local Crisis Committee managed to get a member on the ward committee. This activist ignored instructions from the councillor not to address public meetings, and reported the proceedings of the ward committee to the community. The councillor then tried to intimidate him, saying that as his employer she was giving him his first written warning. He refused to accept that, saying that she is not his employer, but he is in his position due to the people who voted for him to be there. After that she left him alone and he continued to report to the community, saying that it's his right under the national Constitution. For example he reports that many of the ward committee members are contractors who hear from the councillor about tenders even before the ward committee meets. Then often they don't come to the ward committee meeting and it has to be called off due to lack of quorum.

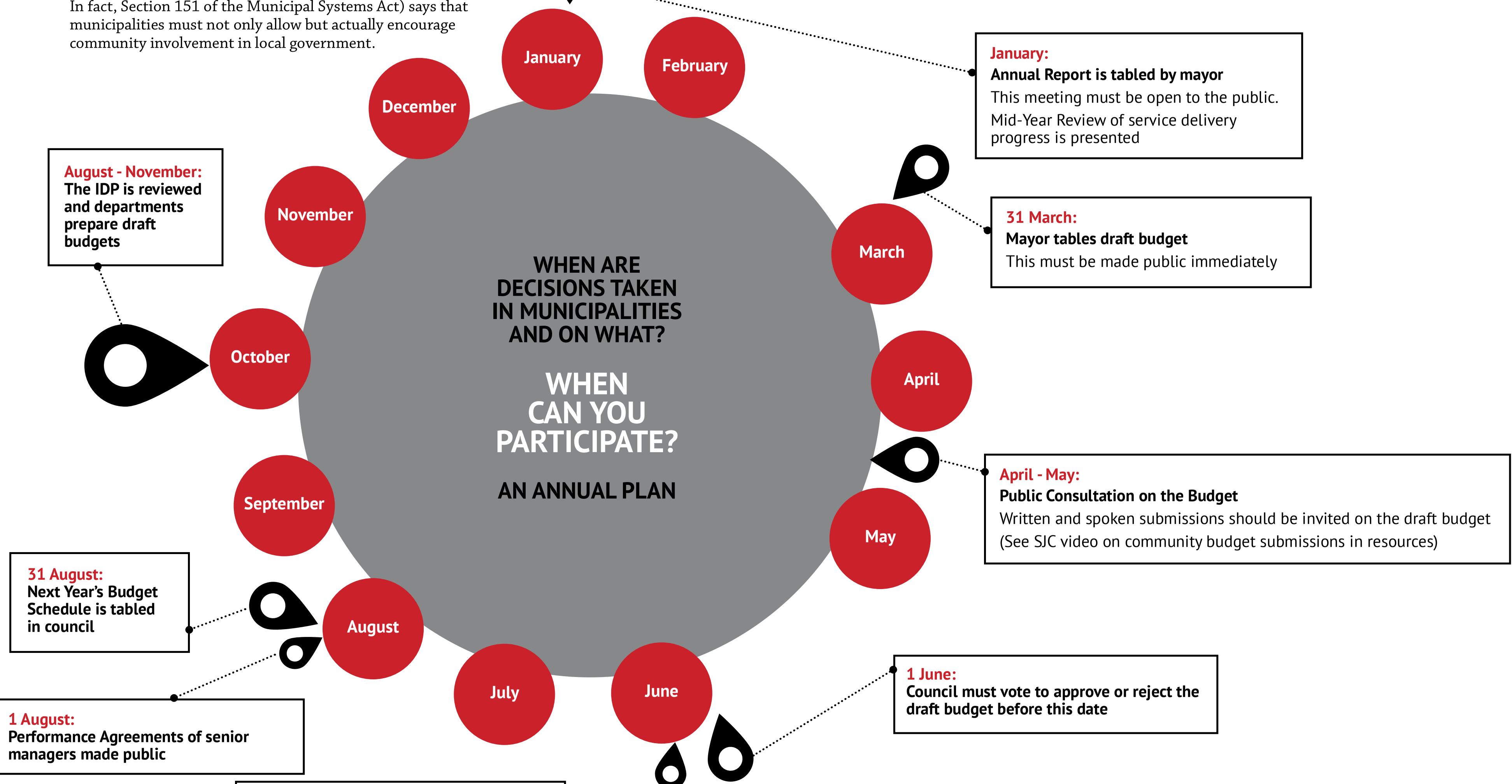
1.6 When and how can we participate in local government decisions?

In line with our Constitution and the Bill of Rights, the Municipal Systems Act enshrines the importance of direct citizen participation in municipalities' decision making processes, beyond the election of councillors every five years. In fact, Section 151 of the Municipal Systems Act) says that municipalities must not only allow but actually encourage community involvement in local government.

The Integrated Development Plan (IDP):
Every municipality must have a 5 year plan that explains how it will improve residents' lives. **The plan must:**

- Identify development priorities and major projects the municipality will undertake
- Explain how the municipality will finance these projects
- Indicate what tenders will be issued

The IDP is reviewed every year when the budget is drafted. The IDP is linked to the political term of councillors. After local elections, a council can choose to develop a new IDP or adopt the previous one.



1.7 Participation opportunities

It is important that opportunities to participate are meaningful, and not box ticking exercises.

The Constitutional Court has ruled that in order to be meaningful, participatory processes must meet the following conditions:

1. Government must consult people before a final decision has been made[a].
2. Representatives must listen to people's opinions with an open mind[b].
3. All relevant stakeholders and interested persons must be given information about the location and time of the consultation, the impact decisions will have on their lives, and given enough time to prepare for consultation[c].
4. A section of the population that may be affected by the decisions under consideration has been consulted[d].

a. Matatiele Municipality and Others v President of the Republic of South Africa and Others(CCT 73/05) [2006] ZACC 2

b. Merafong Demarcation Forum and Others v. President of the Republic of South Africa (CCT 41/07) [2008] ZACC 10

c. Doctors for Life International v. National Assembly & Others (CCT 12/05) [2006] ZACC 11

d. Matatiele Municipality and Others v President of the Republic of South Africa and Others(CCT 73/05) [2006] ZACC 2

2 Fighting for local government **transparency**

In addition to the requirements identified by the Constitutional Court, participation can only be meaningful, and government can only be held accountable, if citizens have access to sufficient information. Section 32 of the Constitution states that 'everyone has the right of access to (a) any information held by the state'.

2.1 What information are you entitled to?

The Municipal Manager is ultimately responsible for making records available in each municipality -- in other words, making sure that the community has access to documents about the municipality. The Municipal Manager is also responsible for appointing an 'information officer' whose role is to assist members of the public to access information.

According to two key pieces of legislation, the Municipal Systems Act (MSA) and the Municipal Finance Management Act (MFMA), your municipality *must* give you the following documents automatically. This means that this information *must* be available at all times at their offices, at libraries, and online, *without* a Promotion of Access to Information Act (PAIA) request:

- The draft and final Integrated Development Plan (IDP); (within 14 days)[3]
- All budget related documents, in particular the draft and final annual budget of the municipality as well as the adjusted budget (immediately)[4]
- Service Delivery Budget Implementation Plans (SDIBP)[5]
- All By-laws, compiled into *a publication called* "the Municipal Code[6]"
- The municipality's annual report[7]
- The quarterly reports tabled in council by the mayor[8]

3. MSA Section 25
4. MFMA Section 22, MSA chapter 4. For a full list of documents see Section 75.
5. MFMA s53
6. MSA Section 15
7. MSA Section 46
8. MFMA Section 75

- Notices of council meeting dates and venues[9]
- Performance agreements with senior staff[10]
- Service Delivery agreements[11]
- Contracts above ZAR 200 000
- A register of all bids received for tenders[12], including the name of the bidder and the cost and BBBEE status if relevant.

The municipality is responsible for making available any of these documents, in any official language, upon request.

2.2 What if I have to submit an access to information request?

Every municipality must also supply a manual for purposes of Promotion of Access to Information Act (PAIA) requests, detailing what further information is available.

When we need information that is not in any of these documents, we can use PAIA to request specific records. A PAIA request can be made to any state body for any information, and a request can be made to a private body for any information that you need to uphold your rights. For more information and guidance on how to do a PAIA request, see r2k.org.za/paia

9. MSA Section 19
10. MFMA Section 53
11. MFMA s75
12. Section 23 of Municipality Supply Chain Management Regulations, notice 868 of 2005

Watch this space:

By July 2017 National Treasury aims to start providing access to detailed municipal financial data. This will enable us to know the exact areas and projects on which the municipality spends its money. Currently this information does not exist.

Pledge proposal #2

Provide information

Ask your councillor to commit to making information available and accessible.
This could include the following:

- Regular report back from your councillor at a venue of your choice.
- The Establishment of a municipal notice board at a venue of your choice that displays hard-copies of key documents within 7 days of their publication.
- These must include the documents listed under 2.1, as well as additional documents such as minutes of council, council committee and sub council meetings; contact details of service providers and the municipal official responsible for them.

Local stories:

The importance of accurate minutes:

This story comes from a group of ex-Midrand Workers who joined with R2K Gauteng. This group of workers retrenched in 1994 from Midrand Municipality thought their struggle for justice was yielding fruit when, after many years of campaigning, in 2010 the then mayor of Johannesburg promised them re-employment and compensation among other things. However, he was replaced soon afterwards and the new mayor's team claimed no knowledge or record of the promise. The workers even demanded access to the minutes of the meeting with the previous mayor via a PAIA request but the municipality replied with an affidavit that no such records exist. The workers' struggle continues - they are trying to get the previous mayor to testify about his promises.

Did you know?

Municipalities are required by law to set aside funds for public participation on the budget and other decisions.

In order to ensure that minutes are captured accurately and that important decisions are taken forward, we can record meetings on our phones, or take our own minutes and notes in the meeting, to compare with (and if necessary challenge) the official minutes. In order to ensure that minutes are captured accurately and that important decisions are taken forward, we can record meetings on our phones, or take our own minutes and notes in the meeting, to compare with (and if necessary challenge) the official minutes.

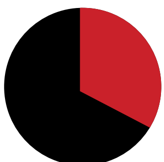
2.3 Do councillors declare their Financial Interests?

A "financial interest" is anything you can benefit from financially, such as an income, ownership of a business or property, or being on the board of a company. By law, councillors must declare their financial interests to the municipal manager for transparency reasons, to try prevent corruption -- because many municipalities give tenders and contracts to companies that councillors and other officials benefit from financially!

The Auditor General's report on financial management in municipalities over 2014/15 year found that

COLLECTIVELY, **VALUE OF THESE CONTRACTS**

R78.6 BILLION



LOCAL GOVERNMENT **TOTAL CONTRACTS**

347 BILLION

19% MUNICIPALITIES AWARDED CONTRACTS TO COMPANIES IN WHICH THEIR **OWN COUNCILLORS OR EMPLOYEES** HAD INTERESTS

30% MUNICIPALITIES AWARDED CONTRACTS TO COMPANIES IN WHICH **CLOSE FAMILY MEMBERS OF THEIR OWN EMPLOYEES OR COUNCILLORS** HAD INTERESTS

61% MUNICIPALITIES AWARDED CONTRACTS TO COMPANIES IN WHICH **OTHER STATE OFFICIALS** HAD INTERESTS

The Code of Conduct for elected councillors (Schedule 5 of the MSA) says that councillors must declare all of their financial interests in writing to the municipal manager within 60 days of their election. This includes:

- Shares in any company
- Directorship of any company
- Any employment or income
- Any property owned
- Gifts above a certain value

Any changes to the financial interests of the councillor must also be declared to the municipal manager every year in writing.

However, the Code of Conduct says that the municipal council must decide which of the financial interests should be made public and which should be kept private, balancing the need for transparency with the councillor's right to privacy.

This could lead to information being covered up from the public. As activists we should strive for maximum transparency. Councillors are public servants, they must be open!

Pledge proposal #3

Provide information

Ask your councillor to commit to:
Posting their financial interest disclosure form on a community notice board
Include the financial interests of their close family members and business partners in the form.

2.4 Are Tender Processes transparent?

TWO THIRDS OF MUNICIPALITIES **FAILED TO ADHERE TO PROCUREMENT LAWS AND REGULATIONS**[13].

- The Auditor General reports 2014/15 financial year

Although this does not mean that all tenders awarded by these municipalities were rigged, it does mean that municipal funds were put at risk.

The MSA, MFMA and the Municipal Supply Chain Management (MSCM) Regulations provide some opportunities for citizen monitoring. These include:

- Municipalities must consult affected community before appointing an external service provider who will provide basic services . The MSA says the municipality must first notify the community of its intention, and then consider the community's views prior to issuing a tender[14].
- Unless properly justified, every outsourced service above R200 000 must be awarded through a competitive bidding process.
- The municipal manager has the option to *appoint an independent observer* of all meetings where decisions on tenders are made, if this will help ensure fairness and transparency[15].
- Once the deadline for submission of tender documents has passed, the tender box must be opened in *public*. Observers may ask the official opening the box to read the name, price and BBBEE status of each bidder if practical to do so[16].
- Within *10 days* of the bid deadline, all the information above must be available in a bid register on the the municipality's website[17].
- Before a municipality awards a contract for a basic municipal service, it must inform and consult the affected community about the contract it plans to sign. Once signed, the contract (known as a Service Delivery Agreement - SDA) information on the contract (who it was awarded to, for what, and for how much) must be communicated to the affected community through the media[18].
- All SDA's must be available in hardcopy and on the municipal website[19].
- A community has the right to ask the municipality to review an SDA if they aren't happy with the service[20]. They can also submit a petition to the municipal council[21].

Unfortunately, South Africa's laws do not provide as much opportunities for citizen oversight as laws of some other countries, such as Mexico, Argentina and the Philippines. Under Pledge Proposal #4 below we include some suggestions to change processes in our municipalities in line with global best practice. For a comprehensive account of procurement processes in SA and the possibilities of monitoring them please see resources listed in the references.

Important to Know:

- Councillors and employees of the municipality may not receive gifts or benefits from a company that provides a service to the municipality[22].
- Councillors are not allowed to participate or even observe meetings in which decisions are made on which companies get tenders[23].
- If corruption and/or fraud influenced the selection of a company, the municipality has the right to cancel that contract[24].
- Gauteng province, the Nelson Mandela Bay, Ekurhuleni and Cape Town municipalities already allow the public to observe the meeting in which it is finally decided which company is appointed (these are called Bid Adjudication Meetings). It is possible and does not undermine the right to privacy or commercially sensitive information.

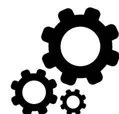
13. These are the MFMA and Municipality Supply Chain Management Regulations, notice 868 of 2005
14. MSA s78
15. MSCM Regulations Section 26
16. MSCM regulations s23
17. As above
18. MSA s80
19. MFMA, s75 and MSA s84
20. MSA s77
21. MSA s17
22. MSA s81
23. MFMA s117
24. MSCM s38

Pledge proposal #4

Open tender processes

When it comes to services in your community, ask your councillor to commit to:

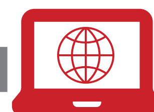
- Respecting your legal right to consultation before making decisions about outsourcing or the appointment of a company
- Hold public opening of tender boxes at a venue easily accessible to your community
- Post a copy of the bid register on the community notice board
- Hold the final meeting in which a decision is made (the Bid Adjudication Meeting) in the community and open to the public.



Petition tools

AMANDLA.MOBI IS A MOBILE PETITION WEBSITE THAT ALLOWS YOU TO CREATE AND DISTRIBUTE PETITIONS THAT CAN BE SIGNED BY EMAIL OR SMS OR ON PAPER. TO CREATE YOUR OWN PETITION CAMPAIGN, **VISIT AWETHU.AMANDLA.MOBI**

Get more information about your ward, online!



THE WEB TOOL WAZIMAP COMBINES INFORMATION FROM THE IEC WEBSITE, THE NATIONAL CENSUS DATA, AND OTHER PLACES, TO TELL YOU A LOT ABOUT YOUR WARD, YOUR MUNICIPALITY, YOU PROVINCE AND SOUTH AFRICA AS A WHOLE. **VISIT WAZIMAP.CO.ZA** AND SEARCH FOR ANY LOCATION YOU WANT TO KNOW MORE ABOUT.

2.5 Who is funding Political Parties?

In South Africa, political parties get both public funding (from the IEC and Parliament) and private funding (from individuals, companies, and other bodies) to finance their campaigns and other activities

But who is giving that private funding? And for what?

There are no laws or regulations that require political parties to be transparent about those private donations (in other words, they are secret). This creates a big opportunity for corruption and secret deals.

Political parties need money to do their work -- but sometimes a person or a company gives money to a political party in exchange for a favour or a tender.

Because these financial donations are secret, it becomes very difficult for the community to know when the people who are giving money to political parties are also the people who are getting tenders or benefiting from other decisions of the municipality.

Local stories:

In December 2015 Mr Truman Prince, the Mayor of Beaufort West, wrote to a state entity in his municipality asking them to help use their procurement process to bring in funds for his political party, the ANC.

MUNISIPALITEIT - MUNICIPALITY - UMASIPALA WASE
BEAUFORT-WES/BEAUFORT WEST/BHOBHOFOLO

KANTOOR VAN DIE MUNISIPALE BESTUURDER / OFFICE OF THE MUNICIPAL MANAGER
DEPARTEMENT KORPORATIEWE DIENSTE / DEPARTMENT CORPORATIVE SERVICES

Board Chairperson
Mr. Raymond Cele
563 Old Pretoria Main Road,
Unit 5 Midrand Business Park,
MIDRAND

6. We are an ANC led municipality, we are therefore in need of financial injection for our 2016 Local Government Election campaign and therefore will also want to see construction companies sympathetic and having a relationship with the ANC to benefit, in order for these companies to inject funds in our election campaign process.

7. We are seeing this project as a mechanism that will help us regain lost ground to the opposition towards our campaigns, we therefore would want to see our own construction companies constructing this centre, construction companies who would create local jobs and have the money revolve around our people.

This letter is a blatant example of how political parties' finances can lead to corruption and abuse of public resources, while robbing the community and undermining service delivery. Truman Prince was fined R10,000 by his party but did not face criminal charges.

Join the campaign to demand transparency

Visit www.myvotecounts.org.za

My Vote Counts (MVC) is a campaign to ensure that voters have the right to know who is funding political parties. MVC first went to the Constitutional Court in 2015 to demand that there must be a law requiring transparency. That case was dismissed on a technicality, MVC is now going to the High Court to continue the fight for voters' right to know.

Pledge proposal #5

Regulate political party funding

- Ask your councillor to commit to supporting political party funding regulations. Although s/he may not have direct power to do so, they can lobby for this decision and set an example.
- Although they do not directly target political party funding regulation, pledge proposals 3 and 4 can minimise the negative impact of untransparent political party funding by making decisions on the use of state resources easier to scrutinise.

Does your councillor:

File a **detailed report** of their financial interests to the municipal manager?

Attend meetings of the municipal council and its committees?

Report back to your community/ward at least 4 times per year concerning the activities of local government?

Disclose information, including any gifts or benefits their family members or business partners stand to get from a municipal contract and avoid conflict of interests?

3 Fighting for local government **accountability**

How can a failing councillor be removed? Local government is supposed to be the most accessible part of government, but sometimes local politicians don't do their job. **What can be done when this happens?**

3.1 The Councillors' Code of Conduct (see Resources - Page 34)

Under the Municipal Systems Act, citizens may report their councillors to the Municipal Council for investigation and sanction if they have not respected the Councillor Code of Conduct (MSA, schedule 1).

The Code says that councillors must:

- (a) Act honestly, transparently, and in the best interests of the community
- (b) Report back to the community at least quarterly
- (c) Attend all council meetings
- (d) Disclose financial interests, including gifts, financial benefits or favours within 60 days of appointment.
- (e) Not use his/her position for personal gain
- (f) Not use and abuse council property

Most of these requirements also apply to traditional leaders who are members of a municipal council (MSA schedule 1)

3.2 Removing councillors using the code of conduct

If you suspect or have evidence of your councillor failing to live up to the Code of Conduct, you can report this to the Speaker of the Municipal Council with a written complaint.Once a complaint is lodged, the community has the right to a quick response (MSA s5). Any breach of the Code must be investigated by the Speaker.

The Council may:

- (a) Give the councillor a formal warning;
- (b) Reprimand the councillor;
- (c) Ask the MEC for Local Government to suspend the councillor for a period
- (d) Fine the councillor; or
- (e) Ask the MEC to remove the councillor from office.

In other words, the MEC may suspend the councillor for some time or remove the councillor from office based on the Code of Conduct alone(MSA, Schedule 1).

3.3 Holding municipal staff to account

National government has set minimum standards of education and skills for officials who occupy important positions in the municipality (e.g. Municipal Manager, Chief financial officer, head of the Supply Chain Management unit. If you have questions about the qualifications of such personnel, approach the Auditor General, an opposition councillor or the media.

3.4 Disciplinary Action against staff

Although the Council must investigate and take disciplinary action against officials suspected of mismanagement, the Auditor General says that in 2014/15 only 55% of reported cases were actually investigated. At times, even when officials are dismissed, they are then employed by a different municipality.
In addition, National Treasury has established a central database in which all disciplinary and dismissal cases are recorded.

Pledge proposal #6

hold officials to account

- Ask your councillor to commit to ensuring staff are investigated and held accountable.
- Provide the community with updates on any such cases.

3.5 The 'recall' option?

Some countries have laws that enable citizens to 'recall' their elected representatives if they do not perform or deliver on their promises. Although South African law does not make such provision, we can ask our councillors to commit to our right to recall. While it may be a 'hard sell', ultimately, if the right conditions are in place, there is no reason for a councillor who plans to work hard and is committed to improving lives in his community should be afraid of giving his or her community this right.

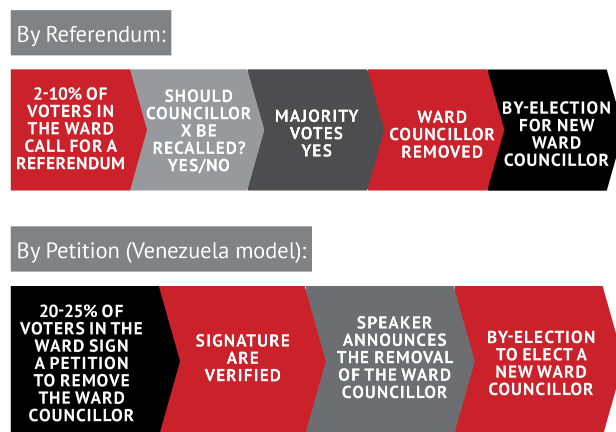
One reason political parties are afraid of a 'right to recall' option is that internal factionalism at a local level could lead to the 'recall' option being abused by factions within a particular party against their own elected representatives. However, examples from other countries may provide solutions to prevent this 'abuse' from happening.

For example, in Venezuela and some US states a recall 'vote' is permitted if one or more of the following conditions are met:

- Certain percentage of the registered voters in a particular constituency sign a petition to hold recall vote. Usually the time to collect signatures is limited to e.g. 60 days.
- Certain conditions trigger a recall vote. These can include misconduct in office, incompetence, or failure to perform prescribed duties

While we do not have these systems of recall in South Africa, we can approach councillors to sign a recall pledge, which commits them to stepping down under specific conditions if they are not representing community interests. We can learn from some of the recall strategies used in other countries, including a referendum or a petition (see below).

If a PR councillor is removed or steps down, they would then be replaced by someone else in their political party. If a ward councillors is removed or steps down, this triggers a by-election in that ward run by the IEC to choose a new councillor.



Pledge proposal #7

The right to recall

Ask your ward councillor to commit to resigning if conditions jointly set by him/ her and the community are met.

Ask the local leader of a political party to commit to resigning if conditions jointly set by the party and the community are met.

Local stories:

How the Operation Khanyisa Movement uses the right to recall

Operation Khanyisa Movement (OKM) is an example of a community coming together for councillor accountability. In 2006 OKM was formed by Thembelihle Crisis Committee, Soweto Electricity Crisis Committee, and Wynberg Concerned Residents to contest the municipal election in Johannesburg. It obtained one PR seat in the Johannesburg City Council and so its learning experience started about how and where the decisions were made which affect service delivery.An important part of the OKM experience is that the councillor shares her pay with the organisation and is answerable to the collective. If she fails in her duty the "party" may replace her with the next person on the list, simply by informing the IEC that she is no longer councillor.

(Please send a photo of this pledge to admin@r2k.org.za or 071 571 4470)

Ward Council Candidates' Pledge to Voters

Candidate Name: ____________________

Candidate ID: ____________________

Ward Number: ____________ **Area:** ____________

Municipality: ____________________

As a promise to the community in ward _____ and to the whole municipality, I commit myself to:

The Right of Recall: I give the community the right to recall me. I will be accountable first and foremost to the community. I commit to stepping down as councillor, as described in the Activist Guide to Local Government Transparency, under the following conditions:

____

____

Key promises:

1. ____________________

Conditions: ____________________

2. ____________________

Conditions: ____________________

3. ____________________

Conditions: ____________________

4. ____________________

Conditions: ____________________

Signed: ____________________ Date: ____________

Witness 1 Name: ____________ Signature: ____________

Witness 2 Name: ____________ Signature: ____________

Resources

Make Councillors Take the Transparency Pledge:

Download the pledge at www.r2k.org.za/pledge

Laws and regulations

- Councillor Code of Conduct: r2k.org.za/councillor-code
- The Municipal Systems Act: r2k.org.za/msa
- The Municipal Finance Management Act: r2k.org.za/mfma
- National Treasury Municipal Supply Management Regulations: r2k.org.za/municipal-supply-regs
- Other municipal laws
- r2k.org.za/municipal-laws

Understanding local government

- Local Government Action's Making Local Government Work: localgovernmentaction.org
- The Ward Committee Handbook: r2k.org.za/ward-committee-handbook
- Ndifuna Ukwazi factsheet on budget procedures: r2k.org.za/nu-budget1

Promotion of Access to Information Act

- Visit R2K's website for useful contacts and guides created by the South African History Archive and Ndifuna Ukwazi: r2k.org.za/paia

Procurement

- The IBP Guide to monitoring procurement in South Africa: r2k.org.za/ibp-guide
- eTender - the website on which all SA government tenders must be listed - http://www.etenders.gov.za/
- Ndifuna Ukwazi factsheet on Service Delivery Agreements: r2k.org.za/nu-sda

Appendix

What's in the Councillor Code of Conduct?

Main points of the Code:

1. The preamble states that Councillors must be accountable to the public via meetings at least quarterly (four times per year);
2. Councillors must act in good faith and in the interest of the municipality;
3. They must attend all meetings except when they have leave of absence or must withdraw due to having a vested interest in the matters being discussed;
4. After missing three or more meetings without leave they must be fired;
5. They must disclose all business interests and large gifts to the council (but the council may decide how much of this must be public);
6. Councillors who have, or whose family or close associates have, an interest in a matter being discussed must leave the meeting for that part of the discussion;
7. They may not use their position to benefit themselves or others improperly;
8. If more than a quarter of councillors object to the council granting permission to a councillor to benefit from doing business with the council, it then requires permission from the province's MEC for local government;
9. Councillors must have permission from the council before they undertake other paid work;
10. They must not disclose confidential information obtained within the council;
11. They may not interfere in the municipal administration;
12. They must not acquire any of the municipal assets;
13. If a Speaker reasonably suspects a councillor of breaching this Code, s/he must launch an investigation, giving the councillor a chance to respond to the findings, then present them to the council, send them to the MEC for local government, and make them public;
14. Speakers must bring this Code to the attention of new councillors and display it at meeting places.
15. Councils have wide discretion in responding to such reports within guidelines; in extreme cases they can ask the provincial MEC for local government to suspend and even fire the councillor.
16. Traditional leaders who work with councils are subject to some of the Code.

July 2016

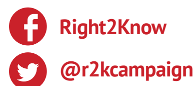
The Right2Know campaign (R2K) was launched in August 2010 response to the South African government's introduction of the Protection of State Information Bill. Since then we have grown into an activist movement centred on freedom of expression and access to information.

Find out more at www.r2k.org.za

JOIN US!

Contact us and get involved in the movement

R2K National Office:	021 447 1000 or admin@r2k.org.za
R2K Gauteng:	011 339 1533 or gauteng@r2k.org.za
R2K KZN:	031 260 2825 or kzn@r2k.org.za
R2K Western Cape:	021 447 1000 and westerncape@r2k.org.za
Other Provinces:	078 030 5192 or bongani@r2k.org.za



DOWNLOAD THIS GUIDE AT WWW.R2K.ORG.ZA/LOCALGOVT

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No:

In the matter between:

CORRUPTION WATCH	First Applicant
RIGHT2KNOW CAMPAIGN	Second Applicant
And	
THE ARMS PROCUREMENT COMMISSION	First Respondent
WILLIE LEGOABE SERITI NO	Second Respondent
HENDRICK MMOLLI THEKISO MUSI NO	Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	FourthRespondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	FifthRespondent
THE MINISTER OF DEFENCE	Sixth Respondent
THE MINISTER OF TRADE AND INDUSTRY	Seventh Respondent

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I, the undersigned

LEANNE GOVINDSAMY

do hereby make oath and state that:

INTRODUCTION

1. I am the Head of Legal and Investigations of Corruption Watch. My offices are situated at 8th Floor, Heerengracht Building, 87 De Korte Street, Braamfontein, Johannesburg.

2. I am duly authorised by a resolution adopted by the Board of Directors of Corruption Watch to depose to this affidavit on behalf of Corruption Watch, the First Applicant. I attach a copy of the resolution marked '**FA1**'.

3. This application deals with the proceedings of the Arms Procurement Commission. In this affidavit, I set out facts and allegations which are drawn from the transcript of the proceedings of the Commission, from documents which were placed before the Commission, from documents which emerged from it, and from other documents which are in the public domain. Where I rely on such documents, I identify their source. It follows that I do not have personal knowledge of the correctness of what is said in those documents. I rely on the fact that those things were said.

4. This affidavit is very lengthy. If I were to attach to it every document to which it refers, it would be so long as to be unmanageable. I have therefore attached only those documents which are of particular importance. The Applicants' attorneys will make available to any respondent who requests it, a file containing (in hard or soft copy) the

documents which are referred to but not attached to this affidavit. A copy will also be made available to the Court at the hearing.

5. This affidavit is structured as follows:

5.1. First, I describe the parties to this litigation.

5.2. Second, I provide a brief overview of this application.

5.3. Third, I provide an overview of the Strategic Defence Package, and the establishment and functions of the Commission. I set out what, I submit, are the legal duties of a Commission and how the law requires it to perform its task.

5.4. Fourth, I identify the essence of the allegations in the public arena about the Arms Deal. I refer in this context to two important reports which were produced, the Joint Investigation Report and the draft report of the Auditor General.

5.5. Fifth, I describe multiple examples of how the Commission failed to gather relevant material, to call material witnesses, and properly to investigate evidence and allegations that were before it or made available to it

5.6. Sixth, I describe and give examples of the Commission's failure to admit into evidence, material that was highly relevant to the enquiry it was required to undertake.

5.7. Seventh, I describe and give examples of the Commission's failure to seek or allow information from important material witnesses.

5.8. Eighth, I describe and give examples of the Commission's failure to test evidence and material placed before it.

5.9. Finally, I deal with the grounds of review and the relief which the Applicants seek.

THE PARTIES

6. The First Applicant is **CORRUPTION WATCH NPC ('RF') ('Corruption Watch')**, registration number K2011/118829108, a non-profit company registered in accordance with the Company Laws of South Africa and having its principal place of business situated at 8th Floor, Heerengracht Building, 87 De Korte Street, Braamfontein, Johannesburg. A copy of its Memorandum of Incorporation is attached marked '**FA2**'. Its work is the following:

6.1. In recognition of the fact that corruption weakens institutions, criminalises individuals and undermines social solidarity, Corruption Watch's main objective is to encourage and enable active public participation by providing a platform for reporting of alleged corruption. On receiving allegations of corruption, Corruption Watch undertakes an investigation, the results of which are handed over to authorities for further action. From that point on, Corruption Watch monitors progress of each case and ensures exposure of its investigative work.

6.2. A key aspect of its work also relates to community mobilisation against corruption. A fundamental guiding principle of the work of Corruption Watch

is that each act of corruption that is prevented by the people of South Africa fortifies civil society and thereby enhances democracy, the rule of law and the establishment of a more just and caring society. The findings of the Commission have great significance for the work of Corruption Watch.

6.3. Pursuant to these objects, Corruption Watch engages from time to time in public interest litigation.

7. The Second Applicant is the **RIGHT 2 KNOW CAMPAIGN**, a voluntary association registered as a non-profit organisation, registration number NPO 132-307, with its national office located at 107 Community House, 41 Salt River Road, Salt River, Cape Town. The Right to Know Campaign's main object is to promote and advocate for a right to be free to access and to share information. This right is fundamental to any democracy that is open, accountable, participatory and responsive; and able to deliver social, economic and environmental justice. A copy of its constitution is attached marked '**FA3**'.

8. Both Applicants bring this application: (a) in their own interest; and (b) in the public interest. As is apparent from this affidavit, the allegations giving rise to the establishment of the Commission are very serious. Individuals at the highest levels of government leadership are implicated, as are various corporate entities and their employees. At its core, the Commission was to investigate two matters: (a) did the country need the equipment obtained through the Arms Deal; and (b) was the process followed a fair and proper one. These are matters of undeniable public interest, and the findings of the Commission are likewise of undeniable public interest. This is particularly so given the

poverty in which so many South Africans live and the challenges that Government faces in vindicating the constitutionally entrenched rights of its people.

9. The First Respondent is the **ARMS PROCUREMENT COMMISSION**, the full name of which is Commission of Inquiry into allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Packages. The seat of the Commission is 21st Floor, Isivuno House, cnr Lilian Ngoyi (Van der Walt) and Madiba (Vermeulen) Streets, Pretoria. As the Commission is no longer operational, service will be effected through the Minister of Justice and Constitutional Development, whose Department was responsible for the administration of the Commission.

10. The Second Respondent is **WILLIE LEGOABE SERITI NO**, who is cited in his capacity as the Chairperson of the Commission. He is a Judge of the Supreme Court of Appeal. The President of the Supreme Court of Appeal has consented, in terms of section 47 of the Superior Courts Act, to the institution of these proceedings against him. I attach marked ´**FA 4"** a copy of his written consent. Service on the Second respondent will be effected through the Chief Registrar of the Supreme Court of Appeal.

11. The Third Respondent is **HENDRICK MMOLLI THEKISO MUSI NO**, who is cited in his capacity as a member of the Commission. He is a former Judge President of the Free State High Court. The Judge President of the Free State High Court has consented to the extent necessary, in terms of section 47 of the Superior Courts Act, to the institution of these proceedings against him. I attach marked "**FA 5"** a copy of her written consent. Service will be effected through the Registrar of the Free State High Court.

12. The Applicants seek no relief against the Second and Third Respondents personally; they are cited in their capacity as Commissioners of the Commission.

13. The Fourth Respondent is the **MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** who is cited in his capacity as the Cabinet Minister responsible for the Commission.

14. The Fifth Respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**, who appointed the Commission.

15. No relief is sought against the Fourth and Fifth Respondents. They are cited as parties to this application by virtue of such interest as they have in it.

16. The Fourth and Fifth Respondents made the Regulations which governed the work of the Commission, which were published in Proc R4 in GG 35023 of 8 February 2012. They did so under the powers vested in them by section 1 of the Commissions Act 8 of 1947 ('**the Act**'). They declared that the provisions of the Act shall be applicable to the Commission, and made the regulations applicable to the Commission.

17. The Sixth Respondent is the **MINISTER OF DEFENCE** and the Seventh Respondent is the **MINISTER OF TRADE AND INDUSTRY**. No relief is sought against the Sixth or Seventh Respondents, both of whom are cited by virtue of such interest as they and their departments have in the Commission.

18. The Fourth, Sixth and Seventh Respondents will be served through the office of the State Attorney, Pretoria.

19. I respectfully submit that this Court has the jurisdiction to determine these proceedings on account of the seat of the Commission being in Pretoria, and because the main place of business of the Respondents is in Pretoria.

OVERVIEW OF THIS APPLICATION

20. The President established the Commission in September 2011 to investigate allegations of fraud, corruption, impropriety or irregularity in the arms procurement process.

21. On 30 December 2015 the President received the final report of the Commission ('**the Report**'). The Report was released to the public on 21 April 2016. I do not attach a copy of the Report but a copy will made available to the Court and to the Respondents on request.

22. The Commission found that there was nothing wrong with the Arms Deal in its conception, execution or economic impact; and that corruption played no part in the Arms Deal, despite evidence of large payments made to 'consultants' on the part of the defence equipment manufacturers. According to the President: 'The Commission states that not a single iota of evidence was placed before it showing that any of the money received by any of the consultants was paid to any officials involved in the strategic defence procurement package, let alone any of the members of the inter-ministerial committee that oversaw the process or any member of Cabinet that took the final decisions.'

23. The Report was the culmination of four years of work at a cost of R 137 million to the South African taxpayer (the initial budget was R 40 million), excluding legal costs to which I refer below.

24. The Report runs to 767 pages contained in three volumes. Among its key findings are the following:

24.1. '[635] The evidence tendered before the Commission indicates that the various officials of the DOD, Armscor, the DTI and the National Treasury who were involved in the acquisition process, acted with a high level of professionalism, dedication and integrity. Despite the fact that numerous allegations of criminal conduct on their part were made, no evidence was found or presented before the Commission to substantiate the allegations.'

24.2. '[654] The evidence presented before this Commission does not suggest that any undue or improper influence played any role in the selection of the preferred bidders who ultimately entered into contracts with the Government.'

24.3. '[659] Despite the fact that various allegations of fraud, corruption or malfeasance were directed at Government officials and senior politicians, no evidence was produced or found to substantiate them. They thus remain wild allegations with no factual basis.'

24.4. '[663] Various agencies investigated the possible criminal conduct of some of the role players in the SDPP, and no evidence was found to justify any criminal prosecution. There is no need to appoint another body to investigate the allegations of criminal conduct, as no credible evidence was found during our investigations or presented to the Commission that could sustain any criminal conviction. The Commission has carried out an intensive investigation, and other local and foreign agencies have investigated the possible criminal conduct of people who were involved in the SDPP. No evidence of criminal conduct on the part of any person was found.'

24.5. ‘[685] Various critics, including Mrs de Lille, Mr Crawford-Browne, Dr Woods, Mrs Taljaard and Dr Young, testified before the Commission and could not provide any credible evidence to substantiate any allegation of fraud or corruption against any person or entity. They have been disseminating baseless hearsay, which they could not substantiate during the Commission’s hearings.’

24.6. ‘[688] We are of the view that another investigation into the SDPP acquisition will not serve any purpose.’

24.7. ‘[698] In our view, the process followed in the SDPP from its inception up to Cabinet approval of the preferred bidders, was a fair and rational process. The decisions of the Cabinet were strategic in nature and policy-laden.’

24.8. ‘[731] The undisputed evidence is that the principle that defence spending is ‘needs-driven and cost-constrained’ was generally applied in the whole process.’

24.9. ‘[746] It is clear that the role of Parliament in the SDPP process was that of oversight, and the evidence confirms that it did exercise the necessary oversight over the process. Consequently, no irregularity was committed in not obtaining prior parliamentary approval for the SDPP.’

24.10. ‘[762] Finally, besides the practical difficulties which would ensue if the contracts concluded pursuant to the SDPP procurement process were cancelled, there is no evidence which suggests that the contracts concluded pursuant to the SDPP procurement process are tainted by fraud or corruption.’

24.11. '[763] There is no basis to suggest that the contracts should be cancelled.'

24.12. '[764] We have in paragraph 664 of this report given reasons why it would serve no purpose to recommend that the allegations of fraud, bribery and corruption in the SDPP be referred to another body for further investigation. The only other aspect of the SDPP procurement process that could be considered for further investigation is the deviations from standard procurement policies and procedures. We have, however, heard evidence from senior Armscor officials that, following the JIT and Auditor General investigation reports, the procurement policies and procedures have been overhauled and new policies put in place which now guide procurement of all military equipment. In view hereof, we deem it unnecessary to make any recommendations in this regard.'

25. The purpose of this application is to have the findings in the report, and the Report itself, reviewed and set aside. The Commission was required by its Terms of Reference to investigate the facts underpinning the six issues identified in the Terms of Reference, and to establish the truth in that regard.

26. I respectfully aver that the Commission failed to perform the function which the President assigned to it. It did not investigate the matters which were within its Terms of Reference, with an open and enquiring mind. It failed to carry out its statutory function and duty. This is demonstrated by the following features of what it did and did not do:

26.1. First, the Commission did not investigate certain matters which were within its terms of reference and were highly material to the enquiry it was required to undertake.

26.2. Second, the Commission did not call as witnesses to give oral evidence, persons who needed to be questioned if the truth was to be established.

26.3. Third, where it did call persons involved in the procurement as witnesses, it did not test the veracity of their evidence.

26.4. Fourth, it declined to admit into evidence material that was highly relevant to its enquiry and that was made available to it.

26.5. Fifth, it failed to gather relevant material and to investigate properly the material which was placed before it or made available to it.

26.6. Sixth, it refused to allow witnesses who were critical of the arms procurement process to testify about documents that they had not written, or events to which they were not personally witness.

26.7. Seventh, it obstructed and impeded a full ventilation of the issues by persons who were critical of the arms procurement process, by refusing to make relevant documents available to them, and by limiting the questions which they could put to witnesses.

27. I submit that the Commission's making of its Report constitutes administrative action. This review is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ('**PAJA**'), and under the principle of legality.

28. In what follows, I give examples of the failures of the Commission which I have identified above. I submit that both separately and cumulatively, these examples

demonstrate that the Commission failed to carry out its mandate, and failed to do what it was required by law to do. Its Report accordingly falls to be set aside.

THE STRATEGIC DEFENCE PROCUREMENT PACKAGE

29. The Strategic Defence Procurement Package (‘**SDPP’**), also referred to colloquially as the ‘Arms Deal’, refers to the purchase of a number of weapons systems for use by the South African National Defence Force.

30. The procurement process for the SDPP was initiated in mid-1997. It concluded with the entering into of contracts between the South African government and its relevant ministries and state entities, and weapons producers which were based predominantly abroad. The SDPP Umbrella Agreements were signed and ratified on 3 December 1999. The finalisation of the purchase and its terms were announced publicly on 4 December 1999.

31. Through the SDPP the South African government acquired the following:

    31.1. 24 Hawk Lead-in-Fighter Trainers (‘**LIFTs**’), which were supplied by British Aerospace (now BAE Systems) of the UK;

    31.2. 28 Gripen Advanced Light Fighter Aircrafts (‘**ALFA**’), which were supplied jointly by British Aerospace and SAAB (Sweden);

    31.3. Three Class 209 1400 MOD submarines,which were supplied by the German Submarine Consortium (composed of Howaldstwerke-Deutsche Werft AG, Ferrostaaal and Thyssen Rheinstahl Technik);

31.4. Four Meko A200 corvettes,which were supplied by the German Frigate Consortium (composed of Blohm + Voss GmbH, Howaldstwerke-Deutsche Werft AG and Thyssen Rheinstahl Technik GmbH) with a combat suite which was supplied jointly by Thomson-CSF (France) and African Defence Systems (South Africa);

31.5. 30 Light Utility Helicopters ('LUH'), which were supplied by Agusta (now AgustaWestland).

32. The stated cost of the SDPP on 15 September 1999, the date when Cabinet confirmed the decision to finalise the SDPP, was R29 992m.[1] The disaggregated costs were as follows:

Table 1: SDPP Costs (1999 Rands)[2]

SA NAVY		Price (R million) 1999 Rands
Submarines	3	5 354
Corvettes	4	6 917
SA AIR FORCE		
Light Utility Helicopters	30	1 949
LIFT	24	15 781
Gripen	28	
TOTAL		29 992

[1] Witness Statement of Andrew Donaldson, Deputy Director of the National Treasury, to The Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procuremetn Packages [hereafter 'the Commission'], 1 April 2014, p. 30, Table 2.

[2] Extrapolated from *Ibid*

33. The cost to the state in Rand terms increased substantially, largely due to currency fluctuations over the life-time of the repayment period. In evidence before the Commission, the witness Andrew Donaldson of Treasury stated that the total cumulative cost to the state between 2000/2001 and 2013/2014 was R46.666 bn.[3] The outstanding total debt on the SDPP as of 2013/2014 was R16.898 bn.[4] The total cost to the state up until the final loan repayment in October 2020 in 2013/2014 Rand would thus equal R63.564 bn, if one was to assume no further change in the loan repayment amounts due to currency fluctuations.

34. The Umbrella Agreements entered into between the South African government and the equipment suppliers provided for the creation of a substantial offsets programme to be implemented by the equipment suppliers. "Offsets" refers to a commitment by supplying parties to invest in or cause other economic activity in the economy of the buying country.

35. The offset agreements in the SDPP consisted of National Industrial Participation (NIP) programmes and Defence Industrial Participation (DIP) programmes. National Industrial Participation programmes involved investment into, or otherwise causing, economic activity in the civilian economy. DIP programmes were focussed on achieving the same in the defence sector.

36. The NIP offset obligations incurred by all contractors in the SDPP totalled over $10 667 430 000 and €2 850 460 450. The NIP obligations were as follows:

[3] *Ibid*, Table 3, p. 35 and para76
[4] *Ibid*, Table 4, p. 37

36.1. BAE/SAAB incurred total NIP obligations of $7 200 000 000, of which:

36.1.1. $2 000 000 000 was to be achieved through investment;

36.1.2. $3 640 000 000 was to be achieved through export sales; and

36.1.3. $1 560 000 000 was to be achieved through domestic sales.[5]

36.2. The German Frigate Consortium incurred a total NIP obligation of $2 699 500 000 in conjunction with Thomson-CSF, of which:

36.2.1. $700m was to be achieved through investment, of which $509 100 000 was to be delivered by GFC and $190 900 000 by Thomson; and

36.2.2. $2bn was to be achieved through local sales and next export revenues, of which $1 538 000 000 was to delivered by GFC and $461 500 000 delivered by Thomson.[6]

36.3. The German Submarine Consortium incurred a total NIP obligation of €2 852 460 450, of which:

36.3.1. €960 000 000 was to be achieved through investment;

36.3.2. €1 641 512 454 was to be achieved through export sales; and

[5] Witness Statement of Sipho Zikode to The Commission, 24 January 2014, para 16.1
[6] *Ibid*, para 16.2

36.3.3. €250 548 000 was to be achieved thorough domestic sales[7].

36.4. Agusta incurred a total NIP obligation of $767 930 000, of which:

36.4.1. $184 500 000 was to be achieved through investments;

36.4.2. $468 230 000 was to be achieved through export sales; and

36.4.3. $115 200 000 was to be achieved through domestic sales.[8]

37. The total <u>DIP</u> obligations incurred by all SDPP contractors totalled $1 679 467 563 and €634 646 174. The DIP obligations were as follows:

37.1. BAE/SAAB incurred DIP obligations of $680 431 667 in relation to the purchase of the Hawk/LIFT, and $808 049 501 in relation to the purchase of the Gripen/ALFA[9];

37.2. GFC incurred DIP obligations of €88 123 584 in relation to the purchase of corvette platforms, and Thomon-CSF incurred DIP obligations of €371 322 167 in relation to the supply of the corvette combat suite[10];

37.3. GSC incurred DIP obligations of €175 200 423[11];

37.4. Agusta incurred DIP obligations of $190 987 395[12].

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[7]*Ibid*, para 16.3
[8]*Ibid*, para 16.4
[9] Witness Statement of Pieter Daniel Burger to the Commission, 11 March 2014, para 4.1.3
[1010] *Ibid*, para 4.1.2.1 and 4.1.2.2
[11] *Ibid*, para 4.1.1
[12] *Ibid*, para 4.1.4

38. There have been persistent and repeated allegations of corruption and wrongdoing in the SDPP, and also criminal proceedings relating to the SDPPs. The criminal proceedings include those initiated against Tony Yengeni, Schabir Shaik and (now President) Jacob Zuma. These allegations have called into question the probity and integrity of leading political figures, including the President. They have had a profound impact on the political life of the Republic and on the institutional structures of law enforcement in South Africa. The potent impact of the SDPP on South Africa's post-apartheid political history can be seen from the fact that the consequences of the allegations and criminal proceedings related to bribery and corruption in the SDPP, and the alleged manipulation of investigations and prosecutions flowing from the SDPP, have included: (a) the dismissal of the then Deputy President, Jacob Zuma; (b) the recall of President Thabo Mbeki; and (c) the dissolution of South Africa's primary anti-corruption enforcement body, the Directorate of Special Operations ('**DSO**').

CALLS ON THE PRESIDENT TO APPOINT A COMMISSION OF ENQUIRY

39. There were a number of public calls for the President to appoint a Commission of Inquiry into the SDPP. I mention two of them here.

40. Democratic Alliance Member of Parliament Raenette Taljaard wrote to President Mbeki on 4 December 2002, requesting that he appoint a Commission of Inquiry to investigate allegations that Deputy President Zuma had materially benefitted from the SDPP through his relationship with Schabir Shaik and Thomson-CSF, and that he misused his powers of office to secure such material benefit. The request was rejected by President Mbeki in a letter from his legal adviser, Mojanku Gumbi. The letter stated 'you will surely appreciate the prudence of not appointing commissions of inquiry on the basis of mere

allegations. We are certain that our law enforcement agencies stand ready to investigate any alleged criminal conduct on the part of any person'.

41. A further notable request was initiated by Archbishop Desmond Tutu and former President De Klerk in a joint letter dated 1 December 2008 and addressed to President Kgalema Motlanthe. The letter requested the appointment of an 'independent and public judicial commission of inquiry' into the SDPP. The request for the appointment of judicial commission of inquiry was based on the 'reasonable apprehension that allegations of impropriety in the arms deal have substance.' They stated:

> *"2. You will be aware that there is reasonable apprehension that allegations of impropriety and corruption in the arms deals have substance. Three books have been written on the subject .... The authors are a retired banker, an historian and an economist who is a former ANC member of parliament.*
>
> *3. In addition to books and extensive media exposes, there are the records of criminal proceedings against both Tony Yengeni and Schabir Shaik, and the judgement of Mr Justice Chris Nicholson in which he indicated the desirability of such an inquiry given the documentation placed before him.*
>
> *4. Allegations of bribery by BAE to secure arms contracts are now under investigation by the authorities of seven countries, plus the Organisation for Economic Cooperation and Development which holds oversight authority over international commitments on corruption. BAE executives have even been detained in the United States for questioning by the Federal Bureau of Investigation. It is public knowledge that the "Scorpions" have raided premises controlled by John Bredenkamp, Fana Hlongwane and others in connection with BAE's South African contracts. BAE is alleged overseas to have paid bribes amounting to more than R1.5 billion to secure these contracts, these bribes having allegedly been laundered through front companies in the British Virgin Islands and elsewhere.*

42. This request was rejected by President Motlanthe in a letter dated 12 December 2008 on the basis, *inter alia*, that allegations of wrongdoing connected to the SDPP were still under investigation by law enforcement agencies, including the NPA, and that the matters canvassed would be better dealt with via the 'ordinary process of the law'. Appointing a judicial commission of inquiry would be tantamount to creating a parallel investigation

that would not 'at this stage assist in bringing about greater clarity or resolution of the issues at stake'.[13]

THE CRAWFORD-BROWNE LITIGATION

43. The failure of President Motlanthe to appoint a Commission of Inquiry was challenged by Mr Terry Crawford-Browne in the Constitutional Court. He made his application at a time when there were no longer any active criminal investigations related to the SDPP. The factual basis of his case included:

    43.1. Three books written and published on the SDPP: *The Arms Deal In Your Pocket*by Paul Holden, which was based solely on publicly verifiable documents; *After the Party* by Andrew Feinstein; and *Eye on the Money* by Crawford Browne;

    43.2. A substantial supporting affidavit by Dr Richard Young, who had unsuccessfully competed for contracts flowing from the SDPP, and acted as a whistleblower and campaigner on alleged wrongdoings in the SDPP process;

    43.3. Affidavits by the UK Serious Fraud Office, submitted in the South African High Court in support of search warrants sought by the DSO against Fana Hlongwane and Johan Bredenkamp;

[13] 'Tutu Unhappy About Motlanthe's Decision,' *IOL*, 14 December 2008, http://www.iol.co.za/news/politics/tutu-unhappy-about-motlanthes-decision-428897.

43.4. The Joint Investigation Report, to which I refer below, and in particular those paragraphs that illustrated irregularities in the procurement processes of the SDPP;

43.5. The outcome of criminal proceedings against Schabir Shaik and Tony Yengeni;

43.6. Contemporaneous newspaper reports alleging bribery on the part of Ferrostaal to secure the submarine contract for its partner GSC; and

43.7. Briefings given to SCOPA by Major General Anwar Dramat in which the scale of the state's accumulated and seized evidence in relation to the SDPP contracts was revealed.

44. Crawford Browne's application was heard in May 2011. The application was postponed to allow further time for the submission of supplementary affidavits by Crawford Browne, and answering affidavits by the respondents. The respondents did not file the anticipated answering affidavits. Instead, President Zuma decided to appoint a judicial commission of inquiry into the SDPP, which was announced on 15 September 2011. Crawford Browne withdrew his application, and the President agreed to pay his costs.

THE ESTABLISHMENT OF THE COMMISSION

45. On 24 October 2011 President Zuma formally established the Commission. He appointed Judge WL Seriti as Chairperson of the Commission. He appointed Judges WJ van der Merwe and M F Legodi as additional members of the Commission.

46. On 28 October 2011 the Presidency announced that Judge van der Merwe had asked to be released from his duties due to 'personal reasons', to which the President had assented.

47. On 6 December 2011 the Presidency announced that the President had appointed Judge HMT Musi as a member of the Commission to replace Judge van der Merwe.

48. On 1 August 2013, the Presidency confirmed media reports that Judge Legodi had resigned from the Commission. The Commission then proceeded with its two remaining Commissioners.

THE TERMS OF REFERENCE

49. The terms of reference of the Commission were published in the *Government Gazette* on 4 November 2011 (attached as '**FA6**'). The notice stated:

> *A Commission of Inquiry ('the Commission') is hereby appointed in terms of Section 84(2) (f) of the Constitution of the Republic of South Africa, 1996.*
>
> *1. The Commission of Inquiry shall inquire into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and relevant legislation, policies and guidelines:*
>
> *1.1. The rationale for the SDPP.*
>
> *1.2 Whether the arms and equipment acquired in terms of the SDPP are underutilised or not utilised at all.*

> *1.3 Whether job opportunities anticipated to flow from the SDPP have materialised at all and:*
>
> > *1.3.1. if they have, the extent to which they have materialised; and*
> >
> > *1.3.2. if they have not, the steps that ought to be taken to realise them.*
>
> *1.4 Whether off-sets anticipated to flow from the SDPP have materialised at all and:*
>
> > *1.4.1. if they have, the extent to which they have materialised; and*
> > *1.4.2. if they have not, the steps that ought to be taken to realise them.*
>
> *1.5. Whether any person/s, 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 and, if so:*
>
> *1.5.1. Whether legal proceedings should be instituted against such persons, and the nature of such legal proceedings; and*
> *1.5.2. Whether, in particular, there is any basis to pursue such persons for the recovery of any losses that the State might have suffered as a result of their conduct.*
>
> *1.6. Whether any contract concluded pursuant to the SDPP procurement process is tainted by any fraud or corruption capable of proof, such as to justify its cancellation, and the ramifications of such cancellation.*

50. It was provided that the Commissions Act 8 of 1947 would apply to the Commission.

51. It was further provided that the Commission was to complete its work within a period of two years from the date of the notice, and was to submit its final report to the President within a period of six months after the date on which it completed its work.

52. The Commission's terms of reference were subsequently amended on two occasions in order to extend the life of the Commission. On 4 November 2013 the President provided that the Commission was to complete its work by no later than 30 November 2014. On 30 April 2015 he further amended the terms of reference to provide that the Commission

was to complete its work no later than 30 June 2015, and submit its final report within a period of six months after the date on which the Commission completed its work.

INVESTIGATORY POWERS AND RESOURCES OF THE COMMISSION

53. The Commission was given far-reaching and wide-ranging powers of investigation, an extended period, and substantial resources in order to carry out the enquiry into the matters set out in its terms of reference.

54. I am advised that in terms of the Commissions Act, the Commission had the power to summon witnesses, examine them, and require the production of books, documents and objects, under threat of criminal prosecution for failure to comply.

55. The Regulations applicable to the Commission (Proclamation 4 of 2012) gave officers of the Commission the right at any reasonable time, without notice, to enter and inspect any premises and demand and seize any document or article on such premises.

56. The Commission was given more than four years to carry out its functions.

57. The Commission was allocated substantial funds in order to carry out its work. In reply to a question posed by MP David Maynier, the Minister for Justice and Correctional Services stated in May 2016 that the total cost of the Commission's work was R137, 264, 251.[14] I believe that this excludes the salaries and benefits of the Commissioners, who were Judges.

58. The breakdown of costs is reflected in the table below:

[14] Reply by Minister of Justice and Correctional Services on 23 May 2016 to Parliamentary Question No. 1248 by Mr. D J Maynier (DA) Submitted on 20 May 2016

Expenditure Items	Actual Expenditure				
	2012/2013	**2013/2014**	**2014/2015**	**2015/2016**	**Total**
Compensation of Employees	R9 220 712	R10 153 919	R6 546 949	R4 429 200	R30 350 780
Evidence Leaders	R2 714 634	R26 068 634	R27 979 362	R26 075 827	R82 838 457
Forensic Auditor	R1 276 078	R5 549 996	R2 834 479	R119 680	R9 780 232
Professional Staff				R351 351	R351 351
Research Consultant		R530 090			R530 090
Transcription Services		R481 257	R53 659	R89 179	R624 095
Inventory	R446 131	R118 563	R181 485	R39 524	R785 702
Communication	R222 182	R210 613	R206 647	R169 726	R809 167
Travel and Subsistence	R831 936	R1 938 640	R2 207 160	R2 316 435	R7 294 171
Partitioning	R497 675				R497 675
Furniture and Equipment (Current)	R325 252	R43 772	R3 037	R4 962	R376 972
Other Goods and Services	R159 384	R1 395 024	R249 154	R92 452	R1 896 015
Furniture and Equipment (Capital)	R647 784	R122 186			R768 970
Motor Vehicle License	R127 928		R372	R264	R128 564
Households				R69 175	R69 175
Finance Leases Photo Copiers	R29 018	R49 583	R54 255	R29 247	R162 104
Total Expenditure	**R16 498 714**	**R46 662 226**	**R40 316 558**	**R33 787 023**	**R137 264 521**

59. There was also other substantial expenditure of public funds, on the legal representation of parties. In a written reply in the National Assembly, the Minister of Defence stated that the Department of Defence spent R18 817 547 on legal representation, and Armscor spent R24 633 714.

THE DUTIES OF THE COMMISSION

60. I have been advised and submit that the duties of the Commission included the following:

60.1. A primary function of a public inquiry such as a commission is fact finding, in order to make the truth known to the public.

60.2. The open and public nature of the hearing by a Commission is intended to restore public confidence in the institution or situation which is being investigated, and in the process of government.

60.3. The function of a Commission is to find the answers to questions put by the President in the terms of reference.

60.4. A Commission is not equivalent to a civil or criminal trial. In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties to present the evidence. A Commission has wide-ranging investigative powers to fulfil its investigative mandate.

60.5. The rules of evidence and procedure of a Commission are considerably less strict than those of a court. Whereas a court of law is bound by rules of evidence and pleadings, a Commission is not so bound. It may inform itself of facts in any way it pleases, including by hearsay evidence, newspaper reports or representations or submissions without sworn evidence. Flexibility is a central feature of Commissions, which are designed to allow an investigation which goes beyond what might be permitted in a court**.**

60.6. A Commission is itself responsible for the collection of evidence, for taking statements from witnesses and testing the accuracy of such evidence by inquisitorial examination.

60.7. As the function of a Commission is inquisitorial in nature, itdoes not wait for issues to be submitted, but itself originates inquiry into the matters which it is charged to investigate.

60.8. In a Commission there are no litigants. There are witnesses who have knowledge of some of the matters under investigation.

60.9. Accountability is paramount to the operation of a Commission.

60.10. In order to have credibility as a mechanism of accountability a Commission must have complete independence from government interference. It must not be subject to political influence or pressure.

60.11. In furtherance of the search for accurate and justifiable findings, a Commission on Inquiry must embark upon an exhaustive investigation which is transparent and open to all possible findings. The Commission must conduct the investigation in an unbiased fashion, probing all possible avenues until the truth is discovered.

60.12. The investigation must be conducted with an open and inquiring mind. An investigation that is not conducted with an open an inquiring mind is no investigation at all. The Commission must be open to all possibilities and reflect upon whether the truth has been told. It should not be unduly suspicious, but also not unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do.

60.13. The material determines the veracity of the witness, and not the other way round. That applies to all witnesses, regardless of their status or occupation.

60.14. If responses are sought from witnesses and then recited without question as if they were fact, there might as well be no investigation at all.

60.15. In a Commission it is inevitable that a piece of evidence may lead the Commissioner to begin a new line of investigation that may be worthwhile to explore.

60.16. Where there is no documentary evidence in support of an allegation, it is necessary for the Commission to put questions to individuals who, if there is any substance to the allegations, may be expected to have some knowledge of them. In other words, it is necessary to question some people, not in order to elicit relevant evidence, but rather to ascertain whether they have any relevant evidence to give.

60.17. If a witness wishes a document to be submitted into evidence or an additional person to be called as a witness, and it is reasonably practicable, a Commission should allow this to happen. Part of the investigative enterprise involves identifying those who have information material to the inquiry and the only way for this to occur is to explore all possible avenues.

60.18. Cross-examination can prove very useful in uncovering the truth. Where significant disputes of fact emerge cross-examination is important. The questioning process should be a crucial part of a thorough investigation to

determine the truth. The Commission and its Evidence Leaders must adopt such a process.

60.19. There are no parties in the strict sense of the word and no-one can be said to bear an overall onus of proof.

60.20. In summary: A Commission must undertake an independent search for the truth.

RESIGNATIONS FROM THE COMMISSION

61. During the life of the Commission it suffered a large number of resignations, including the resignation of two commissioners.

62. As I have stated above, two of the Commissioners (Judge van der Merwe and Judge Legodi) resigned.

63. Judge Legodi resigned from the Commission on 31 July 2013. This was just before the first public hearing, on 5 August 2013. The reasons for his resignation were not made public. Quoting sources within the Commission, the *Mail & Guardian* claimed on 31 July 2013 that his resignation was brought about by his unhappiness with the manner in which the Chairperson was managing the Commission.[15] The report stated 'Legodi is known to have been unhappy with the secrecy surrounding the workings of the commission, the covert handling of the documentation, the fact that Seriti ruled with

[15] 'Legodi Resigns From Arms Commission on Eve of Hearings', *Mail & Guardian*, 31 July 2013

'an iron fist', according to sources close to the process.'[16] As far as I know, this has never been denied on the record, and neither has any other reason been publicly given.

64. Advocate Tayob Aboobaker SC was appointed by Judge Seriti as the chief evidence leader for the Commission. It was reported that he was deeply unhappy with the way that the Commission was run. According to media reports, he threatened to resign from the Commission and drafted a resignation letter dated 2 August 2013, two days after the resignation of Judge Legodi.[17] His letter allegedly criticised the Commission for 'nepotism, unprofessionalism and infighting.' He was alleged to have written 'I cannot operate in an environment which is so suffocating.'[18] It was stated shortly afterward that he had retracted his resignation letter. It was not officially made public.

65. In April 2014, Commission spokesperson William Baloyi confirmed that Adv Aboobaker had resigned from the Commission.[19] He stated that Aboobaker had resigned from the Commission in February 2014. No reason was given publicly for his resignation.

66. Attorney Mokgale Norman Moabi was appointed as a senior investigator at the Commission. He resigned from the Commission in protest at the manner in which the Commission was undertaking its work. His resignation letter, dated 7 January 2013, was subsequently made public. It claimed that the Commission was operating according to a 'second agenda' which ensured that Commission did not fulfil its mandate as

[16] *Ibid*
[17] 'Arms Probe in Tatters', *TimesLive*, 7 August 2013
[18] *Ibid*
[19] 'Advocate quits arms deal commission', *ENCA*, 12 April 2014

outlined in its terms of reference. The full text of his resignation letter (Annexure "**FA7"**) was as follows:

> *'I herewith submit my resignation with immediate effect from 01/01/2013. I have gradually come to hold a firm view that the direction in which the Commission is headed will not achieve the spirit of the founding/enabling Government Gazette No. 34731.*
>
> *According to my perception there are two agendas that are in place within the commission:-*
>
> *a) The well-known agenda is the one which is defined in the Government Gazette, with clear objectives and state expectations of what the commission should do and achieve.*
>
> *b) The second agenda is the REAL work in progress at the commission that will deliver the REPORT to the President of the RSA.*
>
> *This second agenda is based on the following foundations:-*
>
> *1. Total Obsession with the control of the flow of information to and from the Commission by the Chairperson.*
>
> *(a) Clandestine preparations of the documents and / or briefs that are Handed over to the Evidence Leaders.*
>
> *(b) Unknown Person(s) who dictate what information should go into the Briefs to the exclusion of the Professional Staff/ Attorneys.*
>
> *(c) Unknown Person(s) who dictate which Evidence Leaders will deal with which witnesses and why.*
>
> *(d) The unknown criteria which is applied to determine which Professionals/ Attorneys are to be paired to specific Evidence Leaders and why.*
>
> *(e) The unexplained reason why the Evidence Leaders are given strict Instructions to contact only one (1) person in respect of any queries concerning the briefs or related matters.*
>
> *(f) All the Professional Staff do not have knowledge of what is in the briefs / files that went to the Evidence Leaders except for one.*
>
> *2. The exclusion of any input by any individual within the Commission that does not advanced this Second Agenda.*

3. The deliberate distraction of the Professional Staff who are kept occupied with matters that will not ultimately be part of the brief contents.

4. The total control of the "Secretariat and "Communications" Departments.

5. The above Portfolios exists only in name since the Individuals in charge of the same have no independent powers to can decide on anything.

The Administrative wing of the Commission is managed by extended family relationships.

THE PENNY HAS DROPPED

The following Comments/ Statements support the existence of an agenda not commonly known to other people:

1) "When we will have dealt with the first witnesses, they will not again make noises in the public media".

2) "When you look at the submissions made by the Terry Crawford Browns (sic) of this world you realise that they are not factual but are based on hearsay. There is no substance in what they have said in the Public media up to now".

I came to the Commission to serve with integrity, dignity and truthfulness. I cannot with a clear conscience pretend to be blind to what is going on at the Commission.

I am unable to be part of this Commission since I have satisfied myself that the Chairperson seem to have other ideas and modus operandi to achieve with the Commission what is not the clear mandate of the enabling Government Gazette.

M N Moabi

[Signed 7/1/2013]

(Senior Investigator/ Attorney)

67. At the time of Moabi's resignation letter, the 'critic' witnesses were scheduled to appear first. The comment 'when we have dealt with the first witnesses' therefore appears to refer to the witnesses who were critical of the Arms Deal.

68. The Second Respondent responded to the allegations by Moabi in a press statement issued on 22 January 2013. He rejected all the allegations in Moabi's letter, specifically denying that there was a 'second agenda.' He speculated:

> *'I think that Mr Moabi is making these false allegations to deliberately tarnish the image and credibility of the Commission probably because of a personal grudge he harbours against me based on reasons he has not disclosed. I note that he has given himself the designation of Senior Investigator and in some publications he has been referred to as a lead investigator. He held no such position within the Commission. His appointment letter gives his designation as attorney/investigator and he has been with the Commission for only four months. I noted that if he had genuine concerns about the modus operandi of the Commission he should have raised these internally with either the Secretary or myself and sought clarification. Instead he raises these very serious allegations for the first time in a letter of resignation.'*[20]

69. Moabi responded in the media by asking the Second Respondent to take a lie detector test. The Second Respondent declined the invitation.

70. Moabi's allegations were also rejected in a statement by the Evidence Leaders who were then employed by the Commission, dated 22 January 2013. They stated:

> 1. *'At all times we have been treated by the Commission with the respect that as professionals we would expect and at no time have we gained the impression that matters are being hidden from us. Instead we have been actively and consistently encouraged to make contributions on how best the Commission should achieve its mandate...*
>
> *9. None of us have had any 'instructions' in any form. We as evidence leaders have never at any time:-*
>
> *9.1 Been cajoled to have a particular outcome in as far as the objective of the arms deal commission is concerned;*
>
> *9.2. Been dictated to or deprived of our views in order to reach a particular envisaged outcome.*

[20] Judge W L Seriti: Press Statement,:, 22 January 2013

> *10. Our independence and views have been respected by the Chairperson and co-commissioners throughout the consultations, meetings and strategic planning sessions the commission held since its inception.*
>
> *11. We therefore have confidence in the leadership of the Honourable Chairperson and the Commissioners in the execution of their mandate.'*[21]

71. Attorney Kate Painting was appointed as the Principal Legal Researcher assisting the Commissioners. She resigned from the Commission in March 2013. She stated in an interview with the *Mail & Guardian* that she was one of the first employees at the Commission, and was heavily involved in setting it up. She was one of the three Commission employees team that travelled to meet with prosecutors and investigators in the UK and Germany. The visit was led by the Chairperson, and was also participated in by Adv Fanyana Mdumbe of the Commission's staff.

72. In August 2013, Painting released a short statement clarifying the reasons for her resignation. She, like Moabi, referred to a 'second agenda' at the Commission. Her statement read:

> *'There has been much speculation about my resignation and I feel the time has come to set the record straight.*
>
> *When the Commission's work commenced in earnest I was one of two legal professionals. We were virtually tasked with setting up the Commission. I went on fact-finding trips overseas and initially believed we would fulfil our mandate; anotheragenda soon emerged as did an obsessive control of information, family relationships and incompetent administration. Fear is a common theme at theCommission and any non-compliance with the second agenda is met with hostility.*
>
> *Despite remaining silent, I have been ostracised by certain members of the legal fraternity. I shall essentially have to rebuild my career but feel it is time for South Africans to reflect and speak out. I feel I have a duty to expose the truth.*
>
> *I immensely respect Judge Legodi and his decision to leave. One wonders how much credibility is left at the Commission. Tax-payers are funding the*

[21] Aboobaker, T., Skinner, B. et al., *Memorandum*, 22 January 2013

Commission and it should be honest about seeking an extension. Ethics and integrity should guide any process. Without these key values no equitable outcome is likely.'[22]

73. Advocates Barry Skinner SC and Carol Sibiya were appointed as Evidence Leaders to assist the Commission. They both resigned on 22 July 2014. Their resignation followed a hearing of the Commission on 21 July regarding procedural matters surrounding the evidence to be given by Richard Young, a 'critic' witness. They had been appointed as Dr Young's Evidence Leaders.

74. The joint resignation letter of Skinner and Sibiya, dated 22 July 2014 (Annexure **FA8**), was released to the public. It set out an extensive list of problems with the operation of the Commission, much of it related to the Commission's approach to Dr Young. Other matters raised by Adv Skinner and Sibiya concern serious issues regarding the conduct of the Commission and its ability and intention in conducting a full and unbiased investigation. A key issue raised by the letter was the Commission's approach to documentary evidence. The letter said:

> *'We have on previous occasions during meetings between evidence leaders and the Commissioners expressed our reservations regarding the apparent approach to documents. In our view since this is not a court of law, it should not be required of a witness to prove the authenticity and source of a document before it can be referred to in evidence. We believe that since the Commission is an investigative body, the correct approach would be that a document which on the face of it appears to be a valid document should be provisionally accepted and a witness allowed to testify on it subject to any person named in such document being afforded an opportunity to deal with it and to demonstrate to the Commission that it is either a forgery or cannot be relied upon at all. Having heard all such evidence the Commission would then be in a position to assess the weight if any to be placed on such document. For the Commission not to permit documents to be referred to in evidence, such as the Debevoise Plimpton report, nullifies in our view the very purpose for which the Commission was set up.'*[23]

[22] Statement Issued by Kate Painting, 1 August 2013
[23] Sibiya, C. And Skinner, B. Letter of Resignation from The Commissoin, 22 July 2014, paragraph 10

75. A second matter related to the Commission's ruling that Evidence Leaders were not permitted to re-examine witnesses in order to draw attention to discrepancies in their evidence, thereby limiting the testing of their evidence:

> *'The Chair has made it clear that in his view the evidence leaders have no right to re-examine a witness after the legal representative of such witness has re-examined. In this regard we would refer to the minutes on 1 March 2013. In paragraph 4.1 of the minutes of such meeting it was noted that the regulations are silent on the right of the evidence leader to re-examine but that the meeting was of the view that this right should not be taken away from the evidence leaders. In our view this is crucial. There has been very little cross-examination and accordingly the re-examination of the various civil servants/members of the defence force by their legal representatives, while clearly permissible in terms of the regulations, has naturally been designed to protect the status and credibility of such witnesses. This was all the more reason why the evidence leaders should have been permitted to re-examine each witness to point out any discrepancies in the evidence'.*[24]

76. A third matter related to claims that the Commission's forensic auditor/researcher, Mr Mahlangu, had not produced his findings sufficiently timeously to be used by the Commission effectively, and that he had only conducted investigations into a small number of bank accounts:

> *'We consulted briefly with Mr Mahlangu. It would appear that his report will not be ready timeously and that in any event he has only had regard to a very limited number of bank accounts. In our view if he had been asked to examine the accounts timeously of all the known "middle men/agents" this would have helped considerably to deal properly with the allegations of bribery.'*[25]

[24] *Ibid*, para 12
[25] *Ibid*, para 13

THE ESSENCE OF THE ALLEGATIONS IN THE PUBLIC ARENA ABOUT THE ARMS DEAL

77. I now identify important allegations of wrongdoing and impropriety in the SDPP, and in particular of corruption and bribery. These were matters which the Commission was required to investigate.

78. In September 1999, then MP Patricia De Lille tabled a document (the '**De Lille Dossier**') in Parliament, alleging wrongdoing in the SDPP. She called for the appointment of a judicial commission of inquiry to investigate the claims. Since then, allegations of wrongdoing and impropriety in the SDPP have been a constant presence in the national media as a result of journalistic investigations in South Africa and abroad, and criminal proceedings.

79. In addition to claims of irregularities, corruption and other criminal wrongdoing, other aspects of the SDPP have attracted controversy in the media. They include:

    79.1. Claims that the decision to pursue the SDPP was irrational because of a lack of short- or medium-term threats to South Africa, and the scale of South Africa's pressing socio-economic concerns: the latter had been identified in the 1997 Defence Review as South Africa's major threats.

    79.2. Claims that the equipment purchased in the SDPP is either under-utilized or unsuitable for service.

    79.3. Reports that the offsets programmes flowing from the SDPP, which were presented as part of the rationale for the transaction, were producing limited economic benefit and may have been a conduit for corruption.

79.4. Claims that investigations into the SDPP, by law enforcement and Chapter 10 institutions, have been truncated and manipulated by powerful political actors in order to selectively 'cover up' wrongdoing in the SDPP.

80. Save for point 4 above, these claims regarding the SDPP formed the basis of the terms of reference of the Commission.

81. The following is a brief summary of the major controversial claims and allegations regarding the SDPP that had been ventilated in the local and international media, and in at least five books on the topic. These claims were either made prior to the establishment of the Commission or were brought to the Commission's attention shortly after its inception.

There was no rational basis or justification for embarking on the Arms Deal

82. The most detailed and comprehensive critique of the rationale for pursuing the SDPP is presented in the exyensive book by Paul Holden & Hennie van Vuuren (2011) *The Devil in the Detail*.

83. The majority of these claims were placed before the Commission in the joint submission of Andrew Feinstein and Paul Holden, which was submitted to the Commission in January 2013. In their joint submission, Feinstein and Holden summarised their critique of the rationale to pursue the SDPP as follows:

83.1. The Arms Deal was undertaken despite South Africa's overwhelming military dominance in the sub-Saharan region (itself a legacy of the militarisation of the apartheid state), measured both in material and absolute spending.

83.2. It was undertaken despite a political context in which the purchase of large defence items was rejected by civil society and the majority of Parliament.

83.3. It was undertaken despite the fact that South Africa's post-apartheid military posture was primarily defensive, and despite the clear elaboration that South Africa faced no short to medium term military threats. The greatest threats to South Africa's security, according to both the Defence White Paper of 1995 and the Defence Review of 1998, were poverty and unemployment.

83.4. It was undertaken in the context of severe economic strain that witnessed a substantial increase in unemployment and a widening of the gap between the rich and poor between 1994 and 1999.

83.5. It was undertaken despite the fact that the procurement team (including the Cabinet sub-Committee in charge of the Arms Deal) were aware that there was a strong possibility that the economic impact of the Arms Deal would be broadly negative.

83.6. As South Africa's greatest security threats were poverty and unemployment, there was a realistic possibility that the Arms Deal could have decreased, rather than increased, South Africa's national security.

83.7. The stated rationale for the Arms Deal – an increase in national security and the economic benefits provided by offsets – was articulated despite considerable evidence in the possession of the procurement team that neither of these objectives would be fulfilled by the Arms Deal.

83.8. The Arms Deal was undertaken at a time when key individuals linked to Defence Minister Joe Modise, amongst others, had established a network of companies that would benefit from any future Arms Deal purchases. Mutual enrichment thus may have provided the real motivation for some of the strong support for the Arms Deal and the selection of the winning bidders.

Equipment acquired as a result of the Arms Deal is either non-functional or ineffectively utilised

84. Intermittent media reports raised concerns as to whether the equipment bought under the SDPP was functional and effectively utilised. Typical of such claims was a report in August 2012 in the *Sunday Times*.[26] It stated that all three of the submarines purchased in the SDPP were non-functional due to accidents or other 'mishaps'. The report stated that one submarine, the SAS Manthatisi, had been in dry dock since 2007 after accidents had rendered it unusable.

85. Statements by the Department of Defence also raised concerns as to whether the equipment acquired in the SDPP has been effectively utilized. In the Department of Defence Annual Report for 2009/2010 it was reported that due to anticipated medium-term budget shortages, the Gripen programme's operation would be substantially reduced. The Report stated:

The major challenges facing the Air Force remained affordability, perennial underfunding, the development and retention of specialist skills and operational and domestic infrastructure maintenance. The impact of underfunding is especially of concern in the air transport capability, which is faced with huge obsolescence problems

[26] 'Not one of the R8 billion arms deal submarines is operational', *Timeslive*, 12 August 2012

brought about by aircraft systems more than 60 years old. It also impacts on the combat and helicopter capabilities engaged in integrating the Special Defence Package aircraft without the benefit of adequate operating funds.

At current funding levels, the continued retention of the combat system hangs in the balance and will require an intervention to prevent the loss of the required capability. The Hawk and Gripen systems were initially partially protected from the impact of low funding levels by system warranties being in effect, but these will cease during the next two years. Combined with the recent cuts to funding for the MTEF period, the Air Force will only be able to sustain one system effectively - the Hawk system. This will result in a very limited intake of new Gripen pilots, whilst the Hawk system will have to retain current aircrew numbers, thereby absorbing a very limited number of new recruits.

Without adequate levels of funding, the Air Force will not be able to meet its mandate in terms of defence or its support of Government initiatives in the medium and longer term. Portions of aircraft fleets may have to be placed in long-term storage, and certain capabilities, units or bases may have to be closed down.[27]

The procurement process followed was tainted by serious irregularities

86. At least three of the four primary contracts, and four of the subcontracts (also referred to as secondary contracts) in the SDPP have been subject to allegations of serious procurement irregularities. These claims have been repeated frequently in the national and international media, as well is in numerous books on the topic. They were placed before the Commission in the joint submission of Feinstein and Holden.

[27] *Annual Report 2009/2010*, Department of Defence, p. 55

87. The accounts of irregularities in the joint submission of Feinstein and Holden were informed by the draft versions of a report by the Auditor General on the SDPP. The draft versions of the Auditor General's report had been released to SDPP critic Dr Richard Young following a court application under the Promotion of Access to Information Act. The draft versions of the Auditor General's report were released to Dr Young in 2005, and their content was made public in the national media.

88. The Commission did not admit any of the draft reports of the Auditor General as evidence during proceedings.

89. I set out below the essence of the alleged gross manipulation and major irregularities. I do so not in order to prove the correctness of the allegations, but rather so as to identify the allegations which were in the public domain concerning the SDPP, which the Commission was required to investigate:

90. The joint submission of Feinstein and Holden to the Commission in January 2013 summarised the key allegations as follows.

91. In respect of the **LIFT/ALFA contracts**, it was alleged that:

    91.1. The Minister of Defence, Mr Joe Modise, intervened to change the SAAF's operational structure from a two-tier (trainer to fighter) to a three-tier (trainer to sub-sonic trainer to supersonic fighter) training and fighting deployment. This was done shortly after the BAE Gripen had received a lower score than the Daimler-Benz AT2000 following an evaluation of the responses to the Request for Information (RFI) under the two-tier system of procurement. The three-tier

training structure ultimately benefited BAE as it allowed BAE to submit both Hawk and Gripen aircrafts for consideration under the SDP process.

91.2. The three-tier system was adopted despite all suppliers confirming that pilots could move directly from the Astra Pilatus in the SAAF's possession to using ALFAs. The middle-tier which was included at the insistence of Mr Modise was thus unnecessary and illogical.

91.3. The Gripen won the Strategic Offers Committee (SOFCOM) evaluation largely on the basis that it was claimed that its competitors had failed to submit adequate financing information despite 'repeated requests'. Financing accounted for 33% of the total score awarded by SOFCOM. Members of the Department of Finance, as well as representatives of Dassault and Daimler-Benz, could not recall any request being made for this information.

91.4. The Hawk won its SOFCOM evaluation only after Mr Modise had intervened to ensure that the LIFT contract was evaluated with cost being excluded as a criterion. This directly benefited BAE as it allowed the Hawk to win the SOFCOM evaluation despite its much higher cost than its competitors.

91.5. The Secretary of Defence, General Pierre Steyn, resigned in protest at the decision to exclude cost as a criterion.

91.6. The BAE Hawk offer received a large score for its NIP programme, which helped it win the SOFCOM evaluation. However, in July 1999 the DTI confirmed that it had miscalculated the offset benefits offered by BAE under the Hawk contract. The DTI had informed Cabinet that the offset offer was

R10bn, when in fact it was R1.5bn. The Hawk was thus selected on the basis of egregiously wrong information. Cabinet took no action to request a re-evaluation despite this finding.

91.7. A further review by the DTI found that the two major projects that formed the BAE Hawk NIP offer were likely never to materialise.

91.8. The International Offers Negotiating Team (IONT) found that the purchase of Hawk and Gripen aircraft was likely to carry great financial risk and cost more than initially budgeted. The IONT recommended either deferring the purchase of the Gripen, or requesting that offset obligations forming part of the Gripen bid be delivered early. Cabinet ignored these suggestions and ordered the IONT to continue negotiating.

91.9. BAE offered to resolve the impasse by suggesting that the aircraft be bought in tranches. The offer was investigated by the IONT and Affordability Team, who highlighted that the tranching system was illogical and carried substantial potential risks. Despite this, Cabinet opted for the tranching approach.

91.10. To resolve further issues of affordability, it was decided to reduce the number of Light Utility Helicopters to be purchased from 40 to 30. This despite the fact that the purchase of LUH was arguably more rational than the purchase of the Hawk, which the SAAF had already discovered was unnecessary.

91.11. Again to resolve issues of affordability, it was decided to remove significant functionalities from both Gripen and Hawk aircraft. The SAAF noted that, with the functionalities excluded, the Gripen and Hawk would be less

technologically advanced and suited to the SAAF requirements than the 50 Cheetah aircraft already in the SAAF's possession.

92. In respect of **the corvette contract**, it was alleged that:

92.1. SOFCOM continued to evaluate the offer of all bidders despite none of the bidders conforming to the minimum bidding requirements, because they failed to submit the required financing information in their response to the RFO (the Request for Offers). This was highly irregular. If bidders failed to submit the requisite information, either they were to be disqualified or the bid process was to be started anew with new requests for offers.

92.2. The German Frigate Consortium (GFC) did not confirm to minimum bidding requirements because it failed to submit the required Defence Industrial Participation information in its response to the RFO. Despite this, the GFC continued to be evaluated, when it should have been disqualified from the bidding altogether.

92.3. The decision to allow the GFC to remain in the evaluation was taken exclusively by Llew Swan and Chippy Shaik and was not discussed with other members of SOFCOM.

92.4. All bidders, excepting Bazan, failed to conform to minimum bidding requirements by failing to submit the required technical information in their responses to the RFO. Bazan should thus have remained as the lone bidder in the evaluation process, or the process should have been started anew. Instead, the decision was made to allow all bidders to continue.

92.5. The German Frigate Consortium emerged as the winner of the SOFCOM evaluation process largely due to the combined score it received for its NIP and DIP proposals. A series of 'calculation errors' in the DIP evaluation meant that the GFC received a DIP score that was larger than its 'true value'. This clearly benefited the GFC over all other bidders.

92.6. The German Frigate Consortium received a NIP score nearly twice the value of its nearest competitor, Bazan, despite both bidders offering virtually the same Rand value of NIP commitments. GFC's NIP score was boosted by the application of favourable multipliers, for which the Auditor General's office could find no documented benchmarks.

92.7. The scores for NIP and DIP commitments were calculated by adding the evaluation scores for both domains following SOFCOM's analysis. This was done despite Armscor's legal services stating that the combined NIP and DIP scores should be calculated by adding the Rand amounts offered. As a result of adding scores rather than Rand amounts, GFC's combined DIP and NIP score was much higher than its competitors. If the scores had been derived by adding Rand values, Bazan would have won the offset domain in the SOFCOM evaluation.

92.8. When all the errors referred to above were corrected, Bazan emerged as the true best bidder, with GFC being relegated to second place.

93. In respect of **the submarine contract,** it was alleged that:

93.1. A series of calculation errors and oversights significantly inflated the NIP score granted to the German Submarine Consortium (GSC). At the same time, GSC's competitor, DCN, had its NIP and DIP scores halved as it had submitted similar business plans in its bid for the corvette contract. The Auditor General's office believed that this was unfair as it would have been simple to request clarification from DCN. The decision was also made without due process being followed, with only one document found recording the decision: a note attached to an evaluation sheet that indicated that the halving of DCN's DIP score was ordered by Chippy Shaik.

93.2. When the errors in the calculation of DIP and NIP scores were corrected by the Auditor General's office, GSC came in second place and DCN was in first place. Only GSC's scores had been inflated as a result of errors; in all other cases, the bidders' scores either remained the same or were reduced.

93.3. The decision was made to allow GSC to proceed in the SOFCOM evaluation despite the fact that it failed to meet the minimum bidding standards by failing to submit the required information regarding its DIP commitments. Either GSC should have been disqualified or the entire evaluation process started afresh.

93.4. GSC's NIP offer was given a score substantially larger than its competitors, despite the fact that its largest offer – a steel mill in the Coega development zone – was found by independent economists contracted by the IONT, to be an unsustainable business proposition that could never come to fruition.

93.5. GSC won the technical evaluation largely through quoting a cost for its Logistics Support Segment that was so low as to be unbelievable. The scores

awarded for the evaluation of the Logistics Support Segment were found by the Auditor General's office to have had a disproportionate impact on the technical evaluation, as this was accorded a weighting of 67.5%. GSC's price was so low that it allowed GSC to win the evaluation of this domain, despite all evaluators concurring that it seemed too low to believe. When the Auditor General's Office recalculated the scores in the technical evaluation by using a more equitable weighting system, GSC was relegated from first to second position.

93.6. A series of errors in the calculation of scores for the evaluation of the financing domain resulted in GSC receiving an inflated score for its financing proposals. All other bidders had their scores either unaltered or reduced. When the errors were corrected by the Auditor General's Office, GSC was relegated from first to third position in the financing evaluation.

93.7. The Auditor General's Office found that the evaluation sheets used in the evaluation of the financing segment had been amended using correcting fluid, despite this being explicitly forbidden by acquisition regulations. The Auditor General's Office stated that this meant that the scores could have been unduly edited and manipulated.

93.8. It was found that DCN was the true best bidder, while GSC was only the third best bid when the Auditor General's Office recalculated the scores in the submarine contract after correcting for the various errors and irregularities.

94. In respect of **the sub-contract for the supply of engines to be used in the Light Utility Helicopters**, it was alleged that:

94.1. The primary contractor, Agusta, favoured the use of Pratt & Whitney engines. Armscor preferred the use of Turbomeca engines, despite Agusta confirming that the Pratt & Whitney engines were cheaper, more technically suitable, and offered a better industrial participation package.

94.2. The Pratt & Whitney and Turbomeca engines were re-evaluated in four separate reviews. It was only in the last review that Turbomeca was nominated the best bidder. This was only possible because the NIP and DIP value system was significantly modified, benefitting Turbomeca.

94.3. A Helicopter Control Board meeting could not make a final decision as to the best bidder, and recommended that both options be presented to Cabinet. Cabinet was not informed of this indecision, as a later meeting merely reflected that Turbomeca was the best option. The meeting was chaired by Chippy Shaik.

94.4. A representative of Pratt & Whitney lodged a formal complaint about irregularities in the evaluation process. These complaints appear to have a basis as later documents discovered by the Auditor General's Office indicated an irregularly close relationship between Turbomeca and Denel.

95. As regards **the sub-contract for the supply of gearboxes to be used in the corvettes**, it was alleged that:

95.1. The primary contractor, the German Frigate Consortium, reached the final stages of appointing MAAG as the preferred supplier. Representatives of Armscor preferred the use of RENK as the preferred supplier and requested GFC to consider this.

95.2. Armscor's Johan Van Dyk wrote a memorandum to Chippy Shaik and Llew Swan requesting that RENK be selected as the preferred supplier because of the business it would generate for the South African company, Gear Ratio. A note on the document handed to Shaik and Swan indicated that the decision would be approved by the Project Control Board shortly thereafter. Reaching a unilateral decision prior to the sitting of the Project Control Board was suspicious and irregular.

95.3. An October 1999 Project Control Board meeting confirmed the selection of RENK as the preferred supplier, despite MAAG agreeing to reviewed DIP commitments that would provide additional business for South African business.

95.4. At the same meeting, it was noted that Gear Ratio had been bought by Vickers UK. This means that the strategic imperative of ensuring business flowed to South African companies no longer applied, and the selection of RENK was unjustified.

96. As regards **the sub-contract for the supply of the Information Management Suite (IMS) to be used in the corvette combat suite**, it was alleged that:

96.1. Thomson-CSF and ADS acted as the main tender board for the evaluation of the IMS supplier, despite Thomson-CSF also being the owner of Detexis, a French company that Thomson-CSF suggested for the IMS. Thomson-CSF and ADS, however, had to receive final approval for their selection from the corvette Project Control Board.

96.2. The State (in particular the corvette Joint Project Team), had nominated C^2I^2 as the candidate supplier to provide the IMS, as C^2I^2 offered a technically suitable solution, was South African owned, and had received considerable skill and technology retention funding from the South African government.

96.3. GFC secured the selection of the Detexis system by claiming that the product offered by C^2I^2 was risky, thus attracting a risk abatement fee. Without the risk fee, C^2I^2 would have won the evaluation.

96.4. The decision to add a risk premium to the C^2I^2 product was unjustified as the Joint Project Team had conducted its own evaluation of the product. The 'Report on the Diacerto Bus' concluded that it was the Detexis system that carried significant risks, while both Thomson and GFC had confided to the Joint Project Team that the C^2I^2 'IMS is a superior product'.

96.5. The risk fee attached to the C^2I^2 product could have been abated if the State had categorised the system as a Category C product, for which the State would have shared the costs of any non-delivery or product failure. Instead, the C^2I^2 product was rated a Category B product despite the Joint Project Team identifying that the Detexis system was equally if not more risky than $C^2I^{2'}$s product.

96.6. There is an insufficient audit trail to identify who in the State categorised the C^2I^2 system as a Category B product. Later testimony by officials claimed that an extraordinary and unminuted meeting was held by the Project Control Board to confirm the decision. This would have been highly unusual as the meeting did not constitute a quorum, was not minuted, and was not reflected in any other minutes. In addition, it was claimed that the Report on the Diacerto Bus was not

forwarded from the Joint Project Team to the Project Control Board, which would have unfairly prejudiced C^2I^2. The claims to the contrary by Rear Admiral Johnny Kamerman and Chippy Shaik were found by the Office of the Auditor General to be false.

96.7. A briefing by Chippy Shaik to the Cabinet sub-Committee overseeing the Arms Deal in May 1999 claimed the C^2I^2 product was risky. This could not have been reliably relayed, as the 'Report on the Diacerto Bus' had not yet been compiled and C^2I^2's system evaluated by the Joint Project Team. This indicates that the decision to irregularly categorise the C^2I^2 product as risky was made before any meaningful technical evaluation was completed and with suspicious motives.

97. In respect of **the sub-contract for the supply of the System Management System (SMS) to be used in the corvette combat suite**, it was alleged that:

97.1. Thomson-CSF and African Defence Systems acted as the tender board, despite African Defence Systems submitting its own product to be used as the SMS.

97.2. African Defence Systems was listed as the original candidate supplier for the SMS. It submitted a grossly inflated bid for the supply of the SMS as it appeared to believe that the outcome was a foregone conclusion.

97.3. The Joint Project Team requested that a competitive bid be tendered. C^2I^2 was required to tender its bid within only a few days, even though African Defence Systems had over two months to compile its bid.

97.4. C^2I^2 offered its SMS product at a price considerably less than African Defence Systems. However, Thomson-CSF and ADS added a series of costs (handling and integration fees as well as a warranty) that increased the cost of the C^2I^2 system. It is unclear whether this was justified.

97.5. African Defence Systems was allowed to resubmit its bid following C^2I^2's competitive offer. African Defence Systems offered its SMS at a new cost only fractionally less than C^2I^2's bid after the application of fees to C^2I^2's bid. This suggests that African Defence Systems was allowed to review C^2I^2's bid documents, which would be credible as Thomson-CSF and ADS acted as the tender board. This significantly prejudiced C^2I^2.

97.6. C^2I^2's bid price was further increased by the demand made by Thomson-CSF and ADS that C^2I^2 make use of ADS frame housings for the SMS system. The frame housings were significantly more expensive than C^2I^2's own frame housings. If C^2I^2 had been allowed to use its own frames, it would have won the competitive bid.

The SDPP Contracts were tainted by corruption and investigations undertaken into the allegations of corruption were undermined by political interference

98. Allegations of criminal wrongdoing, and particularly corruption and bribery, were widely ventilated in the South African media, not least due to the fact that they encompassed alleged wrongdoing on the part of the current President.

99. Again, the most substantive summary of the allegations of corruption and wrongdoing in the SDPP is included in joint submission of Feinstein and Holden.

100. The submission by Feinstein and Holden summarised the key allegations as follows. Again, I set them out in order to identify the allegations which were in the public domain concerning the SDPP, which the Commission was required to investigate.

101. I note at the outset that the Chairperson ruled that a key document referred to below, the Debevoise & Plimpton Report, was inadmissible due to legal privilege. The Commission stated in its final report that on perusal of the Debevoise & Plimpton report, it found that no substantive allegations of corruption were included in it. I submit below that this finding is in fact inexplicable. It had the result that the Commission did not investigate very material issues raised by the Debevoise & Plimpton Report.

102. It was alleged, in the public domain, that the primary contracts signed in the Arms Deal were tainted with corruption and other criminal conduct. The contracts alleged to be so tainted were the following.

103. In respect of **the LIFT/ALFA contract**, it was alleged that:

103.1. Joe Modise, with his business partners Major-General Ian Deetlefs (then head of Denel) and Ron Haywood (head of Armscor), acquired shares in Conlog in a manner that earned all of those parties significant income. Conlog was due to receive lucrative business via BAE/Saab's NIP program. This meant that not only did Modise, Haywood and Deetlefs act on confidential information for their pecuniary gain, but they would stand to benefit financially should BAE/Saab win the LIFT/ALFA contract and incur NIP obligations.

103.2. Joe Modise was reported to have been thoroughly investigated by members of South African law enforcement, who were said to have uncovered a substantial money trail linking payments from BAE/Saab to him.

103.3. BAE made use of a highly secretive payment system operating from the British Virgin Islands by which covert and overt agents in South Africa were paid for 'consulting' work by the BAE controlled Red Diamond Trading.

103.4. In total, BAE, via Red Diamond Trading, transferred £115 million to various agents for work on the South African deal. Amongst the largest recipients of funds from Red Diamond Trading were Fana Hlongwane (the special advisor to Joe Modise), Kayswell Services (majority owned by Rhodesian sanctions-buster John Bredenkamp), Huderfield Enterprises (majority owned by the now-deceased Richard Charter, who was also employed as an overt advisor to BAE via his company Osprey Aerospace). None of these recipients could provide evidence to investigators of meaningful work done to justify such large payments.

103.5. BAE signed a further consulting agreement with Fana Hlongwane via BAE/Saab's South African vehicle, SANIP. In 2011, a documentary by Sweden's TV4 highlighted the relationship between SANIP and Hlongwane. Saab claimed that the company was run by BAE during the period in which Hlongwane was a consultant. SAAB also confirmed that the amounts were paid to Hlongwane via SANIP.

103.6. SANIP financial statements released by Saab indicate that one Viktor Verichenko, as sole director of Veriytech CC, was granted a loan of R750 000

by SANIP on extremely favourable terms. The loan was written off two years later without any repayments being made. Viktor Verichenko was close to Chippy Shaik, including acting as Shaik's PhD supervisor. (Shaik's PhD was later invalidated after it was discovered that the PhD had plagiarised extensively from the work of Verichenko himself.)

103.7. BAE intended to pay a further $10m to Fana Hlongwane, which never materialized. The payment was to be effected with the help of Count Alfons Mensdorff-Pouilly, a BAE agent working on contracts in Eastern Europe. Mensdorff-Pouilly is currently on trial in Austria on charges of money laundering related to his role as an agent for BAE.

103.8. BAE, via Red Diamond Trading, intended to distribute funds to Stella Sigcau, a member of the Cabinet sub-Committee overseeing the Arms Deal, via the intermediary company Arstow. According to SFO documents, these funds were transferred although the amounts were not stated. SFO investigators privately confirmed to Holden and Feinstein that the SFO had found a substantial trail of funds being made available to Stella Sigcau by BAE in cash and kind. SFO investigators specifically noted that BAE had paid for the school fees of Stella Sigcau's daughter at a top British school.

103.9. BAE entered into two separate plea bargain agreements with the US Department of Justice and US Department of State in 2010 and 2011 respectively. BAE confirmed that they had paid large sums to consultants on the South African deal, and that these payments 'would be used to ensure BAE was favored in foreign government decisions regarding the sale of defense articles'.

103.10. An agreement was entered into between the National Union of Mineworkers of South Africa (NUMSA) and both Saab and the Swedish union IF Metall. The agreement stipulated that NUMSA would provide political support for the Gripen purchase in return for Saab and IF Metall's investment in a NUMSA training school (valued at roughly R10m). The agreement was not approved by NUMSA's leadership, but was instead signed by Moses Mayekiso, the former national chairperson of NUMSA. At the time he appended his signature to the agreement, he had resigned from NUMSA. NUMSA resolved to investigate the deal following allegations of wrongdoing. Upon visiting Sweden, NUMSA investigators were given a copy of the agreement. NUMSA investigators confirmed to Swedish TV in November 2012 that the agreement specifically linked funding for the training school to NUMSA's political support for the Arms Deal. In addition, NUMSA investigators found that a clause in the contract was missing from documents provided to them; it was similarly redacted in copies of the agreement later provided to NUMSA's steering committee. This raised suspicions that a further allegation was true, namely, that an additional R40m had been paid by BAE/Saab to South African decision-makers and individuals of influence, and that these funds had been routed via IF Metall and NUMSA.

104. In respect of the **corvette contract**, it was alleged that:

104.1. Thomson-CSF and Nkobi Holdings entered into a relationship in which both parties gained shares in African Defence Systems. Nkobi Holdings was owned by Schabir Shaik, the brother of Chief of Acquisitions, Chippy Shaik. Chippy Shaik participated in meetings in which the selection of Thomson-CSF/African

Defence Systems to provide the corvette combat suite was approved. Thomson-CSF were convinced of the need to include Nkobi as a shareholder in African Defence Systems after the direct intervention of Jacob Zuma as well as Chippy Shaik.

104.2. Thomson-CSF was alerted by French intelligence services to the fact that Nkobi Holdings was considered politically unpalatable to a number of high profile South African government officials. Thomson-CSF thus sought and achieved at least one meeting with Thabo Mbeki, where it is alleged such matters were discussed. 20% of the shares in ADS were given to Futuristic Business Solutions as part of a black empowerment transaction. Futuristic Business Solutions was owned and directed by relatives of Joe Modise, and was reported to have little or no capacity to conduct work related to the defence trade.

104.3. Investigators in Germany probed the payment of $25m in bribes from ThyssenKrupp (a member of the German Frigate Consortium) to South African officials. Documents drawn up by German police investigators indicated that $22m was paid to a company owned by Tony Georgiades, who was close to former Deputy President FW De Klerk and a number of high-level ANC politicians. The funds were paid to a company named Mallar Inc in Liberia. It was suspected that funds were transferred onwards to South African officials and people of influence.

104.4. Among documents uncovered by the German investigators were two separate sets of minutes written by an executive of ThyssenKrupp (Chistoph Hoenings).

The minutes indicate that ThyssenKrupp negotiated the payment of a $3m bribe to Chippy Shaik, and that this payment was executed by ThyssenKrupp.

104.5. A raft of South African government officials and individuals of influence were provided with discounts on luxury vehicles by Daimler Chrysler Aerospace, a subsidiary of EADS. EADS was bidding for sub-contracts in the corvette deal. The individuals who received discounts included: Tony Yengeni (chair of the Joint Standing Committee on Defence), Siphiwe Nyanda (chief of the SANDF), Llew Swan (a participant in the SOFCOM evaluation process and later negotiations phase who sat on the Corvette Project Control Board, who had earlier been appointed to the board of Armscor by Joe Modise) and Vanan Pillay (a DTI official who formed part of the IONT team).

104.6. Rear-Admiral Johnny Kamerman was employed by ThyssenKrupp Marine Systems soon after the corvette contract was concluded. He was part of the SOFCOM evaluation process and the negotiation process, with a seatson the Corvette Joint Project Team and Project Control Board. He was employed despite the sales agreements between the GFC and the South African government barring any such post-employment for a period of 8 years following the signing of the contract unless written approval was provided by the relevant SANDF official. He received no such approval. Neither GFC nor he have faced any action arising from his employment.

105. In respect of **the submarine contract**, it was alleged that:

105.1. Ferrostaal (a member of the German Submarine Consortium) paid €16.5m to two companies controlled by Tony Georgiades. Investigators from Debevoise

& Plimpton who were appointed by Ferrostaal to undertake an internal review of the company's criminal liability were told by senior Ferrostaal executives that Georgiades was paid as he provided a conduit to South African officials, politicians and other individuals of influence. These contacts were claimed to be 'decisive' in securing the contract for the German Submarine Consortium.

105.2. Ferrostaal paid €16.5m to Tony Ellingford between 2000 and 2003. Ellingford was appointed as Ferrostaal executives wanted to employ an individual with 'political connections' who could be used to secure the submarine contract. Ellingford was recommended to Ferrostaal by Jeremy Mathers (referred to below) who, in turn, was acting on the advice of Llew Swan. Ellingford was close to Joe Modise. He was a trustee of the Letaba Trust, a major asset of Modise.

105.3. Ferrostaal entered into a consultancy agreement with Jeremy Mathers to secure advice relating to the submarine contract. Mathers was employed by the DoD as a permanent force member until January 1998, and later entered the reserve force. Mathers was actively involved in assisting the DoD develop the value system to be used in the selection process for the submarines. He was contracted by Ferrostaal shortly after leaving the DoD as a permanent employee, and was paid an estimated €1 million for his services.

105.4. Llew Swan was providing consulting services to Ferrostaal indirectly via his company Moist CC only three months after the final Arms Deal contracts were signed (Swan resigned from Armscor a week prior to the signing of the contracts).

105.5. Ferrostaal entered into a range of business deals with Chippy Shaik following the signing of the submarine contracts in 1999. The deals included a joint-venture in a mine in Mozambique in which Ferrostaal invested $1.5m. Other directors attached to the joint venture (via Enable Mining, of which Chippy Shaik was a director) were Julekha Mohamed, Yunis Shaik and Rafique Bagus.

105.6. Chippy Shaik actively intervened with members of the SA Submarine Industrial Cluster (SASubClub) to ensure that African Defence Systems secured subcontracts from the submarine deal. He also sat in on meetings relating to the award of the submarine combat suite. He chaired a Project Control Board meeting in which GSC were forced to invite a competitive quote from African Defence Systems, even though GSC had indicated their preference for STN Atlas. When STN Atlas was found to be the cheaper system, Llew Swan and Chippy Shaik 'engaged' GSC to achieve greater 'visibility' as to the cost calculations. African Defence Systems was partially owned by Schabir Shaik, Chippy Shaik's brother, as well as Futuristic Business Solutions (FBS), directed and owned by relatives of Joe Modise.

105.7. Futuristic Business Solutions established Applied Logistics Engineering (ALE), a joint venture with Logtek, with a view to securing contracts in the submarine contract. ALE signed cooperation agreements with both GSC and GFC with the aim of entering into subcontracts related to logistics services. FBS were granted 70% of the shares in ALE while only being contractually obliged to perform 10% of the work. This suggests that FBS may have been included due to their political connections.

106. In respect of **the Light Utility Helicopter contract**, it was alleged that:

106.1. Representatives of Bell Helicopters claimed that they were informed by Chippy Shaik that they could only win the contact if they contracted Futuristic Business Solutions as a consultant. Bell Helicopters refused to do so.

106.2. Scorpions investigators found that the winning contractor, Agusta SpA, had entered into contracts with Futuristic Business Solutions only three weeks after the signing of the final contracts between the South African government and Agusta. On 19 January 2000, FBS were contracted for the supply of integrated logistic support services to Agusta with a contract value of R17m. This despite the fact that the business capacity of FBS was reported to be almost non-existent.

A substantial portion of the Offsets never materialised

107. Concerns regarding the non-fulfilment of offsets were frequently aired in the media, in particular in the investigative work of the Sunday Times and the Mail & Guardian. The concerns were amplified by the publication of details of the Debevoise & Plimpton Report, which stated that Ferrostaal, one of the largest offset obligors under the NIP program, had spent only €62m to earn offset credits of €3bn, and that a large portion of the projects in which Ferrostaal had invested 'failed or performed poorly'.[28]

108. The substance of the allegations regarding offsets was summarised in the joint submission of Feinstein and Holden as follows:

[28] Ferrostaal: Final Report Compliance Investigation, Debevoise & Plimpton, 13 April 2011, p. 59

108.1. The creation of 65000 jobs was promised upon the announcement of the Arms Deal.

108.2. The economic benefit of the Arms Deal, by virtue of the National Industrial Participation Programme (NIPP, hereafter referred to as offsets), was estimated to be in the region of R104bn.

108.3. These figures were directly contradicted by the Affordability Report produced by the International Offers Negotiating Team, which in August 1999 provided an analysis of the macroeconomic impact of the Arms Deal to the Cabinet sub-Committee in charge of procurement.

108.4. The Affordability Report clearly indicated that the impact of the Arms Deal on the economy would be broadly negative. This applied, too, to the impact of the Arms Deal on employment.

108.5. The Affordability Report did not model for the full cost of the Arms Deal, as it failed to take financing charges into account. It also did not model for the purchase of the full complement of Hawk and Gripen aircraft.

108.6. The Affordability Report's estimates were thus based on a total purchase cost that was significantly less than the actual cost of the Arms Deal, and would thus have substantially under-estimated the negative impact of the Arms Deal.

108.7. Based on the actual purchase cost, including financing charges and accounting for exchange fluctuations, the overall macroeconomic impact of the Arms Deal, and

the impact on job creation in the broader economy, was more severe than originally estimated.

108.8. If the funds spent on the Arms Deal were directed to other social priorities, the number of jobs created would far exceed 65000.

108.9. The global experience of offsets in the defence trade has largely been disappointing and infected with problems such as corruption and manipulation.

108.10. The offset credit system used by the Department of Trade and Industry was opaque, but evidence shows that the evaluation system could be manipulated to ensure that Arms Deal companies only had to invest a fraction of their total offset obligation to reach targets set in the purchase contracts.

108.11. The Department of Trade and Industry's consolidated account of the offset programme shows that the actual amount invested in the country via offsets was considerably less than promised.

108.12. The figures presented by the DTI appear, on the face of it, to be estimates rather than final figures. This suggests that offset projects have not been subject to a final audit.

108.13. The total number of new direct jobs created by the Arms Deal is 12 965, as opposed to the 65000 jobs promised.

108.14. The DTI attempted to correct this shortfall by including indirect jobs created. This figure was calculated by simply doubling the number of direct jobs created. This is not an appropriate means of estimating job creation.

108.15. According to DTI figures, the total actual investment in the South African economy was roughly R5.8bn. This suggests that it cost just under R450 000 to create each direct job. This is excessively high.

108.16. The job statistics provided by the DTI do not identify the length, quality and average rate of remuneration for the jobs created. There is therefore no indication of the sustainability of employment arising from the offset programme.

108.17. A number of offset projects were granted offset and sales credits despite either failing entirely or being involved in criminal activity or other misdemeanours.

108.18. On this basis, the allegations in the public domain suggested that the offsets programme was deeply problematic and almost certainly failed to deliver actual economic benefits that would outweigh the negative macroeconomic impact of the Arms Deal.

Previous investigations into the SDPP had been truncated or hampered by incompetence and/or political interference

109. There has been considerable controversy surrounding previous investigations into the SDPP. Repeated claims have been made that political interference truncated or otherwise impacted negatively on investigations into the SDPP.

110. In his book *After the Party*, Andrew Feinstein provided an account of his experience on the National Assembly's Standing Committee on Public Accounts (SCOPA). Feinstein was the senior ANC member of SCOPA at the time. SCOPA was empowered to investigate the SDPP after the initial report of the Auditor General into the SDPP, which was presented to Parliament in September 2000. The Auditor General's report raised

concerns about procedural irregularities in the procurement processes for the SDPP, and questioned the likelihood of offset delivery. SCOPA initially recommended a joint investigation undertaken by four investigative units, overseen by SCOPA. One of these units was the Special Investigating Unit (SIU) under Judge Willem Heath. Feinstein alleged that senior ANC politicians forced the ANC members of SCOPA to withdraw the proposal that the SIU be involved.

111. The investigation undertaken by the remaining three units – the DSO (Scorpions), Auditor General and Public Protector - culminated in the publication of the Joint Investigation Report.

112. In 2005, after making an application to court under the Promotion of Access to Information Act, Dr Richard Young obtained drafts of the Auditor General's reports on the SDPP. The Auditor General's reports provided the basis of much of the Joint Investigation Report. The drafts provided to Dr Young were reported on extensively in the media and in books on the topic. They appeared to demonstrate that large sections of the Auditor General's original findings were excluded from the Joint Investigation Report. The Joint Investigation Report included findings that had not been contained in the original Auditor General's Report, including a finding that there was no wrongdoing in the SDPP sufficient to compromise the South African government's contracting position.

113. It was subsequently reported in the media that documents provided to Dr Young indicated that the excision of some material and the inclusion of favourable findings had taken place after draft versions of the Auditor General's Report had been circulated to members of the Inter-Ministerial Committee overseeing the SDPP, and feedback had been received

from them. Numerous commentators questioned the probity of individuals who were being investigated being given the right to comment on or require amendments to the findings of a supposedly independent investigation.

114. Despite the findings of the Joint Investigation Report, the NPA continued to investigate criminal wrongdoing in the SDPP process. This resulted in the successful prosecutions of Tony Yengeni and Schabir Shaik. The conviction of the latter spurred the laying of criminal charges, including corruption and racketeering, against Jacob Zuma.

115. Reports in the media stated that South African investigators had been frustrated by the Department of Justice, amongst others, in their attempts to investigate additional criminal wrongdoing. For example, the *Mail & Guardian* alleged that Menzi Simelane, then the Director General in the Department of Justice, had 'stymied' cooperation between South African and British investigators. He had allegedly achieved this by raising a serious of vexatious and unfounded queries and objections to the granting of a Mutual Legal Assistance request filed by the UK Serious Fraud Office.[29]

116. There was a good deal of criticism of the decision by the Directorate for Priority Crime Investigation (DIPCI) to terminate the last remaining criminal investigations into the SDPP in September 2010. In June 2011, for example, the *Mail & Guardian* reported that the decision to terminate the investigation was informed by a 'six-page memorandum littered with contradictions and inaccuracies' written by General Hans Meiring. The report questioned Meiring's grasp of the basic facts, and pointed to material inaccuracies in the memorandum. The ineluctable inference from the *Mail & Guardian* article was

[29] 'How Menzi Stymied Arms Probe', *Mail & Guardian*, 3 December 2010

that the final criminal investigation into the SDPP had been terminated due to either incompetence or a lack of will.

THE FINDINGS OF THE JOINT INVESTIGATION REPORT

117. The joint submission of Feinstein and Holden drew extensively on the Joint Investigation Report and the findings of the draft Auditor General's Report into the SDPP. I summariuse the relevant findings of both.

118. On 14 November 2001, the Public Protector, Auditor General and National Director of Public Prosecutions submitted the Joint Investigation Report to the Speaker of Parliament for presentation to that body.[30]

119. The tabling of the Joint Investigation Report was not without controversy, as it was claimed that substantive material had been excluded from the Report of the Auditor General without justification. This claim was given credence by the subsequent disclosure of draft versions of the Auditor General's report to Richard Young. The disclosure of draft versions of the Auditor General's report indicated that the final Joint Investigation Report had not included large quantities of evidence appearing in the Auditor General's Report. Most of the excluded material reflected poorly on the SDPP acquisition process, and raised serious questions regarding the probity of many of the decisions that formed the SDPP.

120. It was also claimed in the media, in books such as *Devil in the Detail*, and in the Joint Submission of Feinstein and Holden, that conclusions and findings had been added to the Joint Investigation Report that appeared to contradict the evidence it contained. The

[30] *Strategic Defence Packages: Joint Report*, 2001, , Cover Letter

conclusions and findings had the effect of 'clearing' the SDPP process, and certainly the Inter-Ministerial Committee, of any wrongdoing. The subsequent disclosure of draft versions of the Auditor General's Report confirmed that these findings did not appear in the drafts of the Auditor General's Report and had been included into the findings only after the Auditor General had submitted drafts of the Joint Investigation Report to members of the Inter-Ministerial Committee and had taken comments on it.

121. I pause to note most of the few findings of the Joint Investigation Report that the Commission quotes (approvingly) in its final report were those that appeared in the Joint Investigation Report, but not in the Auditor General's Report.

122. It is not the purpose of this affidavit to argue whether the draft Auditor General's Report or the Joint Investigation Report was the truer version of events. I deal with matters raised in order to identify matters which merited and (I submit) required proper investigation by the Commission. It is important to note that both provided evidence of serious and repeated irregularities, flaws and deviations from good procurement practice in nearly all contracts in the SDPP save that of the Light Utility Helicopter procurement . This evidence, I submit, provided sufficient cause for the Commission to test the evidence of witnesses appearing before it whose testimony contradicted what was contained in the Joint Investigation Report or the draft Auditor General's Report.

123. A number of findings in the Joint Investigation Report raise concerns regarding the propriety, probity and rationality of the decision-making process.

124. I first briefly describe the manner in which bids were assessed to decide which bidder was to be selected as the preferred supplier. Very simply, the bids were all assessed on three domains:

124.1. on military value of the equipment: a score for the technical suitability of the equipment was divided by the programme cost to establish the best military value for money;

124.2. on the NIP/DIP offers made: a score was derived based on the NIP/DIP plans submitted by the offerers; and

124.3. on the financing packages offered: a score was derived based on the terms, conditions and cost of the loans that the bidders presented as the payment mechanism.

125. The final score for each bidder was arrived at by adding the scores achieved in each domain. Each domain was thus weighted equally at 33%.

Selection of the Preferred Bidder – ALFA

126. The Joint Investigation Report found that there were no errors or irregularities in the assessment of the competing bids to supply the ALFAs in relation to the military value of the ALFAs and NIP and DIP.[31] However, the Report found that only BAE/SAAB had submitted an offer under the financing domain. The competing bidders, namely DASA of Germany and Dassault of France, were not accorded a score as they failed to submit an offer on this domain.

127. The Report found: 'It is clear from the above that there was no competitive financial evaluation. The aforementioned lack of competitive financial evaluation played an

[31] *Strategic Defence Packages: Joint Report*, 2001, sections 4.3.2 – 4.3.5

important role during the overall evaluation process, as the financial evaluation score comprised 33.3% of the total evaluation.'[32]

128. The implication of this is clear: there was potentially severe prejudice to the fiscus, as the financing proposals had substantial implications for the final cost to state of the SDPPs. In addition, a failure to conduct a competitive evaluation of the financing proposals could be considered to violate Section 217(1) of the Constitution that requires that public procurement through a system that is 'fair, equitable, transparent, competitive and cost-effective.'

Selection of the Preferred Bidder – LIFT

129. The Report pointed to a series of substantive and material concerns regarding the evaluation process that led to the selection of the LIFT. The BAE Hawk was the eventual winner of the evaluation and BAE was selected as the preferred supplier.

129.1. The most notable concern raised, related to the development of two separate scores to be presented to Cabinet: one that included cost as a criterion, and one that excluded cost as a criterion.

129.2. The Report notes that the issue of assessing by cost first arose during the Request for Information stage, in which the shortlist of bidders to receive RFO requests was being determined:

> *'Minutes of the Joint AASB/AAC forum of 30 April 1998 indicate, in paragraphs 8 and 9 thereof, that the project team presented the meeting with an affordability analysis of LIFT contenders. Without cost considerations the selection process was biased towards the higher performance category of aircraft. These are aircraft are, however, also*

[32] *Ibid*, paragraph 4.3.6.3

significantly more expensive to acquire, operate and maintain. Therefore, unless additional funding could be found to support the acquisition of a more superior aircraft, the SAAF would have to take cognisance of budgetary constraints in the selection process. The Minister of Defence cautioned the meeting that a visionary approach should not be excluded, as the decision on the acquisition of a new fighter trainer aircraft would impact on the South African defence industry's chances to be part of a global defence market through partnership with major international defence companies, in this case European companies. In terms of this vision, the most inexpensive option might not necessarily be the best option.'[33]

129.3. The Report confirms that this directive appearsed to have been taken to heart during the RFO evaluation phase. Minutes of the Special SAAF command meeting on 29 June 1998 indicate that the project team was instructed to generate two sets of results with regards to the military value (i.e. technical capacity divided by cost). The first set of results would be calculated with cost included. The second set of results would be calculated with costs excluded.[34] These two results were to be forwarded to SOFCOM for evaluation. The minutes indicated that this was the direct result of an instruction from Joe Modise: 'A separate recommendation is required where cost is not taken into account as per the request from the Minister of Defence.'[35]

129.4. According to the Report, in the technical evaluation, under the costed evaluation, the MB339FD, the cheapest LIFT on offer, received a normalised score of 100 against scores of 52 for the L159, 44,2 for the Hawk and 42.9 for the Yak 130. When cost was excluded, the MB339FD still led with a normalised score of 100, but the scores for the other contenders was significantly improved: the Hawk was raised from third to second place with a score of 90,2, while the

[33] *Ibid*, paragraph 4.5.1.10
[34] *Ibid*, paragraph 4.5.3.6
[35] *Ibid*, paragraph 4.5.1.12

L159 moved down a place but with an improved score of 88,3. The Yak 130 remained in last place but with an improved normalised score of 62.5.[36]

129.5. Concerns were also raised as to the evaluation of the NIP offers of the competing bidders during the RFO phase. According to the evaluation undertaken, the NIP offer attached to BAE's Hawk bid was considered to be the best on offer, and was given a normalised score of 100 as against the 97 awarded to the L159, and 25 given to each of the MB339FD and Yak 130.[37] This had a material impact on the outcome of the evaluation of the preferred supplier as it gave the BAE/Hawk a combined and normalised NIP/DIP score that was considerably higher than the competing bids.

129.6. However, the Report noted that in June 1999, the Minister's Committee was informed that the Committee may have been given an incorrect impression of the quality of the NIP offer attached to the Hawk:

> *'According to the records of the DTI, a view was expressed in June 1999, that a report that was submitted to the Minister's Committee on the proposed package for the LIFT programme had a radically inflated Hawk NIP offer. This view held that a 'breakdown' in communication within the Department caused the Minister's to have been provided with an incorrect impression of the quality of the offer.'*[38]

129.7. A further evaluation found that the two largest components of the NIP offer submitted in connection with the Hawk bid had material problems that

[36] *Ibid*, paragraphs 4.5.3.6 and 4.5.3.7
[37] *Ibid*, paragraph 4.5.5.1
[38] *Ibid*, paragraph 4.5.5.2

threatened their potential realisation.[39] The result was that BAE's NIP offer was not properly evaluated:

> *'The above situation led to negotiations with the supplier in order to replace certain projects. This is indicative of the fact that the NIP offer of BAE was not properly evaluated during the RFO phase.'*[40]

129.8. On 8 July 1998 the consolidated scores were presented to the AASB.[41] Two sets of results were presented to the AASB: one that included, and one that excluded, cost as a criterion. Where cost was included as a criterion, the final consolidated rankings indicated that the MB339FD was placed first, the Hawk 100 was placed second, the L159 was placed third and the Yak 130 was placed last. Where cost was excluded as a criterion, the Report notes, the Hawk was elevated to first. The MB339FD was then placed second, followed by the L159 in third and the Yak 130 in last place.[42] Paragraph 4.6.2 of the Report stated that 'although the MB339FD was still the preferred option under the costed and non-costed options in terms of the military performance index, the Hawk was placed in an advantageous position under the non-costed option for the total evaluation.'[43]

129.9. According to the minutes of an AASB meeting on 16 July 1998, the AASB recommended that the 'MB339FD be procured in accordance with the preference of SAAF within its envisaged fighter training system.'[44]

[39] *Ibid*, paragraph 4.5.5.3
[40] *Ibid*, paragraph 4.5.5.5
[41] *Ibid*, paragraph 4.5.7.4
[42] *Ibid*, paragraph 4.5.7.3
[43] *Ibid*, paragraph 4.6.2
[44] *Ibid*, paragraph 4.6.4

129.10. On 21 August 1998, the Council on Defence was briefed on the recommendation of the AASB. At the meeting, the Chief of Acquisitions (Shaik) explained the difference between the prices of the MB339FD and the Hawk. The Secretary of Defence, according to the Report, 'remarked that the cost of the Hawk would be twice that of the MB339FD, for an increase in performance of approximately 15%. Hence the recommendation of the AASB that the cheaper option be selected.'[45] However, this view was contradicted by the Minister of Defence, who 'held the view that the operational qualities of the aircraft were only part of the consideration and the government had to decide whether or not to enter the European market, and if so, through which partner.'[46]

129.11. According to the Report, on 31 August 1998 a special ministerial meeting was held. At this meeting, the ministers were provided with the costed and non-costed options. The minutes of the meeting recorded that 'after a discussion it was decided by the Ministers present that the Hawk (Option B) [the non-costed option] should be recommended as the preferred option. This decision to recommend the Hawk was based on national strategic considerations for the future survival of the defence aviation sector and the best teaming up arrangements offered by the respective bidders. Strategically important industrial participation programmes offered with the best advantage to the state and local industries were also a determining factor in the final recommendations for the preferred bidders per programme.'[47]

[45] *Ibid*, paragraph 4.6.5
[46] *Ibid*
[47] *Ibid*, paragraph 4.6.6

129.12. On 7 September 1998 the Secretary of Defence (General Pierre Steyn) directed a memorandum to the Chief of Acquisitions (Chippy Shaik). Steyn stated that he did not agree with the minutes quoted above. He said: 'I question the completeness and accuracy of paragraph 11. I cannot recall that a decision was made. The merits of the Hawk and MB 339 were discussed. The fact that the MB 339 meets the SAAF LIFT requirements adequately (with reference to the pre-determined criteria) is not reflected. The Hawk is not the 'best' option from a military point of view – the fact that its acquisition cost could solicit substantially more IP apparently carries the day. The SAAF, however, will have to absorb considerably higher operating costs during its life cycle.'[48]

130. Thus the Report found with regard to the LIFT evaluation, that:

130.1. The LIFT contenders were evaluated on a costed and non-costed basis.

130.2. The decision to evaluate without cost as a criterion was made by the Minister of Defence.

130.3. There were material concerns regarding the calculation of BAE's NIP score related to the LIFT, and the NIP value assigned to BAE's bid was overinflated.

130.4. When the NIP/DIP, technical and financing evaluations were consolidated, the MB339FD was ranked in first place when cost was included as a criterion; when cost was excluded as a criterion, the Hawk was placed first and the MB339FD second.

[48] *Ibid*, paragraph 4.6.12

130.5. A special ministerial meeting was held at which the costed and non-costed options were presented for discussion. At that meeting, the ministers decided to approve the non-costed option in which the Hawk was ranked in first place, and thus directed that BAE be selected as the preferred bidder to begin negotiations.

130.6. The content of this meeting was disputed by the Secretary of Defence, who asserted in a memorandum to the Chief of Acquisitions that while the matters were canvassed with the Ministers, no final decision was actually made to recommend BAE as the preferred bidder to supply the LIFT.

Selection of the Preferred Bidder – Submarines

131. The Report stated that there were numerous substantive problems in the assessment process that led to the selection of GSC as the preferred bidder, and with the bid of GSC itself.

132. In the review of the NIP evaluation conducted by the SDPP procurement teams, the Report found:

132.1. There were errors in the computation of the dollar value of GSC's offset offer, the effect of which was to increase the score granted to GSC for its offset component, albeit only of 1%[49]

132.2. There were errors in the calculation of Fincantieri's NIP scores, the effect of which was to understate the offset score awarded to the company[50]

[49] *Ibid*, paragraph 6.4.2.1
[50] *Ibid*, paragraph 6.4.2.2

132.3. The combined effect of the computation errors on the final NIP scores was marginal, although if the errors were corrected, the bidder DCN would have received a normalised score of 12 rather than 11.[51]

132.4. There was a difference between the total NIP offered by GSC in its bid and the NIP amount that it was finally contracted to deliver: the amount of NIP that GSC was to deliver according to the final contract was less than it had offered during the evaluation phase. This was material as Cabinet had decided to approve GSC as the preferred bidder based on the NIP amount offered in the evaluation phase, which proved to be more than GSC eventually delivered. A recalculation of the NIP scores of GSC and other bidders, based on what GSC was contracted to supply rather than what it originally offered, showed that while GSC's normalised score would have remained 100, Fincantieri's score would have increased to 14 from 10; Kockums would have increased to 20 from 14; and DCN's score would have increased to 16 from 11.[52]

132.5. There were computation errors in the assessment of a major project submitted by GSC – a stainless steel plant at Coega. The effect of the computation error was to increase GSC's NIP value.

132.6. Once the various errors referred to above were corrected, the assessed total value of GSC's NIP offer was reduced from $239 593 950 000 to $147 703 624 000, while the value of Fincantieri's offer was increased from $22 941 603 to $24 218 618.[53] While GSC's normalised NIP score remained at 100, the scores

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[51] *Ibid*, paragraph 6.4.2.3
[52] *Ibid*, Section 6.4.3
[53] *Ibid*, 6.4.4.4

awarded to Fincantieri increased from 10 to 16, Kockums from 14 to 23 and DCN from 11 to 19.

132.7. DCN's final NIP score with regard to the submarine evaluation was valued at only 50% of its submitted value. This was because DCN had submitted a parallel bid to supply the corvette, and had submitted the same suite of offset offers in both bids. The Report found that SOFCOM had the right and ability to communicate with bidders to clarify matters. SOFCOM could thus have contacted DCN to establish whether it wanted its offset offers to be evaluated as part of its corvette bid or as part of its submarine bid. DCN was however not contacted to clarify this matter. Instead, Chief of Acquisitions Chippy Shaik directed that DCN's NIP scores be split, with 50% attaching to the submarine bid, and 50% to the corvette bid. This had the effect of excluding 50% of DCN's offset offer in calculating the submarine bid.[54]

133. With regard to the evaluation of the DIP domain, the Report noted that:

133.1. There were computation errors in the calculation of the DIP values of the different bidders.[55] Once the errors were corrected, GSC's DIP score should have been 25,10 rather than the 54 it was awarded; the Kockums score should have been 88,80 rather than the 93.28 awarded; and Fincantieri's DIP score should have been 89,60 rather than the 93,30 awarded. DCN's DIP score remained at a normalised 100.[56]

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[54] *Ibid*, paragraph 6.4.5.2
[55] *Ibid*, paragraph 6.4.6.12
[56] *Ibid*, paragraph 6.4.6.13

133.2. Most seriously, it was found that both GSC and Kockums had, in their bid, failed to comply with a critical DIP requirement.[57] This should have led to their exclusion from the evaluation process.[58] This led to the evaluation team, in particular Johan Van Dyk, head of Countertrade at Armscor, seeking legal advice on on the validity of the bids. The legal opinion, provided by a Mr Hlahane, confirmed that both GSC and Kockums had failed to meet the critical DIP requirements.[59] Despite this legal opinion, Chippy Shaik and L Esterhuyse ordered that all bidders that had failed this critical requirement be allowed to rectify the problems and proceed to the next evaluation phase.[60] The Report summarised its findings as follows:

> *'It was observed with respect to the submarine program that only Fincantieri had fully complied with the critical criteria pertaining to the DIP. According to the value system, only Fincantieri should then have gone through to the second round of the DIP evaluation, as the only bidder that had fully complied with the critical criteria pertaining to the DIP evaluation.'*

134. With regard to the scoring of the financing domain, the Report found serious errors that, if corrected, would have generated substantially different results. They related to the manner in which scores were awarded. Evaluators were asked to score bidders on various aspects of their financing bid from 1 (excellent) to 5 (poor). Thus the lower the total, the better the score. In some instances, bidders failed to comply and could not be given a score. Certain evaluators gave these elements a score of 0, rather than 5. This had the perverse effect that bidders who submitted bid elements that could not be evaluated due to non-compliance, received a better score.[61] Importantly, the Report found that once this

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[57] *Ibid*, paragraph 6.4.6.14
[58] *Ibid*, paragraph 6.4.6.19
[59] *Ibid*, paragraph 6.4.6.17 (a) – (c)
[60] *Ibid*, paragraph 6.4.6.17 (d)
[61] *Ibid*, paragraph 6.4.7.6

error was corrected, the final scores awarded to the bidders were substantially different, as the table below indicates:[62]

Bidder	Original Score	Original Ranking	Revised Score	Normalised Score	Revised Ranking
GSC	2,279	1	2,823	86.98	3
DCN	2,459	2	2,497	100	1
Fincantieri	2,621	3	2,663	93.37	2
Kockums	2,878	4	2,967	81.22	4

135. The Report noted on this point: 'The recomputation indicates that DCN would have been placed first and Fincantieri second in the financing domain. GSC would have been placed third and not first as originally determined.'[63]

136. In relation to the final evaluation domain, the establishment of the best military value, the Report raised concerns as to the weighting systems used and decisions made regarding the assumed cost of a critical segment. The Report noted that technical evaluation score consisted of three scored domains: the product performance evaluation, the logistics evaluation, and the engineering management evaluation. Each bidder was awarded a score on each of these domains. These scores were then divided by the quoted cost of the bidder in each domain to derive a further score. These scores were then added together according to a weight factor. The engineering management

[62] *Ibid*, paragraph 6.4.7.6 (d)
[63] *Ibid*

component was weighted at 6.54%; the integrated logistics support was weighted at 67.51%; and product performance was weighted at 25.95%.[64]

137. In assessing the manner in which the scores were derived, the Report noted that GSC received a winning score in large part because it received a much larger score for its integrated logistics support offer. This, in turn, was due to the fact that it had quoted a cost of $36m for integrated logistics support. This was considerably lower than the other three bidders. GSC's ILS cost was lower due to the failure of GSC to cost certain options. As such, the evaluator decided to 'arbitrarily' increase the cost of GSC's ILS offer by 75%. While this marginally decreased GSC's score, it still produced a result that placed GSC first in the technical evaluation. The Report noted:

> *'The decision to allocate an additional 75% of the quoted logistic cost of the GSC, which was significantly less than the logistics costs offered by Fincantieri and DCN, was arbitrary. This additional 75%, amounting to $27m, resulted in a total ILS cost of US$63m for the GSC, compared to US$111.18 million for Fincantieri and US$113.47 million for DCN. Therefore, because the denominator for the ILS element in the formula for GSC was much less than the other bidders, and because of the impact of the weigh factor of 67.51% of the ILS component, the result was that GSC was effectively the preferred bidder in the overall technical evaluation on the basis of the value of $63 million.'*[65]

138. Despite these findings, the Joint Investigation Report concluded that, in relation to the submarine selection, 'there is no evidence to indicate that any individual influenced the selection process.'[66] This finding appears to be contradicted by the evidence of serious irregularities presented in the chapter. I submit that this apparent inconsistency required the Commission to investigate this issue in order to establish the truth of the matter.

Selection of the Preferred Bidder – Corvettes

[64] *Ibid*, paragraph 6.4.8.4
[65] *Ibid*, paragraphs 6.4.8.10 – 6.4.8.11
[66] *Ibid*, paragraph 6.8.8

139. The Report found numerous serious problems in the process that led to the selection of the German Frigate Consortium as the preferred bidder to supply the corvette platform:

139.1. In assessing the technical evaluation, the Joint Investigation Team noted that some of the bidders 'did not conform to the critical minimum performance criteria, as stipulated in the value system.'[67] The bidders that failed to meet the minimum criteria were DCN, GEC and GFC. Indeed, of the four bidders which bid in the RFO phase, 'only Bazan complied with the minimum performance criteria.'[68]

139.2. The Report found that despite these non-conformances, which should have led to the exclusion of these bidders, they were forwarded to the next round of evaluations:

> *'Despite these non-conformances, the above offers were nevertheless evaluated in the second round. No evidence of approval of such a decision could be found during the forensic investigation. Upon enquiries made to the co-Chairperson of SOFCOM, Mr Shaik, regarding these non-conformances, indicated that he was not aware of these failures to conform. He referred the investigators to the technical evaluation team.'*[69]

139.3. The Report noted similar concerns with regard to the evaluation of the DIP component of the bids. It noted that 'several calculation errors were found in the scores allocated to certain bidders.' When the errors were corrected, the scores awarded to the various bidders was changed, although the DIP rankings were unmoved: '... no change occurred in the final ranking. In terms of the calculation performed during the forensic investigation, the normalised score

[67] *Ibid*, paragraph 7.3.3.5 (a)
[68] *Ibid*, paragraph 7.3.3.5 (a) (v)
[69] *Ibid*, paragraph 7.3.3.5 (a) (iv)

decreased for DCN, GEC and GEC by 4,1 and 10 points respectively. This change did not have an effect on the final consolidated ranking where the three evaluation criteria were combined.'[70]

139.4. Most importantly, GFC, the eventual winner of the corvette bid, 'did not comply with the minimum criterion specified in the DIP value system...'[71] As a result, 'GFC should have been disqualified from proceeding to the next round of evaluation.'[72]

139.5. To overcome the flaw in their bid, GFC were given the opportunity to submit additional information that brought them in line with the minimum criteria. This was 'clearly a deviation from the value system instructions.'[73] Indeed, it was reported that that Johan Van Dyk had sought a legal opinion from Armscor's counsel, which confirmed GFC's non-compliance.[74] The evaluation team was also of the opinion that GFC should be excluded.[75]

139.6. Nevertheless, GFC were allowed to submit additional information. The Report notes that this decision appeared to have been taken by the co-Chairpersons of SOFCOM, and that they failed to inform or check this with other members of SOFCOM:

> *'There is no evidence from the minutes of SOFCOM that the memorandum directed to SOFCOM chairpersons had, at any stage, been submitted to the entire committee. In the absence of such evidence, it would appear that the chairpersons took a decision to condone the mentioned non-compliance without the approval of the committee. The*

[70] *Ibid*, paragraph 7.3.5.4 (b)
[71] *Ibid*, paragraph 7.3.5.4 (c) (i)
[72] *Ibid*
[73] *Ibid*, paragraph 7.3.5.4 (c) (ii)
[74] *Ibid*, paragraph 7.3.5.4 (c) (iv)
[75] *Ibid*

decision had a far-reaching impact on the eventual selection of the preferred bidder for the corvettes, which was GFC. Upon enquiry about this decision, Mr. Shaik indicated that this decision was taken by them in their capacities as Chief of Acquisitions of DoD and CEO of Armscor. His authority, according to him, vested in his management delegation from DoD.'[76]

139.7. With regard to the evaluation of the financing domain, the Report stated that all bidders had failed to meet the 'minimum critical criteria as stipulated in the value system.'[77] As with other domains, this should have led to the exclusion of all bidders. However, 'a decision was taken on 3 June 1998 by SOFCOM that all bids will be evaluated' despite these non-conformances.[78]

139.8. The Report also pointed out the following features of the corvette selection process, all of which raise questions about the correctness and probity of the evaluation process:

'Further observations with regard to the selection process are that:

- *Bazan was the only bidder that complied with all the critical minimum criteria in respect of technical and DIP evaluation.*
- *Bazan obtained the highest military value and DIP scores.*
- *Bazan provided the highest percentage of DIP and NIP in relation to the contract price.*
- *Bazan offered the lowest price of the four bidders.*

GFC, however, was nominated the preferred bidder on the basis of their NIP offer. This is despite the fact that NIP is not ascertainable in terms of achievability.'[79]

Selection of Subcontractors

[76] *Ibid*, paragraph 7.3.5.4 (c) (iv)
[77] *Ibid*, paragraph 7.3.7.3 (h)
[78] *Ibid*
[79] *Ibid*, paragraph 7.3.5.4 (i)

140. In addition to its findings regarding the correctness of the process in the selection of the primary contractors, the Report made significant findings regarding the selection of subcontractors. This is a highly salient issue as members of the Inter-Ministerial Committee claimed that the state through the SDPP process had played no role in selecting subcontractors, and that the selection of subcontractors was performed entirely by the primary contractors.

141. The Report found that 'in at least two instances where a tender process was followed, the basic principles of fairness and open competition appear not have been followed, viz:

141.1. The selection of the supplier of engines for the LUH;

141.2. The selection of the supplier of gearboxes for the corvettes.

142. The Report concluded that entire process pertaining to the abovementioned instances, from soliciting through to adjudication of the relevant tenders can be criticized. The facts and circumstances show that the project teams and senior personnel in the employ of Armscor and DoD played a significant role in these instances of the selection of subcontractors, apparently because of technical and strategic considerations. Complaints were lodged by the competitors against the process followed for the selection of these subcontractors.'[80]

Conflict of Interest – Schamin 'Chippy' Shaik

[80] *Ibid*, paragraphs 10.2.4.4 and 10.2.4.5

143. The Joint Investigation Team was tasked with investigating whether the Chief of Acquisitions, Schamin 'Chippy' Shaik, had taken part in any part of the SDPP process in which a company owned by his brother, Schabir, was discussed or was otherwise germane to proceedings. The Report found that 'there was a conflict of interest with regard to the position held and role played by the Chief of Acquisitions of DoD, Mr S Shaik, by virtue of his brother's interest in the Thomson Group and ADS [African Defence Systems], which he held through Nkobi Holdings. Mr Shaik, in his capacity as Chief of Acquisitions, declared his conflict of interest in December 1998 to the PCB, but continued to take part in process that led to the ultimate awarding of contracts to the said companies. He did not recuse himself properly.'[81]

144. This finding was amplified in the following chapter of the Report, which dealt specifically with allegations of irregularities arising out of the selection processes related to the corvette combat suite, which was due to be provided in part by ADS. The findings in this regard were equally damning:

> *'Mr Shaik chaired most of the PCB [Project Control Board] meetings. He disclosed a conflict of interest at the second PCB meeting and indicated that he would recuse himself from decisions regarding the Combat Suite, but not from the meeting.*
>
> *His recusal was no recusal at all. It appears he mostly remained present during discussions of the Combat Suite and that he also, on occasion, took part in discussions on the topic.*
>
> *Mr Shaik's presence at certain meetings of the PCB, even though he declared a possible conflict of interest, created a perception of impropriety. The mere fact that he remained in the room and that he made certain inputs could have created the belief that he could have influenced certain decisions in favour of ADS or Thomson-CSF, as some of the other members of the Board might have regarded his presence as intimidating.'*[82]

[81] *Ibid*, paragraph 10.5.4
[82] *Ibid*, paragraphs 11.11.8.1 – 11.11.8.3

Allegations of Irregularity in the Selection of the System Management System (Corvette Combat Suite)

145. The Joint Investigation Team was tasked with investigating allegations by Richard Young that his company, C^2I^2, had lost the contracts to supply certain subcontracts related to the corvette combat suite in irregular circumstances. The two subcontracts were for the provision of an Integrated Management System (IMS) and a System Management System (SMS).

146. The findings with regards to the IMS were lengthy and, at times, contradictory. I do not deal with them here. However, with regard to the SMS subcontract, the Report found:

> *'ADS was the only supplier nominated or listed for the SMS. ADS submitted its first quote for the SMS on 15 March 1999 for R64.73 million. On 7 April 1999, ADS submitted a lower quote for R37.64 million. The JPT thereafter requested the GFC to obtain competitive quotes, which resulted in a further quote being obtained from ADS, and a quote also being obtained from C^2I^2. ADS then, on 15 April 1999, submitted its third quote for an amount of R29,647 million. C^2I^2 submitted a quote for R30,04 million. All quotes were submitted to the GFC.*
>
> *ADS therefore had three chances to quote. Their third offer was R35,08 million than their first quote, and R390 000 less than that of C^2I^2. ADS was awarded the contract.*
>
> *It is clear that the first ADS quotation was inflated. Furthermore, ADS was given the opportunity of lowering its tender of R64.73 million for the SMS to just below that of C^2I^2 over a period of more than a month. C^2I^2 was given a maximum of four days to submit its tender. This creates the impression that C^2I^2 was merely requested to quote in order to bring down ADS's [sic] price.'*[83]

THE DRAFT AUDITOR GENERAL'S REPORT

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[83] *Ibid*, paragraph 11.11.5.1 – 11.11.5.3

147. The detail and evidence in the draft version of the Auditor General's Report were substantially more voluminous, and in most instances more critical of the SDPP procurement process.

148. In this section of this affidavit, I highlight the material that was in the draft AG report but excised in the Joint Investigation Report. I do not attempt to summarise the totality of the material in the draft AG Report, but rather draw attention to significant additional material that sheds further light on the findings outlined in the discussion above.

149. Unless otherwise stated, the version of the draft AG Report discussed here is the version that appears to have been compiled on 18 October 2001. This was shortly before the submission of the document to the Inter-Ministerial Committee. This appears to be the most complete version of the draft AG Report. This is demonstrated by, *inter alia*, the cogency and consistency of the evidence and findings, in addition to the document formatting that closely mirrored that adopted in the final Joint Investigation Report.

Selection of the Preferred Bidder - ALFA

150. As noted above, there was no competitive evaluation of the financing domain for the ALFA, as Dassault and DASA failed to submit financing proposals. The Joint Investigation Report noted that the minutes of an AAC meeting of 13 July 1998 recorded that DASA and Dassault had failed to submit their financing proposals 'notwithstanding repeated requests', but did not comment on this claim.[84] The draft AG Report had cast doubt on this claim, stating 'the 'repeated requests' mentioned in the minutes could not be confirmed during the investigation. Letters have been forwarded to bidders concerned,

[84] *Ibid*, para 4.6.3.1

requesting them to confirm that they have been requested again to provide finance offers.'[85]

Selection of the Preferred Bidder – LIFT

151. While the draft AG Report included most, if not all, of the detail subsequently included in the Joint Investigation Report regarding the LIFT evaluation and selection, the findings were fundamentally different:

151.1. The Joint Investigation Report was silent on whether the Minister of Defence, Joe Modise, had materially impacted on the selection process regarding the ALFA and LIFT. This was particularly notable in light of the claims then in the public domain that the Minister was conflicted by virtue of his ownership in the shares of the company Conlog, which was due to receive business flowing from BAE's NIP offer. The draft AG Report, however, had made clear and unambiguous findings (which appear to have direct relevance to paragraph 1.5 of the Commission's terms of reference). It stated:

> *'There is an indication that the former Minister of Defence could have influenced the decisions of role-players in the process, for example:*
>
> *During the 1997 Council of Defence approved the ALFA be included in the SDPs as part of a 2-tier system. This was to replace the Impala and Cheetah/Mirage with a fighter/trainer aircraft. During a meeting of the SAAF Command Council on 17 November 1997, after having received the results of the RFI evaluation, the Council concluded that a 3-tier system was essential to satisfy the requirements of the SAAF. However, the minutes of the meeting indicate that the Minister of Defence had taken a decision to revert a 3-tier system.*
>
> *After the evaluation results for the LIFT RFI in April 1998, the former Minister cautioned the members of a joint Armaments Acquisition Steering Board (AASB), Armaments Acquisition Council (AAC)*

[85] Draft Auditor General's Report Dated 18 October 2001, paragraph 5.9.7.2

meeting of 30 April 1998 that a visionary approach should not be excluded, as the decision on the acquisition of a new fighter trainer aircraft would impact on the RSA defence industry's chances to be part of the global defence market through partnerships with major international defence companies, in this case European companies...

According to the minute of a special SAAF Command Council meeting held on 29 June 1998, a separate recommendation is required where cost is not taken into account, as per a request of the Minister of Defence. According to a Project Study Report, he had also requested that cost not be the only consideration when recommending a LIFT contender for final selection. By not taking cost into account, British Aerospace (BAE) was favoured during the technical evaluation of the LIFT. After evaluation of the RFO for LIFT, the AASB recommendation was for the MB339FD. According to the minutes of the CoD meeting held on 21 August 1998, the Secretary of Defence remarked that the Hawk 100 doubled the cost of the LIFT aircraft for an increase in performance of approximately 15% - hence the AASB recommendation that the cheaper option be recommended. During the meeting the Minister said that the availability of funds was secondary and the amount of investment coming in was of primary importance. He said "we must not prejudge – let the politicians decide." This viewpoint of the Minister had an influence on the final selection of BAE (Hawk 100) as the preferred bidder.'[86]

151.2. The Joint Investigation Report found that the decision to select the LIFT using a non-costed approached, while unusual, was neither unlawful nor irregular. This finding did not appear in the draft AG Report. The draft AG Report had suggested a different view. It had stated:

'During the investigation it became apparent that, during the technical, DIP, NIP and financial evaluations, as well as during the negotiation phase, preference was given to BAe/SAAB...'[87]

'Furthermore, during the investigation it became apparent that preference was given to BAe/SAAB by making changes to value systems midway through the process. This caused the Hawk aircraft to be ranked first, followed by the MB339FD. The MB339FD could have been acquired much cheaper whilst also meeting the SAAF LIFT requirements adequately.'[88]

[86] *Ibid,* paragraph 5.12.1.1 – 5.12.1.4
[87] *Ibid,* paragraph 5.12.2
[88] *Ibid,* paragraph 5.13

151.3. The draft AG Report had also appeared to cast serious doubt on the probity of the procurement process that led to the selection of the LIFT aircraft:

> *'The relevant bodies with authority should make proper recommendations to ensure that the Cabinet does not have to decide on the best acquisition options as was decided by the AAC. This in essence meant that the entire acquisition process for LIFT was a fruitless exercise.'*[89]

Selection of the Preferred Bidders – ALFA and LIFT (Conclusion)

152. In the 'overall conclusions' in the first chapter of the draft AG Report, the following two findings had been noted:

152.1. 'The findings of the joint investigation support the majority of the key findings by the AG as contained in his Special Review dated 15 September 2000

152.2. There were fundamental flaws in the selection of BAE/SAAB as the preferred bidder for the LIFT & ALFA program.'[90]

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[89] *Ibid,* paragraph 5.14.10
[90] *Ibid,* paragraph 1.8.1 and 1.8.2

Selection of the Preferred Bidder – Submarines

153. With regard to the NIP evaluation, in addition to the problems described in the Joint Investigation Report, the draft AG Report had noted:

153.1. The evaluation of the NIP bid consisted of evaluation team members assessing the business plans and other data submitted by the bidders, and entering this data onto an evaluation sheet. However, it emerged that there was no moderation of this process: 'Individual team members performed these tasks with respect to the various offers received from the bidders of the six different programmes. Based on interviews with Ms Jogessar and Ms de Risi we understand that this process involved only one team member evaluating and quantifying the information furnished by a particular bidder. There was no independent check by another evaluation team member of the credits awarded by the allocated evaluator. This was a significant weakness in the process, as the reasonableness of the evaluation results attained has not been checked. It would be expected that a project of this magnitude would have required that at least two evaluators conduct the evaluation of a single bidder independently, whereafter the results would be compared and moderated.'[91]

153.2. In addition, it had been questioned whether the evaluators described above had the sufficient skills to conduct the NIP evaluation: 'It was noted that expertise of the evaluation team members may not have been sufficient or appropriate. In this regard we draw attention to our interviews with various evaluation team members, where it was specifically stated during one of the consultations that

[91] *Ibid*, para 7.2.11.7

this was the first time that this team member conducted an evaluation of this nature. In addition, all team members interviewed made reference to significant time constraints under which they were required to conform. In particular one team member stated that the time allocation did not enable proper completion of the economic evaluation schedules required in this phase.'[92]

153.3. There was a significant and potentially prejudicial difference between the amount of IP offered by GSC and that which was eventually contracted for. This was because, after the RFO evaluation process was completed and GSC was confirmed as the preferred supplier, it was decided to reduce the number of submarines to be acquired from 4 to 3. As a result of the change, GSC reduced its NIP offer at the same time as it agreed to a reduced price. The draft AG Report had noted two serious implications of this. First, 'the cabinet decision may have been based on inflated information in view of the subsequent reduction in the value of NIP contracted for.' Second, 'prejudice towards unsuccessful bidders could exist, as the reduced value of NIP eventually contracted for did not take into account the impact that this could have had on the original NIP evaluation. Had these final contracted figures been utilised for the purposes of the NIP evaluation, it is conceivable that a different result might well have been obtained and it is therefore likely that a different bidder might have been identified as the preferred bidder.'[93]

[92]*Ibid*

[93] *Ibid,* paragraph 7.2.17

153.4. With regard to the financial evaluation, and in addition to the manifest problems described in the Joint Investigation Report, the draft AG Report had noted that:

153.4.1. The financial evaluation sheets compiled by Ms Phillipa Barstowe had been altered using correcting fluid. This was potentially a significant problem: 'The value system specifically prohibits the use of correcting fluid on the evaluation worksheets. We could find no evidence that this amendment had been properly authorised. There possibility therefore exists that the final results might have been manipulated deliberately in view of the unauthorised use of correcting fluid.'

153.4.2. In totality, the effect of the many computation errors and other problems described in the draft AG Report (and mostly reported in the Joint Investigation Report) was profound in terms of who emerged as the preferred bidder in the selection process. Indeed, when the AG's office conducted a recalculation of the scores according to more reasonable and correct criteria, GSC, instead of emerging the winning bidder, was placed in third. DCN of France was the winning bidder according to the new calculation. The draft report had noted that 'the cumulative effect of the adjustments highlighted in this report indicates that a different bidder might have been selected.'[94] This was stated in a different draft from that which I have quoted thus far. The table below was not included in the Joint Investigation Report, even though

[94] Draft Auditor General's Report, Undated, paragraph 7.9.2

that Report provided much of the underlying mathematical calculations. The exclusion of this table obscured a damning fact regarding the selection of the submarine, which could have led to significant controversy. The draft AG Report had provided the following table by way of illustration:

Recalculated and Corrected Scores for the Submarine Contract as per the Auditor General[95]

Bidder	Total IP Value	Military Value Index	Financial Index	Best Value	Revised Ranking	Original Ranking
GSC (Germany)	96	88	87	95.8	**3**	**1**
Kockums (Sweden)	82	71	81	82.7	**4**	**2**
Fincantieri (Italy)	79	100	93	96.1	**2**	**3**
DCN (France)	100	83	100	100	**1**	**4**

154. The draft AG Report had raised a series of ancillary concerns that were excluded from the Joint Investigation Report. They included the following:

154.1. The draft AG Report found that J J Van Dyk of Armscor's DIP Section had directed a memorandum dated 8 April 1999 to Chippy Shaik indicating that a local defence supplier had queried the selection of the company Zeiss as a supplier for the submarine periscopes from a DIP benefit point of view. A

[95] *Ibid*

second supplier, Kollmorgan, was considered by the local supplier to offer a better DIP package. The memorandum asked the Chief of Acquisitions (Shaik) to indicate the preferred supplier. Shaik approved Zeiss on 1 May 1999. This was also signed by L Swan on 6 May 1999. While this was not irregular, it is further evidence that individuals and decision-making bodies within DoD/Armscor played an active role in decisions concerning the selection of subcontractors. It contradicts the claim that the prime contractor was responsible for the selection of subcontractors and that no individuals from DoD/Armscor or the DTI were able to influence the process.

154.2. The draft AG Report indicated that a memorandum dated 14 October 1997 had been discovered, indicating that one JR Mathers had provided 'inputs on the development of the value system of the submarine program.' Later correspondence discovered by the AG's office indicated that 'Mathers was communicating information pertaining to the RFO via JRM Maritime Consulting'. This information was being communicated to a member of the GSC consortium, HDW. The Report had found that 'the fact that Mathers has communicated with a bidder while having had access to the value system indicates a degree of impropriety has occurred.'[96] The Debevoise & Plimpton Report, to which I refer below, indicated that Mathers had entered into consultancy contracts with a member of the GSC consortium, Ferrostaal.

154.3. The AG's office had reviewed the minutes of an industry group, the South African Industry Submarine Cluster Group Consortium (SASubClub). The minutes 'suggested that attempts by Mr S Shaik and R Adml Howell to facilitate

[96] Draft Auditor General's Report Dated 18 October 2001, paragraph 7.6.1

meetings between SASUBCLUB and ADS with a view to securing projects relating to the submarine acquisition. The minutes referred to related to meetings held between June 1998 and August 1998, which coincided with the dates when the determination of preferred bidders was being confirmed.'[97] This is a serious claim: it is that two senior members of the acquisition team responsible for overseeing the selection of the preferred bidder for the submarine were actively attempting to assist a potential subcontract bidder, ADS, which was to eventually become partly owned by the brother of the Chief of Acquisitions, to secure contracts in a contract over which they were supposed to provide neutral and objective oversight and over which they wielded considerable decision-making power.

Selection of the Preferred Bidder – Corvettes

155. With regard to the evaluation of the financing domain, and in addition to what was noted in the Joint Investigation, the draft AG Report had stated that:

155.1. The AG's office was concerned that, in addition to the non-conformance of bidders with critical minimum criteria in their financing offers, those conducting the evaluation of the financing domain may have lacked the necessary expertise to do so properly: 'it is important to note that the non-conformances as recorded by the evaluators vary amount the evaluators for any particular bidder. Instances were noted where other evaluators indicated a non-conformance by some evaluators as a conformance. Such inconsistencies

[97] *Ibid*, 18/10/2001, paragraph 7.6.2

brought to question the understanding the evaluators had of the evaluation and therefore the results of the actual evaluation.'[98]

155.2. In addition, the AG's office stated that 'no review of the evaluation results was performed, as was confirmed by one of the evaluators, Mrs. B Potgieter. Taking into the inconsistencies noted in paragraph 8.1.1.1 (b) [quoted above], further discrepancies might not have been identified and corrected. This might have had an influence on the financing evaluation results.'[99]

Selection of Subcontractors

156. With regard to the selection of subcontractors, the draft AG Report had provided considerable additional detail of at least two instances where Armscor/DoD was directly involved in the selection of subcontractors, namely the selection of the engines for the LUH contract and gearboxes for the corvettes. In both instances, the selection process was materially flawed. With regard to the selection of the engine for the LUH, which was not described except in passing in the Joint Investigation Report, it was noted that:

156.1. Agusta presented two engine options to Armscor, namely, the Pratt & Whitney 207C and the Turbomeca Arrius 2K2.[100]

156.2. During a meeting on 3 December 1998, Armscor requested that Agusta conduct a trade-off study between the two engines. The study was to 'compare the

[98] *Ibid*, paragraph 8.11.1.1 (b)
[99] *Ibid*, paragraph 8.11.4 (g)
[100] *Ibid*, paragraph 11.5.5.1

technical characteristics, costs and industrial participation proposed from each of the two engine manufacturers.'[101]

156.3. Agusta recommended, based on a 34 page study of the issue, that the Pratt and Whitney engine be selected. It was shown that the Turbomeca engine was more expensive and would thus increase the cost to the SANDF. Pratt & Whitney also offered better DIP value. It was additionally noted that the Pratt & Whitney engine had been successfully installed on over 60 A109 helicopters by Agusta, 'resulting in a high level of confidence in handling and supporting this engine.'[102]

156.4. On receipt of Agusta's report, Armscor and DoD decided to undertake their own evaluation of the offers. A project team was appointed to undertake a technical evaluation. The project team produced a report dated the 24th of June 1999. This report concurred with Agusta's report and recommended the selection of the Pratt & Whitney engine, noting *inter alia* that the Turbomeca engine was more expensive, still under development and thought to have timescale and technical risks.[103]

156.5. An analysis of the DIP and NIP offers of the two engines was conducted by Armscor personnel. The combined results found that Pratt & Whitney was overall the best bidder with regard to DIP and NIP, receiving a total normalised score of 100 against the 84 awarded to Turbomeca.[104]

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[101] *Ibid*
[102] *Ibid*, para 11.5.5.2
[103] *Ibid*, paragraph 11.5.8.2 and 11.5.8.3
[104] *Ibid*, paragraph 11.5.10.3

156.6. Upon the presentation of this scoring, Llew Swan, who presumably oversaw the process, requested that a second evaluation be undertaken, this time taking into account a project involving an investment by Turbomeca in Denel Airmotive. Swan's intervention was recorded in a hand-written note by Mr J Van Dyk dated 12 March 1999.[105] Upon evaluation of the information, Pratt & Whitney again received the highest score – indeed, it increased its score as Turbomeca obtained a newly normalised score of 78 versus 84 previously.[106]

156.7. Remarkably, a third evaluation of the same data was again requested, on the basis that Turbomeca's acquisition of Denel Airmotive might not have been reflected. Again, Pratt and Whitney won the evaluation, although Turbomeca's score was increased to 85.[107]

156.8. Three months later, a fourth and final evaluation was undertaken. According to this new evaluation, the results were reversed, with Turbomeca now receiving a score of 100 and Pratt & Whitney receiving a score of 94.

156.9. On 3 August 1999, a special meeting of the Helicopter Control Board (HPCB) was convened to discuss the engine selection results. At that meeting it was decided that no decision could be made, and that the choice would be presented to Cabinet for a final decision on the engine.[108] This was repeated at a further HPCB meeting on 24 August 1999.[109] However, the minutes of a meeting of the Board on 22 September 1999 merely indicated that 'the engine selection for the LUH was performed and the engine decided upon was the Turbomeca Arrius

[105] *Ibid*, paragraph 11.5.10.5
[106] *Ibid*, paragraph 11.5.10.8
[107] *Ibid*, paragraph 11.5.10.8
[108] *Ibid*, paragraph 11.5.10.12
[109] *Ibid*, paragraph 11.5.10.14

2K2.'[110] The AG's office, however, could find no evidence that the matter had been referred to the Inter Ministerial Committee or Cabinet for a decision.[111]

156.10. This led the draft AG Report to conclude that 'the facts and circumstances relating to the selection of the subcontractor for the supply of engines for the LUH showed that the process leading to the awarding of the contract to Turbomeca was irregular.'[112] In addition, the draft Report found that 'direct intervention by Mr L Swan led to several re-evaluations that ultimately resulted in the contract being awarded to Turbomeca.'[113]

156.10.1. As a result of these events, a local representative of Pratt & Whitney lodged a formal complaint.

156.10.2. The draft AG Report also included a serious allegation regarding the conduct and approach of Chippy Shaik and Llew Swan: 'during consultations with witnesses it was alleged that Messrs L Swan and S Shaik had intimidated certain staff members who had been opposed to the awarding of the contract to Turbomeca. The staff members concerned had been threatened with dismissal if they dared to openly oppose the said two persons.'[114]

156.11. With regard to the selection of the gearbox for the corvettes, which was not described except in passing in the Joint Investigation Report, it was noted that:

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[110] *Ibid*, paragraph 11.5.10.14
[111] *Ibid*, paragraph 11.5.10.15
[112] *Ibid*, paragraph 11.5.11.1
[113] *Ibid*, paragraph 11.5.11.2
[114] *Ibid*, paragraph 11.5.11.4

156.11.1. On 8 June 1999, a meeting of the 'decision-making' Project Control Board meeting was convened. At the meeting a 'summary of supplier decision made by the PCB' was presented and the suppliers on the list ratified. The suppliers on the list included MAAG, which was listed as the approved supplier for the corvette gearboxes.[115]

156.11.2. On 29 June 1999, Mr L Swan informed GFC of this fact.

156.11.3. However, minutes of the PCB of 24 August 1999 indicate that this decision was under renewed consideration. The meeting was informed that while the MAAG gearbox was the approved and selected option, a competitor, RENK, would 'provide much needed work for Gear Ratio, a division of Reumech-OMC.' The Chief of Acquisitions stated that if both suppliers met the requirements, the eventual decision would be decided by DIP related issues. The Chief of Acquisitions ordered the project team to 'take the lead in determining this requirement.'[116]

156.12. It is notable that before this decision was made, it appears that Armscor had already asked the prime contractor to consider using the RENK instead of MAAG gearbox. This was confirmed in a telefax dated 12 August 1999 from Blohm & Voss GmbH (a member of the consortium/prime contractor) to J Van Dyk of Armscor, in which the request to consider RENK over MAAG was

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[115] *Ibid*, paragraph 11.5.12.1
[116] *Ibid*, paragraph, 11.12.4

discussed. In that telefax, the prime contractor confirmed that MAAG had 'been chosen for technical reasons.'[117]

156.13. On 6 September 1999, J J Van Dyk directed a memorandum to L Swan and S Shaik. The memorandum claimed that RENK was offering a more substantial DIP package, and in particular that it was directing all its business to Gear Ratio. The memorandum stated that Gear Ratio played an important role in the maintenance of certain SANDF defence equipment, and that the company had struggled financially due to a lack of orders and would potentially have to be 'mothballed.' The memorandum stated that selecting RENK would 'provide a lifeline for maintaining the capabilities (and to some extent the capacities) of Gear Ratio in support of the SANDF's logistic support.'[118] This memorandum had been presented to L Swan and S Shaik prior to a PCB meeting on 6 October.[119]

156.14. At the PCB meeting on 6 October 1999, it was minuted that the PCB ratified the selection of the RENK gearbox as the preferred option, and that this was based on the DIP evaluation and, in particular, that 'the RENK option provided work to Gear Ratio which is considered a strategic industry for the SA army.'[120]

156.15. As a result of these events, MAAG's representative filed a complaint.

156.16. The draft Auditor General's report found:

[117] *Ibid*, paragraph 11.5.12.5
[118] *Ibid*, paragraph 11.5.12.8
[119] *Ibid*, paragraph 11.5.12.9
[120] *Ibid*, Paragraph 11.5.12.9

'the view expressed by the representative of MAAG in his letter of complaint appears to be well founded. They stated the following:

Armscor was in favour of RENK from the beginning and decided to step in when the contract did not go RENK's way.

When Armscor named the two companies Reumech and Gear Ratio in their letter they showed that they were no longer neutral.

Armscor is trying to keep Gear Ratio financially viable. Gear Ratio has been supplying Armscor with RENK gearboxes...'[121]

156.17. The draft AG Report noted, once more, that 'this is clear example of how Armscor became involved in the selection of subcontractors. Its claim that this issue was left entirely to the prime contractors is therefore not sustainable.'[122]

157. I submit that it is clear from what I have said above that in a variety of reports, there were very serious allegations of misconduct in the SDPP. Some of them were contained in the draft Report of the Auditor General. I submit that these allegations went to the heart of the matters which the Commission was required to investigate.

158. For the reasons set out in the next parts of this affidavit, I submit that the Commission failed to carry out the task which ut was by law required to perform. I stress that the Applicants do not ask the Court to find that the Commission reached the 'wrong' conclusions. Rather, we assert that the Commission did not undertake the enquiry which was required of it. The fact that some of its findings are inexplicable is symptomatic of its failure to carry out the task which it was by law required to perform.

THE FAILURE OF THE COMMISSION TO GATHER RELEVANT MATERIAL, CALL MATERIAL WITNESSES, AND INVESTIGATE PROPERLY EVIDENCE AND ALLEGATIONS THAT WERE BEFORE IT OR MADE AVAILABLE TO IT

[121] *Ibid*, paragraph 11.5.13.1
[122] *Ibid*, paragraph 11.5.13.3

Failure to access and/or consider evidence emanating from criminal investigations: the shipping containers

159. Material emanating from the DSO and DPCI investigations into the SDPP was stored in shipping containers on premises controlled by DPCI.[123] On 11 August 2011, the *City Press* newspaper carried an article by journalists Athandiwe Saba and Charl du Plessis. The article claimed that:

> *"When the arms deal commission of inquiry convened its first public hearings on Monday, it was doing so without having scrutinised more than 3 million pages of documents, which have been gathering dust in these containers at the Hawks' Pretoria headquarters. City Press can reveal that the Arms Procurement Commission, appointed by President Jacob Zuma in November 2011, has been so "overwhelmed" by the more than 4 million pages of documents provided to it by the Hawks that it has disregarded most of it. Three independent sources with knowledge of the commission's work have confirmed that the Hawks are storing about 4.7 million pages of documentation that have been collected in successive criminal investigations by their predecessor, the Scorpions...*
>
> *The three sources have confirmed that only about 1.3 million pages, which relate to the Scorpions' investigation of corruption charges against Zuma and Shaik, have been digitally scanned on to a hard drive that was provided to the commission.*
>
> *The documents are housed in three shipping containers at the Hawks' headquarters.*[124]

160. The following day, the Commission spokesperson issued a statement disputing the 'thrust' of the article:

> *The thrust of the article is that this Commission is disregarding vital evidence gathered by the erstwhile Scorpions in their investigations of the SDPP and comprising massive documentation which is stored in shipping containers at the headquarters of the Hawks. It is alleged that the Commission is avoiding this evidence because it implicates people associated with the ruling party. This is cited as part of the so-called second or secret agenda that the Commission's chairperson and its head of legal research are alleged to be pursuing.*

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[123] 'Arms Deal's Top Secret Graveyard', *City Press*, 11 August 2013
[124] *Ibid*

The article is riddled with half-truths and is misleading to say the least. The simple facts are set out hereunder.

The Commission is fully aware of these documents. The reasons why we have not collected and analyzed them are, firstly, that we do not have sufficient safe storage facilities and, secondly, the state in which the documents are, where there are no indexes etc. The documents needed to be scanned and reduced to electronic format. We can confirm we took possession of some of these documents precisely because they were in hard drives.

The Commission was fully briefed by some of the officers who were involved in the investigations and are au fait with the contents of these documents and doubt was expressed whether the bulk of them would be of any assistance to the Commission's investigations. The Commission then had to decide whether to embark on a time consuming and costly exercise of scanning documents which may turn out to be of no use to the Commission or to rather lead evidence of the relevant officers who would be better placed to know which of the documents are relevant and would be able to refer to them. We chose the latter course.'[125]

161. The statement concludes by stating that, notwithstanding the above, the Commission 'nonetheless decided to proceed to scan the documents and service providers are being engaged to do that'.[126]

162. Volume 1 of the Commission's Report indicates, however, that the substance of the City Press report was accurate. It indicates that the Commission did not fully examine the evidence in its possession that emanated from the investigations that were undertaken by the DSO and taken over by DPCI. Volume 1 of the Report states the following regarding the material in the containers:

On 21 May 2012, the Head of the DPCI advised the Commission that due to the extraordinary volume of documents in its possession, a practical process needed to be devised to ensure that all relevant information is provided to the Commission. On 13 July 2012, the Commission conducted an on-site inspection at the DPCI offices in Silverton and was shown information relating to all the legs of the SDPP investigation. This included documents garnered in preparation for court proceedings; bank statements; forensic reports; requests for MLA directed to various countries; and transcripts of interviews conducted

[125] Media Statement Issued by William Baloyi, Spokesperson: Arms Procurement Commission, 12 August 2013, http://www.armscomm.org.za/media/20130812-ms-response-to-City-Press.pdf
[126] *Ibid*

in terms of section 28 of the NPA Act. All the information was contained in three proverbial Maersk-sized containers and ran into millions of pages. On this day, the DPCI formally handed over the documentation to the Commission. However, due to the limited storage facilities at the Commission's offices, the Commission could not take physical possession of the documentation. On 1 June 2012, the Commission requested an inventory of all the documentation contained in the ship containers and a briefing by officials who were involved in the investigations. On 26 June 2012, the Commission was informed by Major General JW Meiring that the DPCI did not have a complete inventory of all the documents in its possession and that the majority of files had been scanned and could be loaded on an external hard drive for the Commission.[127]

163. The Commission confirms that after speaking to Col Johan Du Plooy, it was provided with an external hard drive of scanned documents. The scanned material equalled roughly one third of the material in the shipping containers. Du Plooy stated that these were the documents that he believed were relevant to the Commission's mandate. Volume 1 of the Commission's Report states at para 47:

It was considered imperative to arrange a briefing for the evidence leaders as well. This briefing took place over two days, on 11 and 12 August 2012. The briefing focused on the investigations into the SDPP conducted by the DSO and the documents and evidence under the control of Colonel du Plooy. At the conclusion of the briefing, Colonel du Plooy handed over to the Commission an external hard drive containing approximately 1,3 million pages of scanned documents relating to all the legs of the investigation referred to above. This information constituted one third of the documents in the containers and was deemed to be the only information that was relevant to Commission's investigation.[128]

164. The Report is silent on the scanning of the remaining documents. The above account suggests that this was not undertaken despite the claims made in the media statement of 12 August 2013.

[127] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015, Vol. 1, Section 10, paragraph 45

[128] *Ibid*, Vol. 1, Section 10, paragraph 46

165. The Commission thus failed to have any regard to roughly two-thirds of the primary evidence seized by the DSO in its SDPP investigation.

166. The Commission's attempt to justify this decision on the basis that it was told by Col. Du Plooy that the remainder of the documents were irrelevant is, I submit, not acceptable given the task and duty of the Commission. The Commission did not conduct even a sampling of the documents to establish whether there was reason to believe that they contained relevant material. It did not independently satisfy itself that the documents contained no relevant information.

167. In addition, the Commission heard evidence from Col Du Plooy that cast doubt on his ability to comment accurately on the full content of the shipping containers. At paragraphs 2955, 2956 and 2957 of Volume 2 of the Report, Du Plooy's impression of the totality of the documents is summarised as follows:

> *'He has given the Commission all the documents he thought relevant. He had gone through some of the documents relating to BAE in the containers stored at their premises and could not find anything significant in those documents.*
>
> *The documents were initially stored in strongrooms and when SAPS took over the Gauteng SAPS offices, he had to move those documents to the containers to make space for the SAPS. They were not properly indexed, except the documents relating to the Shaik matter.*
>
> *Documents relating to the BAE and GFC investigations were not indexed. He agreed with General Meiring that it was difficult to find a document in the containers.'*[129]

168. This demonstrates that:

[129] *Ibid*, Section 55, paragraph 2955 - 2957

168.1. Du Plooy had only gone through 'some' of the documents related to the BAE leg and contained within the container;

168.2. The documents lacked an index that allowed for easy review;

168.3. The organization of the container and its contents made it difficult to locate relevant documents.

169. The Commission must have been aware that Du Plooy was the lone investigator into the SDPP from 2008 onwards, including in the period during which the DSO executed search warrants on the residential and business properties of BAE consultants Fana Hlongwane and John Bredenkamp. He self-evidently would not have been able, in the period between the search and seizure in late 2008, and the DPCI's termination of its SDPP investigation in October 2010, fully to scrutinize the evidence collected in the BAE searches, such that he could reliably testify as to their contents.

170. The Commission adopted an attitude of willing and wilful ignorance with regard the contents of an estimated 2.6 million documents in its possession, which had been collected by the DSO in its investigation of the SDPP.

Failure to access relevant records of criminal proceedings

171. The Report states (Vol 1 Section 1) that the Commission gathered and considered the records of a number of court proceedings. Section 7.3 paragraph 33 states that the Commission attempted to secure records of the Special Commercial Crimes and High Courts regarding the matters between the *State v Ian Pearce* (11 December 2002) and the *State v Michael Woerfel*, but was unable to do so. The Commission was informed

telephonically that the records could not be located and that they had likely been destroyed in a fire.

172. It appears that the Commission did not gather the full record in three further legal proceedings that were directly relevant to the SDPP and to the Commission's terms of reference, in particular paragraphs 1.1, 1.5 and 1.6. Where the Commission did consider a partial record of proceedings, it inexplicably concluded that their content was not germane to the Commission's mandate.

173. The three additional matters are:

173.1. S v Schabir Shaik (2005, Case No: CC27/04) and related appeals.

173.2. S v Jacob Zuma, Thint Holdings (Southern Africa) (Pty) Ltd and Thint (Pty) Ltd. This would include the extensive records of the related proceedings brought by Mr Zuma against the Director of Public Prosecutions in order to have his criminal prosecution set aside.

173.3. S v Tony Sithembiso Yengeni and Michael Joseph Woerfel (2003, Case No 14/09193/01). It may be that the Commission's reference to the Woerfel case is a reference to this case, and that the Commission did attempt to obtain the record of the Yengeni case. The Commission's records will no doubt clarify this.

174. The Commission's findings at Volume 3 make no mention of Schabir Shaik or Jacob Zuma. Schabir Shaik is referred to once in Volume 2, in the summary of the evidence of Richard Young.

175. Although the Commission does not explain directly why it did not consider the records and findings of the Schabir Shaik trial and the criminal proceedings against Jacob Zuma germane to its enquiry, the underlying reason appears to emerge from Chapter 1, Section G of Volume 1 of the Report. Section G of Volume 1 provides the historical background to the investigation, including the previous criminal and other investigations into the SDPP. At paragraph 28, the Report describes the nature and content of the DSO investigation into the SDPP, and refers to an internal DSO memorandum dated 2 December 2008, intended 'as a response to a letter of 1 December 2008 from SCOPA to Advocate M Mpshe SC about the status of the investigations.'[130] The Report states:

> *'The investigation that the team had focused on since 2001 and that proceeded furthest was the Shaik/Thomson/Zuma/Thint leg. The team had this to say about this leg of the investigation:*
>
> *'As will be seen below, this investigation and prosecution ultimately included offences that were entirely unrelated to the Arms Deal. It has thus become a misnomer to regard the Shaik/Nkobi/Zuma/Thint leg as an "Arms Deal" prosecution, when it is in fact not.'*[131]
>
> *The aforementioned investigation was extended on 22 October 2002, on 8 August 2005 and again on 1 December 2006. The essence of the additional offence, according to the investigating team, was that the current President 'had fraudulently failed to disclose the payments he had received from Mr Shaik and his companies to Parliament, the Cabinet and SARS.' This assertion bolsters the earlier statement that this investigation did not form part of the so-called 'Arms Deal' investigation.'*[132]

176. It thus appears that the Commission concluded, on the basis of the internal memorandum, that the matters canvassed in the Schabir Shaik trial and the investigation and criminal proceedings related to Jacob Zuma and/or Thint had nothing to do with the SDPP.

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[130] *Ibid*, Vol. 1, Section G, para 28
[131] *Ibid*
[132] *Ibid* Vol. 1, Section G, para 29

177. This interpretation of the internal memorandum was rejected by Col Johan Du Plooy in his evidence to the Commission. Du Plooy was a member of the DSO investigation team, and was thus well placed to comment on the content of the internal memorandum. He clarified that what was meant by the internal memorandum was not that the Shaik and Zuma matters did not touch on the Arms Deal, but that that they also touched on matters that had nothing to do with the Arms Deal. [In the words of the internal memorandum, they ultimately included offences that were entirely unrelated to the Arms Deal.] Pressed on the meaning of the paragraph quoted, Du Plooy said:

> *'What he is trying to say and I do agree, honourable Commissioner, that it can be a bit confusing with what he is trying to say there. But, in my understanding, all that Advocate Steynberg tried to tell me, tell SCOPA is that we, as a team investigator, this Schabir Shaik, or the Shaik, Nkobi, Thint leg that forms part of the Armsdeal investigation. But, in that, while we are investigating that, there we also found other projects that, where Shaik was involved with. Because you must remember, our focus was the Nkobi Group of Shaik. What he did, where he was involved in. To say then, that is not, so we tried to tell them this is part of the Armsdeal, but there were other projects that were not part of the Armsdeal, but were also investigated.'*[133]

178. I submit that the Commission misconceived the position, and as a consequence failed to investigate a matter which it was obliged to investigate. In this regard it is necessary also to have regard to the formal submission of DSO to SCOPA, which was made on 23 January 2009. The submission was 'compiled in response to a letter from the Chairperson of the Standing Committee on Public Accounts (SCOPA) dated 1 December 2008.'[134] It included no version of the paragraph in the internal memorandum on which the Commission relied to justify its not investigating the Shaik and Zuma prosecutions.

[133] Public Hearings Transcript, 18 May 2015, p. 10786

[134] Report by NPA to Scopa on Arms Deal Investigations, Submitted by the National Prosecuting Authority to SCOPA, 23 January 2009

179. The NPA submission to SCOPA explicitly states that the Schabir Shaik trial and the charges against Jacob Zuma arose from information that emerged from the 'Corvette Suite leg' of its broader investigation into the SDPP.[135] Paragraph 24 explains that in addition, other investigations unrelated to the Arms Deal emerged out of evidence uncovered during the course of this investigation. The NPA submission said:

> *'The Corvette Suite Investigation*
>
> *This matter had its origins in the allegations during the JIT investigation of the conflict of interest of the former Chief of Acquisitions in the DoD, Mr Shamin "Chippy" Shaik in relation to the involvement the Nkobi companies owned by his brother, Mr Schabir Shaik in tendering for the combat suite sub-contract of the corvette contract.*
>
> *17. Searches conducted in this matter led to the discovery of the so-called "encrypted fax" which purported to deal with a meeting brokered by Mr Schabir Shaik. The fax stated that at the meeting Mr Zuma agreed to accept a bribe of R500 000 pa. from Thomson CSF (Thint) in return for his protection and future support. Further investigation uncovered evidence of payments by Mr Schabir Shaik and his companies to Mr Zuma over a number of years and corresponding assistance offered by Mr Zuma in certain of Mr Schabir Shaik's business dealings.*
>
> *II. Charges investigated*
>
> *18. On 24 August 2001 and arising out of the preliminary investigation described in paragraph 11 above, the Investigating Director instituted an investigation in terms of section 28(1)(a) of the NPA Act.*
>
> *19. The terms of the investigation included the suspected commission of offences of fraud and/or corruption in contravention of the Corruption Act, 1992 arising out of the arms deal involving the prime bidders/contractors in terms of which certain contracts and/or sub-contractors for the supply of armaments were concluded and more specifically in respect of the following contracts and sub-contracts:*
>
> *19.1. the German Frigate Consortium (between African Defence Systems (Ply) Ltd, Thyssen Rheinstahl Technik GmbH, Blohm & Voss GmbH, Howaldtswerke Deutsche Weft AC and Thomson-CSF NCS France) as prime bidder/contractor for the supply of corvettes for the Corvette programme; and*

[135] *Ibid,* para 14 - 27

19.2. African Defence Systems (Pty) Ltd as sub-contractor for the German Frigate Consortium for the supply of the corvette combat suite for the Corvette Programme, including the undue payment to Futuristic Business Solutions (Pty) Ltd for the supply of Integrated Logistic Support Services and/or the solicitation/payment/agreement of undue payments involving entities directly or indirectly linked to African Defence Systems (Pty) Ltd, Futuristic Business Solutions (Pty) Ltd and/or Thomson-CSF.

20. On 22 October 2002 the investigation was extended to include the suspected commission of fraud and/or corruption in contravention of the Corruption Act 1992 arising out of payments to or on behalf of or for the benefit of Mr Zuma by Mr Schabir Shaik and/or the Nkobi group of companies and/or the Thomson/Thales group of companies, the protection of, and/or wielding of influence for, and/or using public office to unduly benefit the private business interests of Mr Schabir Shaik and/or the Nkobi group of companies and/or the Thomson/Thales (Thint) group of companies by Mr Zuma and other suspected offences by Mr Schabir Shaik and/or the Nkobi group of companies relating to the theft of company funds, tax evasion, the making false entries in the books and records of the Nkobi group of companies and/or failing to keep proper books and records in respect of the Nkobl group of companies, and fraud against the shareholders of the Nkobi group of companies.

21. On 8 August 2005, the investigation was further extended to include an investigation into offences of fraud and the contraventions of the Income Tax Act pertaining to alleged non-disclosure of benefits by Mr Zuma.

22. On 1 December 2006 the investigation was further extended to include racketeering and money laundering in contravention of the Prevention of Organised Crime Act, 1998. committed by Mr Zuma, the Thint companies and persons associated with Nkobi.

IlI. <u>Persons under investigation</u>

23. The persons and entities that are or have been under investigation in this matter include Mr Schabir Shaik, various companies related to his Nkobi Group, Mr Zuma and the two Thint companies.

24. Certain other investigations arose out of evidence uncovered during the course of this investigation, but since they are unrelated to the arms deal, it is not necessary to discuss them further in this report.

<u>IV. Progress of investigation</u>

25. This investigation has progressed the furthest to date and has resulted in criminal prosecution and conviction of Mr Schabir Shaik and various of his companies on various offences including corruption, fraud and money laundering.

26. Subsequent to this, Mr Zuma and the two Thint companies were indicted on similar charges. A host of pre-trial litigation has ensued and at the time of writing the matter is expected to be before court again shortly. It is hoped that the remaining pre-trial issues can be disposed of expeditiously and the matter set down for trial.'

180. Also relevant in this regard are comments made by the Chairperson during the same questioning of Col Johan du Plooy on the 18 May 2015. They suggest that the Chairperson believed that the events discussed in the Schabir Shaik case referred only to matters occurring after the conclusion of the SDPP, and thus fell outside the Commission's terms of reference. Thus, in raising concerns about questions directed to Du Plooy with regard to the relationship between Schabir Shaik and President Zuma, the Chairperson said:

> *'I am not quite certain in the evidence that is being adduced whether it fits into [indistinct] facts. I am really not sure. Last Monday I said to Advocate Pansergrow I said he must make sure that whatever he testify or his clients testify about falls within our terms of reference. Now the Shaik Matter that we are being told about now, I am not sure whether it falls within 1.5 in our terms of reference.* ***My reading and understanding of that trial deals with issues which happened after the contract was signed.'***[136]

181. The Chairperson's comment, and the evidence of Du Plooy, indicate that the Commissioners were aware of the judgment of Squires J convicting Schabir Shaik and his companies and, at the very least, the draft KPMG Report that was compiled in support of the prosecution of Mr Zuma. However, the Chairperson's comments, coming as they do three years into the life of the Commission, demonstrate that the Chairperson and the Commission misconceived the situation, misdirected themselves, and wrongly failed to investigate the content of the Shaik/Zuma/Thint matters and the related legal proceedings these entailed. Those matters are not dealt with at all in the Commission's Report.

[136] Public Hearing Transcript, 18 May 2015, Page 10766

182. Much of the Schabir Shaik trial directly concerned matters that the Commission was obliged to investigate. This is evident from the NPA submission to SCOPA on 23 January 2009, and from the many documents emanating from the trial, including the judgment of Squires J and the Summary of Substantial Facts in terms of section 144(3)(a) of Act 51 of 1977 submitted by the NPA.

183. The Summary of Substantial Facts clearly shows that the factual matrix of the charges against Schabir Shaik related directly to the SDPP and the selection of the preferred combat suite. While these were of course allegations, the judgment of Squires J shows that the court accepted most of their substance. The Summary of Substantial Facts states:

'F. THE ARMS DEAL

33. In the design for the South African Defence Force, which was recommended in the Defence Review, military equipment types were identified as being required by the Force.

34. In order to procure the said military equipment, requests for information were submitted during or about September 1997 to various other countries, and upon receipt of such information, requests for offers were issued to short listed potential suppliers.

35. The process to procure the various types of equipment was generally known as the Strategic Defence Package Acquisition Programme, or the arms deal.

36. In response to the request for offers, inter alia for corvettes, the German Frigate Consortium submitted an offer dated 11 May 1998 to supply the corvettes. The German Frigate Consortium included Thomson CSF NCS (France) and ADS.

37. Offers were also received from the other short listed parties. The German Frigate Consortium bid was eventually approved as the preferred bidder by the South African cabinet on 18 November 1998.

G. THOMSON'S STRATEGY IN PREPARATION FOR THE ARMS DEAL

38. The Thomson group positioned itself at an early stage to obtain a slice of the arms deal in South Africa. The group considered that it was necessary to obtain black empowerment partners to assist in achieving this goal. It was anxious that the partners it chose should meet the approval of the South African Government or more specifically the ANC leadership.

39. The French conglomerate was urgently seeking influence in South African government circles in this period, as the change of government in 1994 had left it with few friends in high places. Pierre Moynot (the Thomson delegate in South Africa and later director of Thomson (Pty) and ADS) sought entrance to government circles and information concerning the progress of the arms deal bidders. During November 1997, Moynot thought that it was necessary to rapidly arrange for a visit by Jean-Paul Perrier, the head of Thomson CSF International, to Deputy President Mbeki and take advantage of this to get him a meeting with Zuma, in order to either succeed in a bid to sell the corvettes, or at least assure a successful bid in respect of the combat system and the sensors.

40. All in all, Thomson perceived that strong political backing would be essential for clinching the combat suite sub-contract.

41. As explained above, Thomson-CSF France first positioned itself by buying at first 50% of Altech Defence Systems, which later became African Defence Systems (ADS), on 24 February 1998. Thomson-CSF France and ADS were joint venture partners within the German Frigate Consortium that was a bidder for the corvette part of the arms deal (project SITRON).

42. During this period Thomson was wracked by uncertainties over the "suitability" of their political contacts in South Africa, as well as the "political correctness" of their partners in ADS, seemingly due to rumours they had received that the then Deputy President, Thabo Mbeki, did not approve of Nkobi as a partner. On 17 March 1998, Shaik conveyed to Jean-Paul Perrier Zuma's wish to meet with Perrier to address this issue.

43. Shamin ("Chippy") Shaik is accused 1's brother and was the Chief of Acquisitions at the Department of Defence. De Bollardiere (a Thomson representative) and his colleague Thétard met Chippy Shaik on 9 July 1998. Chippy Shaik indicated that he would facilitate matters for Thomson if Thomson's position with partners and friends was convenient to Chippy Shaik. He would otherwise make things difficult. Chippy Shaik confirmed that Zuma would be a member of the next cabinet.

44. Thomson-CSF France chose to invest initially directly in ADS, as described above, and not through Thomson Holdings or Thomson (Pty). This direct investment in ADS excluded Nkobi [being a shareholder of Thomson (Pty)] from the corvette bid, seemingly in contravention of the Thomson/Nkobi shareholders agreement.

45. Thomson continued to regard Zuma as a rising force, whilst at the same time regarding it as necessary that what was regarded as "the Zuma problem" must be resolved.

H. NKOBI'S STRATEGY IN PREPARATION FOR THE ARMS DEAL

46. Accused 1 had as early as June 1996 during a bosberaad, informed other directors that Nkobi should strategically place itself to tender for the corvettes. He did not consider its lack of applicable expertise a problem, since its political connectivity would ensure a partnership with a big international company with the necessary expertise or skills. It was understood that accused 1 would use his political connections in order to facilitate the contracts and tenders. It was understood from Shaik as early as 1996 that Zuma would become the deputy president in the post Mandela government.

47. Nkobi regarded its initial exclusion from the arms deal extremely negatively and sought to rectify the situation, inter alia, with the assistance of Zuma, who was being paid for performing such favours.

48. The evaluation of the corvette bid started on 12 May 1998. At this time, accused 1 sought to arrange a meeting between Zuma, at Zuma's request, and Perrier, to resolve a matter that had been outstanding for some time then.

49. Accused 1, Perrier and Zuma met in London on 2 July 1998.

I. THE RESOLUTION OF THOMSON'S AND NKOBI'S STRATEGIES RELATING TO THE CORVETTE BID

50. Nkobi's attempts to rectify its exclusion from the corvette bid were protracted. The minutes of a joint general meeting of directors and shareholders of Thomson Holdings and Thomson (Pty) on 9 June 1998 reveal the extent of accused 1's dissatisfaction. He threatened to obtain redress by way of an interdict should the matter not be satisfactorily resolved.

51. The ADS portion of the corvette contract was worth R1,3 billion, with R450 million coming directly to ADS and the balance going to sub-contractors.

52. On 18 November 1998 the South African cabinet selected the German Frigate Consortium as preferred suppliers of the corvettes.

53. On the same day, a meeting was held at the Nkobi offices between Nkobi and Thomson-CSF France. The subject matter of the meeting was the sale of 10% of Thomson-CSF France's share in ADS, through Thomson (Pty), to Nkobi. The minutes reflect that the meeting was attended by accused 1, Moynot, Thétard, Perrier, Anand Moodley (attorney) and "Minister JZ"

54. Zuma was there as a mediator to resolve the dispute between Thomson and Nkobi and to facilitate Nkobi (also in the promotion of empowerment) obtaining effective shareholding in ADS. The result of this would be effectively the resumption of the partnership between Thomson and Nkobi and thus Nkobi's entry into the corvette bid.

55. The result of the abovementioned meeting was that Nkobi Investments, with Zuma's assistance, became a joint venture partner with Thomson in the German Frigate Consortium and so joined the successful bidder in the corvette bid. This resolved Nkobi' strategy to enter the arms deal. It also resolved Thomson's strategy to obtain an approved empowerment partner.'[137]

184. On 31 May 2005, Squires J delivered his judgment. He found Shaik guilty on two separate charges of corruption and one charge of fraud. Both charges of corruption revolved around the SDPP and its aftermath, although the first count, in respect of which Mr Shaik was found to have developed a 'mutually beneficial symbiosis' with Mr Zuma, also referred to interventions by Mr Zuma on Shaik's behalf on a range of business projects in addition to the SDPP. On the charge that Mr. Zuma had intervened to assist Shaik in relation to the SDPP, the judgment demonstrated the connection between this charge and the SDPP (and thus the Commission's terms of reference). Squires J found:

> *'Running concurrently with these developments were two other attractive possibilities for someone of Schabir Shaik's new advantages. One was the prospect of profitable ventures in the defence sector of Government spending which he confidently expected to expand, and the other was the potential to exploit that expansion which was latent in the company then called African Defence Systems (Pty) Limited, or ADS. The company that became ADS, and in which Shaik sought a participation, was originally incorporated under another name in 1967. After a succession of changes of shareholding and changes of name, it became a division of Allied Technologies Limited (Altech). This latter company was one of those enterprises into which enormous subsidies were poured by the previous Government, in a bid to develop the South African armaments industry to meet the arms embargo placed on this country by the United Nations. Allied Technologies Limited, and this particular division, met the challenge sufficiently well to be regarded eventually as in world class in this field and the only local electronics*

[137] Summary of Substantial Facts in Terms of Section 144(3)(a) of Act 51 of 1977, in the Matter Between The State and Schabir Shaik and Others in the High Court of South Africa (Durban and Coast Local Division), 11 October 2004

enterprise capable of producing the necessary combat munitions suite equipment for the proposed new warships.

Amongst those South Africans who knew of this expertise and capability was Mr Schabir Shaik. If he could persuade a suitable foreign company to become involved with him and his group in acquiring an interest in or control of ADS, the prospects of profitable business in the defence industry were enormous... But by mid-1995 he had decided that better prospects were offered by joining forces with Thomson-CSF (France), who had identified the same potential in the Government defence sector even earlier than Shaik himself.

It is clear from the evidence of Mr Pierre Moynot, who represented Thomsons in this country in the early 1990s, that if it was not already known then it was confidently expected well before the Government white paper on defence was put before Parliament in 1996, that an extensive upgrading of this country's defence capabilities would be needed sooner rather than later because a great deal of the equipment of the Defence Force was by then already obsolete or likely to become so soon. Nor was it only warships, surface and submarine, that would be needed, as Moynot had realised by 1993, but, as the white paper subsequently indicated, also aircraft, both fixed wing and helicopter, and a battle tank, none of which could be made in South Africa and would have to obtained from a foreign source.

Indeed it seems that, as early as 1995, the Government had selected a Spanish shipyard as being suitable for the building of its required corvettes, but that came to nothing because it was realised that there had first to be a white paper on the subject to be laid before Parliament and, while Thomsons itself did not build ships, its electronics industry could, and wanted to, supply the munitions suite of any such vessels as the new South African Government wished to acquire.

It was this capacity and interest that first brought Shaik into contact with Moynot and Thomson-CSF. At a meeting between Thomson, represented by Moynot, the company called ATE with whom Schabir Shaik was already in contact, the South African branch of Plessey and Nkobi, represented by Shaik, the topic of discussion was for these four participants to form a company that would compete against others for the combat systems of any such vessels. While Moynot could not recall the date of this meeting, it was clearly before early August 1995 because it was out of this meeting that Moynot and Shaik discussed the question of Nkobi joining Thomson, and which eventually led, after one or two attempts, to the meeting in Paris on 9 August 1995 between Schabir Shaik and Mr Gomez, where Thomsons accepted the principle of joint ventures in South African business with Shaik and Nkobi as its black economic empowerment partners.

There then followed the incorporation in South Africa of Thomson-CSF Holdings (Southern Africa) (Pty) Limited on 27 May 1996, in which Nkobi Investments was allocated 10% of the shares and with Schabir Shaik appointed as a director, and on 16 July 1996 the incorporation of Thomson-

CSF (Pty) Limited, in which Nkobi Investments held 30% of the shares and Thomson-CSF Holdings 70% and of which company Schabir Shaik was a director from its inception. The importance of repeating these facts is that when it was first mooted in 1995 that Thomsons would acquire an interest in ADS and, as this development subsequently unfolded, the company that was to acquire such ADS shares as Altech would sell was Thomson-CSF (Pty) Limited, as the local operations company, and in which Shaik had nearly a one-third interest...

But the most important aspects of Thomson's activities in South Africa in this trial were, first, the part it played in the bidding process for the new Navy corvettes and its eventual accommodation of Nkobi's interests in the benefit of such bid; and, secondly, its alleged attempt with Shaik thereafter to buy Zuma's protection from any public investigation of the arms deal and his promotion of Thomson's interests in the future which is the subject of count 3. However, to establish how that all came about and how the State says the influence of Zuma was invoked and applied, it is, unfortunately, necessary to set out a little of the history of the bidding process that came to be known as "The strategic defence package programme". This programme consisted of several exploratory and investigative stages, extending from March 1997 to November and December 1998, when the successful bids were announced and even beyond to late 1999 and early 2000 when, after prolonged negotiations, the final contracts were signed by Armscor.

Starting with the defined requirements of each service arm, information was sought from the governments of several countries whose industrial capacity included the ability to produce the required needs of the white paper. From the answers received, it seems international competition was keen and it may be of interest to note that, of the nine governments so asked, one did not reply but there were nevertheless responses from eleven countries. Three governments not so asked also submitted unsolicited information. In fact and in all, for the seven products to be acquired there were 37 would-be suppliers.

From these applicants a short list of possible suppliers was prepared, and that list was drawn up by November 1997. These selected offers were then subjected to an extensive process of examination, analysis, discussion and provisional conclusion by successive committees in the Ministry of Defence, each one in turn examining and assessing the other's conclusions. If, after such a process, both eventually agreed on a particular requirement and a particular possible supplier of that requirement, a further short list of these was prepared for subsequent consideration and that stage was reached by early 1998.

It was the suppliers on this list that were then sent a request for offers. That request was intended to elicit from each such possible supplier its best and final offer for the supply of those particular equipment types so offered. Such response would constitute an irrevocable offer on which the Government or its purchasing agency, Armscor, could thereafter negotiate and conclude a binding agreement. Once these offers were received, they were subjected to

yet a further evaluation process. This time by a number of specialist committees, the members of which came not only from the service arms concerned with the particular equipment, but also representatives of the Ministry of Defence, the Ministries of Trade and Industry, of Finance, Public Enterprises and even some private sector bankers.

Each offer comprised three sections, a technical section, a section that set out the extent to which local industries could be utilised and a section on the financing of the project that was offered, so they required an equivalent spread of expertise to assess and evaluate their work. That process was done against predetermined value systems with marks being awarded as the details of each offer met or did not meet the specified requirements, and from each such exercise would emerge the offeror with the best score. Adding up the scores of the different evaluation teams would determine eventually, as the highest marks indicated, who would be the preferred bidder for each product type, and that process took place from May to July 1998. Nor was that the end of the selection process. The preferred suppliers who emerged from this winnowing reduction were again closely examined by the two specialist committees in the Ministry of Defence. Their conclusions were then submitted to a special ad hoc sub-committee of the Cabinet, consisting of the Minister of Defence and his Deputy, the Minister of Public Enterprises, of Trade and Industry and of Finance, and presided over by the Deputy President. That milestone was reached in August 1998. This Cabinet sub-committee then reported its conclusions and recommendations to the full Cabinet, which made the final decision on the preferred bidders, which decision was announced on 18 November 1999.

But central to this whole exercise, managing and driving it and privy to every bid, reaction, debate and response was Mr Chippy Shaik, the brother of accused No 1, who held an important office in the Ministry of Defence. And another person whose presence and activities during this whole process were noted by the French observer was Mr Jacob Zuma, although officially he had nothing to do with the selection process and was not then a member of the National Government. The State is quite entitled to ask what business he had to be there.

Nor was even that the end so far as the corvette bid and Thomson's interest in it was concerned. When the German Frigate Consortium, ("GFC") was announced as the preferred bidder for the corvettes, it was only to provide the hull and propulsion machinery. The Government, speaking for the Navy, had wanted to retain the capacity of deciding who should supply the sort of combat suite that was required. So when bids for the corvettes were submitted they excluded that part of the vessel except for the anticipated price that the munitions suite would cost. For that reason, after the announcement of the GFC as the preferred bidder for the corvettes, a further process was commenced to decide on the required contents of the munitions suite or the "black box", as Moynot called it, at the most competitive price.

In this context, although Thomson-CSF (France) had ADS to offer, since by then it had acquired control of that company, and ADS, being South African and already a supplier of some of the Navy's requirements, would have been a preferred choice for this work, the first presentation by Thomson-CSF of what it offered to provide was not accepted because the price was too high. The GFC, which had in its bid indicated an intention to use ADS as a leading part of the combat suite installation, was then asked to obtain prices from other possible suppliers to compare these with those of Thomson. This was done and the result was that if the Navy was to accept Thomson's offer, it required a reduction in price.

Some anxious exchanges then took place that were finally resolved, according to Moynot, by the Government being prepared to underwrite the risk of any defective performance by any of the South African sub-contractors that it wanted to be used in this contract. If that were done, Thomsons was able to reduce its price by the amount of the risk provision it had factored into its original cost projections to cover this potential source of liability. Thus the munitions suite contract was settled on 24 November 1998, when it was announced that Thomson-CSF would supply the combat suites for the corvettes, although the formal contracts were only signed about a year later.

For anyone with an interest in the outcome, that was a very welcome achievement. By then, as is discussed later, Nkobi had been restored to the ranks of ADS beneficiaries, and in the Chairman's report of the Nkobi group of companies for the financial year ending 28 February 1999 there is reference to the fact that the contract for systemsintegration of the combat suites for the corvettes had been awarded to ADS in the sum of R450 million. But that reward for all Shaik's hard work and planning had very nearly been derailed for, running concurrently with the exercise of the bidding process, were two other dramas that have a bearing on the dispute that is count 1. The first was this. The evidence shows that, taking place in tandem with this prolonged process of solicitation, response and repeated scrutiny to semi-final and final selections, was a constant swirling undercurrent of lobbying and informal meetings between interested applicants and potential selectors, carried on through the medium of self-proclaimed confidantes of the persons perceived to be the ultimate decision-makers. Mr Moynot, with charming Gallic candour, said that it was standard practice in the armaments industry to cultivate the services of such people, although the rumours or information they provided always needed careful assessment for their reliability. Moreover, he said, notwithstanding the existence of apparently impartial institutions like tender boards, the ultimate choice in competitions of this sort was always made at a political level.

In the instant case, of course, the final choice was always going to be made at a political level because of the uniqueness of the event and the cost to which the country would be committed. But the need to meet the relevant political figures for a chance to impress on them the wisdom of selecting one's own offerings, and a need to cultivate the individuals who claimed to facilitate such access, still remained.

The second such drama was the acquisition of ADS by Thomson-CSF (France), and the two such developments meet in the circumstances of Jacob Zuma's intervention on behalf of Schabir Shaik that is admitted by the accused. Although the thought of acquiring an interest in ADS had been in contemplation by Shaik and Moynot since 1995, it was not until a joint meeting of shareholders and directors of both Thomson-CSF Holdings and Thomson-CSF (Pty) Limited on 25 August 1997 that the possibility of such an investment was formally resolved. Thereafter, on 22 September 1997 Moynot wrote a letter to Shaik, announcing that agreement in principle had been reached with Altech for the disposal of 50% of Altech's ADS business to Thomson-CSF (Pty) Limited at a cost of R50 million. This was to be done by an increase in, and a restructuring of, the share capital in ADS and the subsequent issue of shares to both future owners to reflect this agreement. But when this arrangement was brought to fruition it emerged that the 50% plus one share of the increased share capital of ADS had been issued to Thomson-CSF (France) and not to Thomson-CSF (Pty) Limited. Neither Shaik nor Nkobi had any right or interest in the parent Thomsons company and were thus excluded from the anticipated rewards that a successful contract for ADS would bring.

This change of strategy on the part of Thomsons was explained thus by Mr Moynot, albeit on a basis of hearsay evidence. At some stage between November 1997, when steps had been put in train for Thomson-CSF (Pty) Limited to acquire the ADS shares and the bidding process was under way, somebody, identified as one Youssuf Surtee, one of the self-appointed facilitators of contact by interested bidders with high-level political figures, and who acted as such during the bidding process, had put it about and actually told Thomsons in Paris that both the then-President and Deputy President did not like Shaik, and that if Thomsons persisted in its embrace of Shaik as its black economic empowerment partner in the arms acquisition programme, then its chances of success for any contract in the process were poor. In fact, Moynot was led to believe that Surtee's motive in doing this was to offer himself as a black economic empowerment partner to Thomson, instead of Shaik. That may or may not be true, but that is how Moynot understood the matter.

Although this was all second- or even third-hand reports, it can be accepted that something of the sort happened because Schabir Shaik himself confirmed it, although he did so on the basis that it was derogatory comments ascribed to Mr Mbeki only that were reported to him. These were to the effect that his claim to be a black economic empowerment participant was unacceptable because he was Indian and not black indigenous South African, and that this was, in fact, being repeated by Perrier, the Thomson parent head of African operations.

The dismay caused by this news was exacerbated by recollection of an earlier response by President Mandela, also reported to Shaik at the time it occurred, that a reference by Perrier in the course of a speech given at a luncheon for the President, to the effect that Thomson's were keen to re-establish

themselves in South Africa and fully embraced the principle of black economic empowerment, also let fall a reference to the fact that the Nkobi group was its selected partner for this purpose. This particular comment was said to have been received with less than enthusiasm by the then-President, a reaction which apparently caused Perrier some embarrassment. That also may or may not have happened in fact, but that is what Shaik had in mind that increased his concern.

But he said he asked Zuma, or it may have been Zuma's suggestion that Zuma meet Perrier and explain that this criticism of him as an unsuitable black economic empowerment partner was unjustified and incorrect. That was done by letter dated 17 March 1998, from Shaik to Perrier, which was copied to Mr Mbeki as the then-President of the ANC, and which stated that it was Zuma who wanted a meeting with Perrier to discuss this looming threat to his plans for Nkobi's fortunes. That letter received no response, so a further letter on 13 May 1998, stimulated by areminder from Zuma, was likewise addressed to Mr Perrier. That too received no reply. But as it was anticipated that Perrier would be visiting South Africa later that year, tentative arrangements were put in train for Zuma to meet him then. Attempts by the local French representatives may have been sharpened to do so by the threat made by Shaik at a meeting of shareholders of Thomson (Pty) Limited and Thomson Holdings on 9 June 1998, and generated by his understandable resentment and dismay at this development, that he might take legal action to interdict the transfer of the prescribed shares in ADS to the parent Thomson-CSF company on the strength of his original shareholders agreement with that concern.
These efforts to arrange a meeting in South Africa also came to nothing because Perrier fell ill, so Shaik took the opportunity of arranging for Zuma to meet Perrier in London at the beginning of July at the end of an official visit by Zuma to the United Kingdom in his capacity as Minister of Tourism in KwaZulu-Natal. That meeting took place.

The only participant in that encounter who gave evidence was Mr Shaik himself, and his description of what took place is that Zuma explained the real basis on which the Government and the ANC saw black economic empowerment credentials, namely that this concept was not limited to black indigenous South Africans only but included coloured and Indian nationals as well. He said that Perrier was satisfied with this explanation and undertook that the ADS shares would be repatriated to the South African subsidiary, explaining his caution to Shaik on the basis that, as the South African Government was Thomson's only customer, the parent company had to be careful that it selected an economic empowerment partner that was acceptable to that customer.

To keep the issues in view, however, it is necessary to say at this point that this account of what happened is not consistent with Moynot's evidence which was called on behalf of the accused, and which made it clear that right from the start of Thomson's return to the South African business scene it had read the Government's requirement in respect of black economic empowerment for Government contracts and proceeded on the basis that the only class of person

excluded from the ambit of this requirement was white males. So it does not sound correct to venture the explanation that all Zuma had to do was explain to Perrier that black economic empowerment did not also include coloured and Indian nationals. Perrier would have already have known that. But whatever was discussed and accepted at this meeting, the fact is that thereafter the French parent directors, together with Moynot, worked out a strategy whereby the shares in ADS acquired by the Thomson-CSF parent could be used to the benefit of the Nkobi group. This strategy was in place and was disclosed at a meeting on 18 November 1998 at the Nkobi offices, attended by Mr Perrier with the two local directors of the South African subsidiaries, Moynot and Thétard. Mr Perrier was on a visit to this country to attend the biennial Defence Force exhibition of that year. But a request had been earlier made by local French officials to Shaik on 9 November 1998 to arrange for him to meet Zuma and Shaik during this visit.

Notes of the meeting on 18 November 1998 were kept by Mr Anand Moodley, then the Nkobi legal adviser. These and the subsequent minutes prepared from them, and recovered from the Nkobi offices, show that the meeting is described only as "Nkobi with Thomson's". It lists the persons present as including "JZ", which was Zuma, and the burden of the meeting was the means whereby Thomson-CSF (France) would sell 20% of its shareholdings in ADS to Nkobi Investments, which was the equivalent of a 10% interest in ADS, doing so by restructuring the shareholding of Thomson-CSF (Pty) Limited. The price of such acquisition and the means whereby Nkobi could pay for this interest were also tabled, as also the fact that Thomson-CSF (Pty) Limited would acquire the remaining 50% shareholding in ADS from Altech at some time in the future. At the end of all that, the French parent of Thomson's would own 50% of ADS shares and Thomson (Pty) Limited the remaining 50%.

Shaik's evidence disputed any suggestion that the notes taken by Moodley may indicate that Zuma attended the meeting as a participant. The notes were wrong to say that. What had happened, he said, was that to accommodate Perrier's request to meet Zuma, which was only to renew that acquaintance, having earlier discovered a common interest in a socialist form of government, Zuma had merely called in at Perrier's request, his Ministerial office being close by. After some uncertainty, he said that Zuma came when the meeting was over, was introduced to those he had not already met, shared some refreshment with the people present and then departed. Moynot's description of events at this meeting was substantially the same, but with this slight but significant difference. Zuma did only arrive when the business of the meeting was over and tea or coffee was being served and he did partake of this, that was correct. But while doing so, the decision that had been reached about the inclusion of Nkobi in the anticipated ADS dividend stream was explained to him, at the end of which he pronounced himself happy with the result.

Moreover, the letter from Thomson-CSF of 9 November was that a meeting be arranged for Perrier to meet both Zuma and Shaik. It would not have been necessary to include Shaik in the desired encounter, if all Perrier wanted to do

was renew his acquaintance with Zuma. It is more probable that he wanted to meet those same two individuals to explain the proposal to repatriate at least part of the ADS interest to South Africa in the shape of Thomson-CSF (Pty) Limited. That is why an explanation of this was also made to Zuma when he arrived at the meeting. It was to explain the way by which Perrier intended to achieve what he undertook at the London meeting of 2 July 1998.
Apart from that, it is also more probable that if Perrier only wanted to meet Zuma to renew their acquaintanceship, it is Perrier, who knew of Zuma's political status, who would have gone to meet Zuma, not the other way round. And, of course, the strategy planned by Thomson-CSF trod a careful line between accommodating Shaik's interest in the anticipated ADS prosperity and not offending the Government by having Nkobi as the black economic empowerment partner in ADS which was to be the actual member of the consortium that offered to design and supply the munitions suite.
The Government's requirement was met by Thomsons disposing of a 20% interest in ADS to FBS (Pty) Limited, an acceptable black economic empowerment partner to the Government, while Shaik's interest was met by the parent company disposing of, first a portion of, subsequently all, its shares in ADS to Thomson-CSF (Pty) Limited. On that basis then, with FBS accepting 20% instead of 25% plus 1 of the ADS shares which it demanded initially, the question of a suitable black economic empowerment partner for ADS and Shaik's participation in its future prosperity was settled. Moreover, the fact that the problem was solved on this basis also makes it unlikely that the reason for Zuma's appointment with Perrier in London on 2 July 1998 was simply to persuade him that the stories he heard that Shaik was not acceptable to the ANC leadership because he was not an indigenous black South African, had that been the case, and Perrier was satisfied with that, as Shaik claimed, the difficulty could have been overcome by simply including Nkobi or Thomson-CSF (Pty) Limited as the black economic empowerment partner for ADS, and not FBS (Pty) Limited. The eventual outcome and Moynot's evidence about Thomson-CSF's concern not to antagonise the South African Government, its only customer in this country, suggests that Zuma's visit was about more than that. In the event, however, and shortly thereafter, on 24 November 1998, Thomson-CSF, in the form of ADS, was declared the successful bidder for the munitions suite of the corvettes.

That is one of Zuma's interventions to protect or assist or further the interests of Nkobi's business enterprises.'

185. The second charge of corruption (Count 3) alleged as follows: Schabir Shaik solicited from Thomson-CSF a payment of R500 000 per year from Thomson-CSF for the benefit of Zuma until the payment of the first dividends owing to ADS. In return for the payment, Zuma would 'shield Thomson's from the anticipated inquiry' into the SDPP that had been triggered by, *inter alia*, the presentation of the so-called De Lille dossier in

Parliament in September 1999 and the Auditor General's initial audit of the SDPP. Zuma would also 'thereafter support and promote Thomson's business interests in the country.'[138] The initial meeting involving Schabir Shaik and Alain Thetard of Thomson-CSF to discuss the payment took place on 30 September 1999, prior to the conclusion of the SDPP contracts. On 11 March 2000, Mr Zuma met with Schabir Shaik and Thetard in Durban and gave his assent to the agreement. The substance of the agreement was outlined in an encrypted telefax sent by Thetard to his superiors in Paris on 17 March 2000, in which Thetard additionally indicated Mr Zuma's agreement to the proposal.

186. The Court found almost entirely in favour of the State's version of events on this charge. It found 'there is, in our view, ample corroboration for the substance of the fax that all points towards it having the meaning contended for by the State'.[139]

187. It might be asserted that this agreement referred to matters falling outside the Commission's terms of reference, as the agreement served to protect Thomson-CSF from investigations then taking place into the SDPP, rather than indicating that Thomson-CSF had used illegal means to secure the contract in the first place. The obvious question however is why, if Thomson-CSF was confident of its innocence in winning the contracts in the SDPP, it required the protection of a high-level politician in the event of an investigation into its conduct.

188. Following the conviction of Schabir Shaik, Mr Zuma was indicted with Thint Holding (Southern Africa) (Pty) Ltd and Thint (Pty) Ltd on four counts of corruption in 2006. This matter was struck from the roll in September 2006. Fresh charges were instituted

[138] Squires, J. 2005. Judgment in the High Court of South Africa (Durban and Coastal Local Division) in the Matter Between The State and Schabir Shaik et al., Case no. CC27/04, 31 March.
[139] *Ibid*

against Mr Zuma, Thint Holding (Southern Africa) (Pty) Ltd and Thint (Pty) Ltd in late December 2007. The charges were reformulated as one count of racketeering and one count of corruption.

189. The summary of substantial facts in the December 2007 indictment deals with the SDPP in detail. It states as follows:

> ***'The Arms Deal***
>
> *88. In the design for the South African Defence Force, which was recommended in the Defence Review, various types of military equipment were identified as being required by the Force.*
>
> *89. In order to procure the said military equipment, requests for information were submitted on 23 September 1997 to various other countries, and after receipt of such information by the closing date of 31 October 1997, requests for offers were issued to short-listed potential suppliers.*
>
> *90. The process to procure the various types of equipment was generally known as the Strategic Defence Package Acquisition Programme, or the arms deal.*
>
> ***The Formal and Informal Processes***
>
> *91. The formal evaluation of the competing bidders for contracts arising from the arms deal was conducted through an ostensibly rigorous and scientific evaluation process conducted by various committees of military and other experts and representatives of the various interested bodies. The final authority for awarding the contracts resided in an ad hoc committee of cabinet ministers chaired by the then Deputy President Mbeki.*
>
> *92. However, a separate and parallel process of informal meetings and communications occurred (hereinafter referred to as the "informal process") in which persons and entities interested in participating in the contracts sought to glean information on the process and exert influence, directly or indirectly, on formal decision makers. This also held true in relation to the corvette program (Project Sitron).*
>
> *93. Through this informal process, it became known at an early stage, even before the award and adjudication processes were completed, to a select group of persons and entities (including Shaik, Thomson-CSF and accused 2 and 3) that ADS was likely to be awarded the contract for the supply of the combat suite for the corvettes.*

Efforts by Thomson CSF to position itself to participate in the Corvette Contract

94. The need to upgrade the capacity of the navy's surface vessels was identified as early as 1993. A process to acquire such vessels was launched and reached an advanced stage, but was subsequently rejected by cabinet in favour of a more comprehensive process to update equipment throughout the armed services. As part of this comprehensive update, the acquisition of 4 patrol corvettes was approved.

95. Thomson-CSF was anxious to participate in this contract, preferably as a primary contractor, failing which as a supplier of the combat suite. To this end, it set about as early as 1995 to acquire an interest in ADS, which it believed to be the favoured supplier of the combat suite, through accused 2 and 3.

The Selection of the Correct BEE Partner

96. Thomson-CSF, and subsequently accused 2 and 3, were of the view that in order to ensure their participation in the combat suite through ADS, it was essential to acquire a local black economic empowerment (BEE) partner. However, it was considered vital to select the "right" BEE partner. The major criterion for the selection of such a partner was its political connectivity (whether this was founded on one or more corrupt relationships of mutual support or otherwise), since ThomsonCSF, and subsequently accused 2 and 3, were of the view that the final decisions for the award of such contracts are always taken at a political level. At the time of the joint venture agreement described above, Nkobi was regarded as a BEE partner which met this criterion, inter alia because of the corrupt relationship between Shaik and accused 1.

97. However, at approximately the same time as the request for information was submitted by the South African government to foreign suppliers in September 1997, Thomson-CSF became concerned that its choice of Nkobi as its South African partner for the proposed acquisition of ADS (all with a view to successfully bidding for the combat suites as described), did not carry the approval of influential figures within the South African government. It was thus decided that the shares in ADS would be acquired directly by Thomson-CSF (France) and not by accused 3, to the exclusion of Nkobi, until the issue of suitable local partners could be resolved. This decision to exclude Nkobi was despite the shareholders' agreement between Thomson and Nkobi. Consequently, Thomson-CSF (France) acquired 50% plus one share of ADS on 14 April 1998.

98. Due to the uncertainty of accused 2 and 3 as to the suitability of Nkobi as the correct BEE partner, accused 2 and 3 entered into negotiations with various other potential BEE partners, including a company styled Coordinated Network Investments (Pty) Ltd ("CNI", led by one Reuel Khoza) and Futuristic Business Solutions (Pty) Ltd ("FBS", led by the former Chief of the SANDF, General Lambert Moloi).

99. In response to the request for offers, inter alia for corvettes, the German Frigate Consortium submitted an offer dated 11 May 1998 to supply the corvettes. The bid included ADS as the proposed supplier of the combat suites. It was also proposed in the bid that ADS would join the joint venture as a consortium partner in the final contract.

100. As indicated above, Nkobi was at this stage excluded from ADS. Thomson-CSF, on the other hand, was urgently seeking the informal political support it considered necessary to improve its chances of a successful bid involving ADS. 101. Moynot, as the then director of accused 2 and 3, suggested as early as 28 November 1997 that a meeting between Perrier and accused 1 should be sought, inter alia to resolve the issue of informal approval.

102. Similarly, on 17 March 1998, Shaik indicated that accused 1 wished to meet Perrier to resolve the issue.

103. The resolution of the issue would include the prospect that Nkobi should participate in ADS and ultimately share in the profits that were to be derived from the arms deal. The prospective benefit to Nkobi would also enable it to continue supporting accused 1.

104. Apart from the German Frigate Consortium, the South African government also received offers from the other short-listed parties. After the closing date for the receipt of offers on 13 May 1998, the next step in the official process was to select a preferred bidder. The Strategic Offers Committee met on 1 and 2 July 1998 for this purpose and specifically to consolidate the scores of the various technical teams that were evaluating various aspects of each bid.

105. Accused 1 met Perrier in London on 2 July 1998 with Shaik, in accordance with both Thomson's and Shaik's wishes. Thomson required accused 1's approval of its ADS partner. Shaik required his approval of Nkobi as such ADS partner in order to cause Thomson to reverse its decision to exclude Nkobi from the ADS acquisition.

106. Accused 1 indicated that he approved of Nkobi as a suitable partner and it was decided in principle to reverse the earlier Thomson decision to exclude it from ADS.

107. Chippy Shaik is Shaik's brother. He was at this time Chief of Acquisitions in the department of defence and as such he directed and participated in the arms acquisition process. Thétard sought a meeting with him on 3 July 1998, which was held on 8 July 1998. During this meeting, Chippy Shaik indicated that he was aware of the meeting in London on 2 July 1998 between accused 1, Perrier and Shaik at which accused 1 had indicated his approval of Nkobi as a partner with Thomson in ADS.

108. The resolution of the dispute between Thomson and Nkobi was taken further, once again with the assistance of accused 1, at a meeting on 18 November 1998

at the Nkobi offices in Durban. The formalities of the earlier agreement were decided upon. In terms of the agreement reached on 18 November 1998, Thomson-CSF (France) would sell to Nkobi Investments, through accused 3, an effective shareholding in ADS. The result of this was that Nkobi Investments would become a joint venture partner with Thomson in the German Frigate Consortium bid and so joined the successful bidder in the corvette bid. The ADS portion of the corvette contract was worth R1,3 billion, with R450 million coming directly to ADS and the balance going to subcontractors. In the result, the Nkobi and Thomson groups stood to benefit from profits arising from the corvette contract.

109. In addition to Nkobi, accused 2 and 3 also included FBS as a 20% direct empowerment partner in ADS. CNI was ultimately excluded from participation.

110. The German Frigate Consortium bid was approved as the preferred bidder by the South African cabinet on 18 November 1998.

111. The actual transactions involving the sale of shares were registered in 1999. The most relevant transaction is that of 15 September 1999, when Thomson-CSF International (France) transferred 25 500 000 shares in ADS to Thomson (Pty), giving Thomson (Pty) 80% of ADS and consequently Nkobi Investments an indirect 20% interest in ADS.

112. A negotiating phase between the South African government and the German Frigate Consortium as the preferred bidder followed after 18 November 1998. The final contract was signed on 3 December 1999 between the government and a new consortium named the European South Africa Patrol Corvette Consortium (ESAPCC). This new consortium included ADS as a principal contractor to supply the combat suites, as originally proposed in the German Frigate Consortium bid.'

190. The indictment and the summary of substantial facts thus clearly indicate that corruption in relation to the SDPP, and in particular the corvette combat suite, formed a substantial part of the narrative of events that underpinned the charges. This narrative was essentially the same as that described and tested in the trial of Schabir Shaik.

191. The result of the Chairperson's approach was that the Commission failed to consider a very important matter in its terms of reference. The charges against Mr Zuma were formulated following additional search and seizure raids on the properties of individuals and entities in 2005. Quite plainly, the material that was prepared by the NPA to be

presented as evidence in the trial was relevant to the Commission's terms of reference. That material appeared to be available to the Commission on the external hard-drive provided by Col Du Plooy as discussed above. The Commission did not consider the material, or investigate the matter at all.

Failure to properly investigate allegations of wrongdoing in the Light Utility Helicopter contract

192. In Section 5.2 of Volume 1 of its Report, the Commission addresses the allegations of corruption related to the Light Utility Helicopter. According to the Report, the Commission attempted to investigate allegations made by Crawford-Browne, Holden and Feinstein. The Commission stated the following with regard to the nature of the allegations investigated and the manner in which they were pursued:

> *'[102] Messrs Paul Holden, Andrew Feinstein and Terry Crawford-Browne alleged that Bell Helicopter withdrew from the process as it was not prepared to pay a bribe. They further maintained that a number of people attached to the Bell Helicopter bid indicated that not only were the scores manipulated to ensure that its competitor came out victorious but also that this was done by means of inducements offered by a competitor of Bell Helicopter.*
>
> *[103] These were serious and damning allegations not to be shrugged off. The Commission invited Bell Helicopter through its President and Chief Executive Officer, Mr John Garrison, to make a submission to it in relation to its participation in the bidding process of the Light Utility Helicopter programme. Mr Garrison informed the Commission that he had asked Bell Helicopter's Deputy General Counsel for International and Commercial Business to find out whether Bell had any relevant records or employees who could have knowledge of this specific procurement.*
>
> *[104] As no information was forthcoming and its duration was drawing to a close, the Commission arranged a meeting with representatives of Bell Helicopter in Fort Worth, Texas. At this meeting the Commission was informed that no record existed of Bell's withdrawal from the bidding process. The*

Commission's delegation was further informed that Bell Helicopter was not aware that any bribe had been requested from it.'[140]

193. The substantive allegation that the Commission attempted to test was thus that Bell Helicopter had withdrawn from the bidding process. Volume 3 of the Commission's Report, containing its findings, made no finding of fact in this regard. However, the above passage appears to indicate that the Commission formed the view that there was little of substance to the allegation, or, at the very least, that it had not gathered information to support the allegation.

194. The Commission's account of the allegations of wrongdoing in relation to the Light Utility Helicopter contract indicates that it did not properly engage with and understand the allegations made by Feinstein and Holden. Even a cursory reading of the Joint Submission of Feinstein and Holden, which drew on material included in Holden and Van Vuuren's book *The Devil in the Detail* (which was also available to the Commission) indicates that Holden or Feinstein did not at any stage allege that Bell withdrew from the bid for the Light Utility Helicopter contract due to concerns regarding bribery. This was a claim made by Crawford-Browne.

195. The essence of the allegation made by Feinstein and Holden is that they spoke to and interviewed senior members of the Bell team that was involved in the bidding process for the Light Utility Helicopter contract. These individuals informed them that they had been told by the Chief of Acquisitions, Chippy Shaik, that they needed to enter into a business relationship with a company named Futuristic Business Solutions (FBS) to have

[140] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015, Vol. 1, Section 5.2, Paragraphs 102 - 104

a chance of securing the Light Utility Helicopter Contract.[141] It is common cause that FBS was jointly owned by, amongst others, relatives of Defence Minister Joe Modise, as well as Ian Pearce. German police documents suggest that the latter allegedly acted as an 'intermediary' for Chippy Shaik in receiving illicit funds from ThyssenKrupp related to the corvette acquisition.

196. Feinstein and Holden stated in their submission that a primary source of their material was retired US Ambassador (to Malawi) George Trail III, who had agreed to be interviewed on record by Paul Holden about these claims. Ambassador Trail had worked for Bell Helicopters as part of the team trying to win the Light Utility Helicopter bid. They stated that another source within Bell, who requested anonymity, was interviewed. (A transcript of the interview between Trail and Paul Holden was posted online by Right2Know after the withdrawal of Feinstein, Holden and Van Vuuren from the Commission in late 2014. The interview was posted to www.armsdealfacts.com. It is still available via weblink on the same website.[142])

197. In their joint submission, Feinstein and Holden stated that Feinstein had spoken to Trail before Holden did so, and that the version of events relayed to and recorded by Holden was substantially the same as that relayed to Feinstein.

198. The joint submission of Feinstein and Holden, and Holden and Van Vuuren's book, were not the only places where the substance of this allegation made. It was addressed in the draft Auditor General's report dated 18 October 2001, which stated:

[141] Joint Submission of Andrew Feinstein and Paul Holden to the Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Pacakges (SDPP), January 2013 p. 183 - 185

[142]https://www.scribd.com/doc/237805973/12-Paul-Holden-Interview-With-George-Trail-III

> *'It was alleged that a representative of Bell Helicopters was assured in mid-1998 that it would get the deal for the supply of helicopters if satisfactory arrangements were made with FBS. However, the company balked at the suggestion when it became clear that FBS lacked the infrastructure to actually deliver services that it would have been contracted to supply. The proposed arrangement with FBS entailed a management and administration fee of $125 000 per month as well as a success fee on delivery of the contract – this would have made Bell vulnerable to prosecution under the United States anti-corruption laws in the Foreign Corrupt Practices Act.'*[143]

199. The substance of the allegation, emanating from a different source, was also contained in an article by the journalist Paul Kirk that appeared in the *Mail & Guardian* newspaper on 9 April 2001. In that article, Kirk stated:

> *'Marketing director of Bell Helicopter Dane Pranke confirmed on the M-Net program Carte Blanche that "Chippy" Shaik had "strongly suggested" that, if Bell wanted the helicopter contract on offer under the multibillion-rand arms deal, the company should enter into a partnership with FBS. When Bell declined to do so – after discovering FBS amounted to "no more than a receptionist and a fax machine" – Bell lost the bid.'*[144]

200. This further source of the allegation, which was made in the public domain, identified a specific person in Bell who alleged that he had knowledge of the matter; and it identified a further public domain source (the M-Net programme Carte Blanche) in which the allegation was published. Crawford-Browne referred to the Carte Blanche programme in his oral evidence before the Commission. He stated, in relation to the LUH contract, that '*this was the subject of the Carte Blanche documentary in 2001 where Bell Helicopter Executives were interviewed and then made the allegation that that is why they withdrew because of the suggestion that they were going to get the [inaudible] as bribe payments.*'[145]

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[143] Draft Auditor General's Report Dated 18 October 2001, paragraph 11, 11.7.5.9

[144] Paul Kirk, 'Arms Groups in Lucrative Deal', *Mail & Guardian*, 9 April 2001, http://www.armsdeal-vpo.co.za/articles00/lucrative.html

[145] Public Hearings Transcript, p. 8641

201. In addition, Feinstein and Holden's joint submission quoted a notice by the Directorate of Special Operations (DSO) that confirmed that the winning bidder, Agusta, had entered into a business relationship with FBS. This business relationship had triggered the interest of the DSO, which initiated a formal investigation into the relationship on 24 August 2001.[146] The notice of investigation in terms of section 28 of the National Prosecuting Authority Act 32 of 1998 was Annex LL to the joint submission of Feinstein and Holden. The Director of the SFO stated in the notice:

> *'Whereas I have reason to suspect that the abovementioned specified offences [of fraud and corruption] have been committed or are being committed or that attempts were made or are being made to commit such offences arising out of the armaments acquisition for the Department of Defence whereby Agusta Un'Azenda Finmeccanica S.P.A appears to have paid undue benefits in the form of success fees to Futuristic Business Solutions (Pty) Ltd for its successful selection as a sub-contractor for the supply of Integrated Logistic Support Services for the Light Utility Helicopter Project.'*[147]

202. Further detail was provided in an affidavit dated 8 September 2001, by Advocate Gerda Ferreira. She was a senior DSO investigator who was responsible for undertaking investigations related to the SDPP. Her affidavit was Annex KK to Holden and Feinstein's joint submission to the Commission. The affidavit was filed in support of a search warrant application in France. She stated:

> *On the 19th of January 2000 FBS was successful in concluding a contract for the supply of integrated logistic support services with Agusta, the Italian corporation whose bid to supply the Light Utility Helicopter contract was successful. The total cost of the contract is specified as R17 298 321.54, while the "Total Delivery Milestone Payment Schedule' reflects an amount of R13 148 869.64.'*[148]

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[146] McCarthy, L. 2001. Institution of an Investigation in Terms of Section 28(1) (a) of the National Prosecuting Authority Act, 32 of 1998, As Amended, 24 August. Submitted as evidence in the Matter of The State Versus Schabir Shaik et al. in the High Court of South Africa (Durban and Local Coastal Division), Case Number CC27/04 , exhibit number JDP2

[147] *Ibid*

[148] Ferreira, G. 2001. 'Supporting Affidavit' in the Application by the Republic of South Africa for a Commission Rogatoire and the Search and Seizure in a Criminal Matter (To The Ministry of Justice of the

203. Adv Ferreira referred to the numerous contracts that FBS had been awarded as a subcontractor in the SDPP by multiple different primary contractors. She stated that there were suspicions and conflicting accounts as to whether FBS had the capacity or ability to effectively perform any of the contracts it was granted. This echoed the interview with Ambassador Trail, who had stated that he had formed the opinion that FBS lacked basic business facilities. She stated:

> *'Finally, it must be mentioned that the evidence under oath in relation to FBS's capacity to service any of the contracts was inconsistent. It was a new company formed in 1997. The company was established "to look at opportunities in the defence industry" and had limited experience in the field of integrated logistics support services. The evidence ranged from the view that the company had the necessary capacity, through the view that the necessary capacity was limited, to the view that the necessary capacity was lacking. There is thus at least a suspicion that irregularities attach to the choice of FBS as a contracting party.'*[149]

204. It appears from the record of the Commission that the legitimacy or otherwise of Agusta's relationship with FBS was addressed in substance only twice: in the oral evidence of Simon Edge, a representative of AgustaWestland helicopters, and in the evidence of Chippy Shaik. Vol 2 of the Report, which summarises the evidence of witnesses appearing before it, says the following with regard to Edge:

> *'He dismissed as false the allegations made by Messrs Holden and Feinstein to the effect that the selection of the LUH as the preferred supplier was manipulated or unfair.*
>
> *They [Agusta] had a legitimate business relationship with FBS.'*[150]

French Republic), 8 September. Submitted as evidence in the Matter of The State Versus Schabir Shaik et al. in the High Court of South Africa (Durban and Local Coastal Division), Case Number CC27/04

[149] *Ibid*

[150] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015, Section 45, Paragraphs 2488 - 2489

205. The transcript of the public hearings of the Commission shows that Edge was asked by the Evidence Leader to respond to quoted extracts from the joint submission of Feinstein and Holden. The extracts quoted above indicate that he was asked to respond only to broad summary paragraphs appearing in the joint submission of Feinstein and Holden. He did so, rejecting the allegations. The totality of the exchange extends to less than four pages in the transcript of the public hearing.[151] The Commissioners did not ask Edge a single question relating to the detailed substance of these allegations, or relating to the suspicions of the DSO. He was not cross-examined.

206. In any event, Edge states in his witness statement that his 'direct knowledge is somewhat limited as I only became involved at an advanced stage in, during or about 2007.'[152] In the circumstances, it is difficult to see how the Commission could place any weight on Edge's personal disavowal of the allegations, considering that they referred to matters outside his direct knowledge. The Commission's attitude in this regard was inconsistent with the position which it took with regard to critical witnesses, ruling that they could not testify with regard to documents or evidence of which they had no personal knowledge.

207. Chippy Shaik was asked a single question on this matter. It was asked by the Chairperson at the conclusion of the leading of his evidence. The transcript reads:

> *Chairperson:* *Mr. Shaik besides what Advocate Sello has dealt with is there any of the bidders that you ask money from because if not I am not wrong is an allegation that one of the bidder's [inaudible] was requested to pay a bribe and when he failed to pay the bride [sic] then they ended up losing the bid and if I recall it was Bell Helicopter. Did you at any stage ask from any money from Bell Helicopter?*

[151] Public hearings transcript, 20 March 2015, pages 9916 - 9919
[152] Witness Statement of Simon Edge to the Commission, March 2015, paragraph 6

Mr Shaik: No sir at no stage I requested money from any other bidder including Bell Helicopter. On the Bell helicopter matter that was a matter relating to the involvement of the Canadians and the United States. My understanding at that time was that Bell Helicopter from the US, Chicago, could not tender directly they had to go via Bell Canada and allegations were made. The Joint Investigative Team did an investigation on that and it was found not to be true because the ultimate decision not to select Bell Helicopter was an Air Force decision and had nothing to do with me.

Chairperson: Yes, I thought let me put this submission to you so that you can respond. You know we are aware of the fact that Bell Helicopter went right through the whole process.

Mr Shaik: Yes sir.

Chairperson: They were evaluated like all the others and fortunately they could not make it at the end.'[153]

208. This was the totality of the Commission's attempt to test this allegation with a key person in the allegations of misconduct, Chippy Shaik, the Chief of Acquisitions in the SDPP. He too was not cross-examined. His denial of any wrongdoing was simply not tested:

208.1. He was not asked to comment, except in the broadest terms, on any of the specific allegations made by Trail;

208.2. He was not confronted with the specific allegations as made in the DSO notice or the affidavit of Ferreira;

208.3. He was asked to respond to a question that was so broadly and poorly framed that he could reasonably have understood that the Commission was asking whether he had asked for money from Bell Helicopters for himself, rather than for the benefit of FBS, which was the allegation.

[153] Public Hearings Transcript, 11 November 2014, p. 8915 - 8916

209. Given the Commission's findings and the comments made by the Chairperson in his questioning of Chippy Shaik, it appears that that it accepted Edge's and Shaik's version of events.

210. The Commission's failures to investigate the matter include the following:

210.1. The Commission never asked Holden or Feinstein for a copy of the transcript of Holden's interview with Trail (I point out that the Holden and Feinstein submission was made on 10th of January 2013, and it was only on the 28th of August 2014 that they withdrew from participation in the Commission).

210.2. The Commission never asked Holden or Feinstein for an audio copy of the interview.

210.3. It appears from the Report that the Commission made no attempt to contact Ambassador George Trail III and to ask for his version of events.

210.4. It appears that the Commission made no attempt to access a copy of the transcript posted online or to consider its contents.

210.5. The Commission never asked Holden or Feinstein for a copy of the transcript of the interview with the senior company employee who requested to remain anonymous.

210.6. It appears that the Commission made no attempt to speak to or otherwise engage with Paul Kirk.

210.7. It appears that the Commission made no attempt to obtain a copy of the transcript or of the *Carte Blanche* broadcast, in which a senior Bell employee repeated the substance of the allegation.

210.8. It appears that the Commission made no attempt to contact Dane Pranke of Bell, who made the allegation.

210.9. It appears that the Commission's sole attempts to test the legitimacy of the relationship between FBS and Agusta occurred during the oral evidence of the representative of AgusataWestland, Edge and during the oral evidence of Chippy Shaik.

210.10. When he gave evidence, Edge was:

210.10.1. not questioned by the Commissioners;

210.10.2. not asked to respond to the specific allegations in the notice of the DSO or the material in the affidavit of Gerda Ferreira;

210.10.3. not subjected to any cross-examination.

210.11. When he gave evidence, Shaik was:

210.11.1. asked a single broad question by the Commissioners;

210.11.2. not asked to respond to the specific allegations in the investigation notice of the DSO or the material in the affidavit of Ferreira;

210.11.3. not subjected to any cross-examination.

210.12. It appears that the Commission failed to call or test the evidence of any shareholder, director or employee of FBS. This is particularly egregious considering that the company was linked to a number of allegations of corruption in this and other contracts.

211. I submit that the Commission's 'investigation' into these allegations was no investigation at all. It failed to follow easy and material leads that could have substantiated the allegations made by Holden, Feinstein and others. It failed to gather or attempt to gather relevant evidence. When there was an opportunity to engage with two witnesses, it did not test their evidence in any way. It simply accepted the truth of what they had said.

Failure to properly investigate BAE's settlement with the Department of State

212. In section 5.1 of Volume 1 of its Report, the Commission recounts its attempts to access to material emanating from the United States. It did so, it claims, in order to investigate allegations made by Feinstein and Holden in their joint submission. The Commission stated as follows:

> *[99] In their submission of January 2013, Messrs Feinstein and Holden drew the Commission's attention to an investigation allegedly conducted by the US Department of Justice into BAE's affairs between 2007 and 2010. They alleged, amongst others, that in 2010 and 2011 BAE Systems entered into two plea agreements with the US Department of Justice and the US State Department respectively. In the plea agreements 'numerous admissions on the part of BAE in relation to its business conduct - most of which were related to its use of 'marketing advisers' around the world, especially in Saudi Arabia, the Czech Republic, Hungary, Tanzania and South Africa featured (Feinstein and Holden Joint Submission at page 129). While South Africa was not explicitly mentioned in the plea bargain documents with the US, it was certainly implicit in the settlement as relayed to Feinstein by an officer of a US government agency involved in the investigation.*

> *[100] In its submission of 2012 to the Commission, BAE Systems proffered that none of the charges against it by the US Department of Justice related to its activities in South Africa. It submitted that it pleaded guilty to making false statements to the US Government and to certain export control violations and not to any offence of bribery or corruption.*
>
> *[101] The Commission met with representatives of the US Department of Justice to verify the information and endeavour to gather the evidence that might have been found by or divulged to the US Department of Justice. The officials confirmed the assertions of BAE that it pleaded guilty to the offence of providing false, inaccurate and incomplete information to the US government for which it was fined $400 000 000. The officials of the US Department of Justice were not aware of the 2011 plea agreement allegedly entered into by BAE and the US State Department. They were also unaware of any investigation relating to BAE's activities in the SDPP. They further said that the plea agreement with the US Department of Justice had nothing to do with BAE's activities in South Africa.'*

213. The Commission seems to have failed to understand the allegations by Feinstein and Holden. It appears from the Commission's summary of the allegations that the Commission only paid attention to page 129 and the first half of page 130 of the Joint Submission of Holden and Feinstein, and did not pay any attention to material facts appearing at the second half of page 130 and 131. It also appears that the Commission failed to consider the documents submitted by Holden and Feinstein to support their account, in particular the documents forming the basis of BAE's settlement with the Department of State ['US DoS Settlement'].

214. Feinstein and Holden contended that the US Department of Justice settlement and the US DoS Settlement should be read *together*. Doing so, they argued, provides a narrative of events, admitted to by BAE, which confirms that BAE Systems made use of offshore entities to make payments to covert advisors to secure contracts in multiple jurisdictions, including South Africa. (The 'Offshore Entity' referred to in the Department of Justice settlement is a British Virgin Islands registered company named Red Diamond, which

was created by BAE Systems to contract with 'marketing advisors' around the world.)

The relevant section of the Joint Submission states:

> *'According to the plea agreement with the Department of Justice, BAE pleaded guilty for failing to disclose information to the US government as was required under the Foreign Corrupt Practices Act, the Arms Export Control Act and International Traffic in Arms Regulations (BAE also paid a fine of $400m).*[154] *By doing so, BAE had prejudiced the US government by preventing it from carrying out the business of governance around arms transfers.*[155]
>
> *The US plea bargain featured numerous admissions on the part of BAE in relation to its business conduct – most of which were related to its use of 'marketing advisers' around the world, especially in Saudi Arabia, the Czech Republic, Hungary, Tanzania and South Africa. Most of these admissions confirm much of the substance of the SFO affidavits quoted from so substantively above, including the creation of offshore entities designed to obscure the reason for and nature of the payments made, as well as confirmation that BAE made payments to 'advisors' and 'agents' related to its worldwide deals of at least £135m and $14m. BAE was also forced to admit that the payments were made even though there was a 'high probability' that the money would be used to swing contracts its way. To quote, in full, from the plea agreement confirmation of offence:*
>
>> *Beginning in 1993, BAES knowingly and wilfully failed to identify commissions paid to third parties for assistance in the solicitation or promotion or otherwise to secure the conclusion of the sale of defense articles… BAES made (or caused to be made) these false, inaccurate or incomplete statements to the State Department both directly and indirectly through third parties. BAES failed to identify the commission payments in order to keep the fact and scope of its external advisors from public disclosure…*
>>
>> *After May and November 2001, BAES regularly retained what it referred to as "marketing advisors" to assist in securing sales of defense articles. In that connection, BAES made substantial payments which were not subjected to the type of internal scrutiny and review that BAES had represented they were or would be subjected to in the foregoing statements made to the U.S. government. BAES took steps to conceal its relationships with certain such advisors and its undisclosed payments to them. For example, BAES contracted with and paid certain of its advisors through various offshore shell entities beneficially owned by BAES. BAES also encouraged certain of its advisors to establish their own offshore shell entities to receive payments while disguising the*

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[154] 'Statement of Offence' in the Matter of the United States of America v. BAE Systems plc, Violation: Title 18, United States Code, Section 371 (conspiracy), United States District Court for the District of Columbia.

[155] *Ibid*

origins and recipients of such payments. In connection with certain sales of defense articles, BAES retained and paid the same marketing advisor both using the offshore structure and without using the offshore structure.

Although instructions were given within BAES during 2001 to discontinue the use of offshore structures in connection with marketing advisors, such instructions were not of themselves sufficient to satisfy the foregoing representations and undertakings made to the U.S. government.

After May and November 2001, BAES made payments to certain advisors through offshore shell companies even though in certain situations there was a high probability that part of the payments would be used in order to ensure that BAES was favored in the foreign government decisions regarding the sales of defense articles. BAES made these payments, ostensibly for advice, through several different routes and, consequently, were not subjected to the type of internal scrutiny and review that BAES had represented that they would be subject to in the foregoing statements made to the U.S. government.

BAES established one entity in the British Virgin Islands (the 'Offshore Entity') to conceal BAES's marketing advisor relationships, including who the agent was and how much it was paid; to create obstacles for investigating authorities to penetrate the arrangements; to circumvent laws in countries that did not allow agency relationships; and to assist advisors in avoiding tax liability for payments from BAES…

After May and November 2001, BAES made payments of over £135,000,000 and over $14,000,000 to certain of its marketing advisors and agents through the Offshore Entity. BAES did not subject these payments to the type of internal scrutiny and review that BAES had represented they were or would be subjected to in the foregoing statements made to the U.S. government.'[156]

While South Africa was not explicitly mentioned in the plea bargain documents with the US in 2010, it was certainly implicit in the settlement as relayed to Feinstein by an officer of a US government agency involved in the investigation. In addition, South Africa featured quite clearly in another plea bargain that BAE Systems agreed to in 2011. This time, the company settled a civil action brought by the US State Department around a different set of offences. Here, it admitted guilt in return for a fine of $79m for violating a number of US regulations. In particular, BAE admitted to numerous violations of US International Traffic in Arms Regulations (ITAR). These violations included 'unauthorized brokering of U.S. defense articles and services; causing unauthorized brokering; failure to register as a broker; failure to file annual broker reports; failure to report the payment of fees or commissions associated

156 *Ibid*, para 18-29

with defense transactions; and the failure to maintain records involving ITAR-controlled transactions.'[157]

According to the plea agreement, BAE admitted that it had made at least 100 payments to various brokers taking care of their overseas deals for the Gripen, Eurofighter and frigates. Further payments were made to 'advisers', 132 of which received payments from BAE between 1995 and 2007. In total, BAE admitted that it had made over 1 000 payments to 'unauthorised brokers' while retaining at least 300 brokers and advisers on its books from the late 1990s to 2007.[158] *And, when it came to South Africa, BAE admitted that it had withheld key information about brokers it had paid to sell Hawk and Gripen jets to South Africa.*

> *The Department conducted a further review of JAS-39 [Gripen] aircraft transactions and identified a license issued by the Department of Justice in June of 2002 to SAAB NA. The license authorized the export of $160 million worth of US defense articles to support manufacture of JA-39 aircraft. The license included a negative certification… on fees and commissions. The license was part of a broader transaction involving £1.6m worth of Hawk and JAS-39 aircraft to National Defense Force – Air Force, South Africa.*
>
> *Based on information obtained by the Department, Respondent or its representative Red Diamond made payments to brokers involved in securing the sale to South Africa. Respondent failed to disclose payments as required…*[159]

Reading the two plea agreements closely clearly confirms that BAE made use of Red Diamond to make payments to hundreds of brokers and advisors; that the payments were made explicitly in order to secure sales in South Africa and around the world, and that the payments were made despite there being a 'high probability' that the money from the payments would be used to influence procurement decisions.

215. The settlement entered into by BAE Systems with the US Department of State is not referred to at any other place in the Commission's Report. The Commission simply failed to engage with the material in the US DoS Settlement.

[157] 'Proposed Charging Letter re: Investigation of BAE Systems plc Regarding Violations of the Arms Export Control Act and the International Traffic in Arms Regulations', May 2011, available from www.pmddtc.state.gov/compliance/consent_agreements/baes.html

[158] *Ibid*

[159] *Ibid*

216. It is striking that the Commission refers to 'the 2011 plea agreement ***allegedly*** entered into by BAE and the US State Department'. The documents forming the US DoS Settlement were provided to the Commission as an annexure to the joint submission of Feinstein and Holden. The key sections were highlighted in the Joint Submission. The documents were and are in the public domain, and were and are available online at http://pmddtc.state.gov/compliance/consent_agreements/baes.html.

217. The following can be deduced from the Report:

217.1. The Commission did not approach and/or meet with the US Department of State to discuss the settlement entered into between BAE Systems and the US Department of State;

217.2. The Commission made no attempt to request the documents in the possession of the US Department of State;

217.3. The Commission apparently did not to do so because unnamed representatives of the Department of Justice expressed no knowledge of the US Department of State settlement. It is unclear why the Commission relied on this lack of knowledge, instead of relying on documents already in its possession, or itself accessing the documents which are a matter of public record, to which it was referred;

217.4. The Commission, beyond meeting with and ascertaining the opinion of unnamed US Department of Justice officials, did not request any of the documents gathered during the Department of Justice investigation into BAE Systems.

217.5. No-one from BAE Systems gave oral evidence to the Commission. Instead, the Commission contented itself with a legal representative of BAE Systems, Adv Meiring, reading into the record a statement submitted to the Commission by BAE Systems and dated 26 July 2012. This appears at pages 11351 to 11363 of the transcript. This was the final act of the public hearings before to the Chairperson's statement closing the public hearings phase of the Commission. The BAE Systems representative was not asked a single question in re-examination or cross-examination.

218. The Commission thus failed in its duty properly to investigate matters within its terms of reference:

218.1. The Commission failed to engage meaningfully with the US DoS Settlement, either through the document presented to it or through obtaining the document itself;

218.2. It failed to approach the US Department of State to discuss the matters contained in the US DoS Settlement;

218.3. It failed to request from the US Department of State any records that formed the basis of its investigation and settlement with BAE Systems;

218.4. It failed to request from the US Department of Justice any documentary evidence gathered by the Department in establishing the narrative of facts established in the settlement;

218.5. It failed meaningfully to test the submission made by BAE Systems.

Failure to investigate the discounted vehicles

219. In 2001 the *Sunday Times* reported that Daimler Chrysler Aerospace (DASA) had provided a discount on a 4x4 vehicle for the benefit of then-MP Tony Yengeni.[160] DASA was a subsidiary of the European Aeronautic Defence and Space Company (EADS). EADS was reported to own a 30% stake in Reutech Radar Systems, which received a subcontract to supply radars for the corvettes as part of the SDP.[161]

220. Mr Yengeni later admitted to a charge of fraud in relation to the receipt of the discount as he had failed to adequately disclose the benefit to Parliament. He entered into a plea bargain agreement with the NPA. The more substantive charge of corruption that had been contemplated was reduced to fraud, although the narrative of facts which he admitted, arguably implied an exchange of influence for the discount.

221. The guilty plea states:

> *'4.1 In 1994 I was elected a Member of Parliament. In Parliament I was elected a Chairperson of the Joint Standing Committee on Defence. I remained in that position until November 1998 whereupon I was elected Chief Whip of the ruling party.*
>
> *4.2 The Joint Standing Committee on Defence was competent to investigate, and to make recommendations on the defence budget, functioning, organisation, policy morale and state of preparedness of the National Defence Force and to perform other functions related to parliamentary supervision of the National Defence Force.*
>
> *4.3 Further parliamentary supervision of the Joint Standing Committee on Defence included an oversight function to assist the Department of Defence in its acquisition of armaments. The final decision thereon however remained with the Department of Defence.*

[160] 'Tony Yengeni, the 4x4 and the R43bn Arms Probe', *Sunday Times*, 25 March 2001
[161] 'This Is A Story About a 4x4, One of the Most Powerful Men in Parliament and How They Get Bogged Down in the R43bn Arms Deal Controvery', *Sunday Times*, 25 March 2001

4.4 In my capacity as chairperson of the Joint Standing Committee on Defence, I, collectively with other members had the power and/or duty to exercise the aforesaid parliamentary oversight...

4.6 In the process of discharging my duties I became friendly with Accused No. 2 [Michael Woerfel]. He was the head of the representative office of Daimler Benz Aerospace AG in Pretoria, a company whose main business was to manufacture and sell military and civilian aircraft and defence systems. The primary function of accused No. 2 was to market the products of Daimler-Benz Aerospace AG in South Africa. The National Defence Force was a potential purchaser of the products of Daimler-Benz Aerospace AG.

4.7 In March 1998 I was invited by Accused No. 2 to attend an air show in Chile and undertake a tour of the Daimler Benz Assembly Plant in Brazil. Whilst I was in Brazil I learnt that Daimler Benz was due to release a prototype 4x4 Mercedes Benz motor vehicle. I immediately developed an interest in the aforesaid motor vehicle.

4.8 On returning to South Africa I enquired from Accused No. 2 if I could get a discount if I were to buy the aforesaid motor vehicle. Accused No. 2 agreed to make enquiries and if possible arrange a discount I convinced Accused No. 2 to arrange a discount of approximately 50%. After some negotiations Accused No. 2 arranged that discount.

4.9 During October 1998 Accused No. 2 ordered a motor vehicle, a Mercedes Benz ML320 from Mercedez Benz of South Africa (Pty) Ltd, a sister company of Daimler Benz Aerospace (Pty) Ltd, in terms of a purchase discount scheme available to companies and employees of the companies in the group...

4.13 The new vehicle was sold to me for an amount of R182 563,63 at a discount of 47%.

4.14 My relationship with Parliament, representing the people of South Africa, was one of trust and I therefore had a duty to;

> *4.14.1 maintain the highest standard of propriety to ensure that my integrity, and that of the Joint Standing Committee on Defence and Parliament are beyond question;*
>
> *4.14.2 as chairperson of the Joint Standing Committee on Defence to act without favour as an independent and impartial overseer of the acquisition of military equipment, and to establish and maintain the Joint Standing Committee on Defence as the impartial parliamentary overseer;*
>
> *4.14.3 not to take any improper benefit or advantage given by virtue of the office I held; and*

> *4.14.4 to act in good faith and to make full disclosure to Parliament of any personal interests which could place me in a position where such interests conflict with my duties.*
>
> *4.15 The discount I received was not available to the public, or to dealers. I realised that it was highly unlikely that I would have received the benefit had I not been a high profile person and Chairperson of Joint Standing Committee on Defence...*
>
> *4.19 The discount I received from Accused No.2 who represented a supplier of military equipment, was an improper benefit and therefore constituted an infringement of my duties.*

222. The narrative indicates that the offence occurred during the period in which preferred bidders were chosen as the primary contractors with whom the state was to enter into final negotiations to procure the equipment. At this time, Yengeni was Chairperson of the Joint Standing Committee on Defence. It seems clear that he received the benefit because he held this position. At the very least, this is a reasonable inference.

223. Media reports and other documents before the Commission indicated that the supplier company represented by Mr Michael Woerfel received a subcontract to supply equipment for the corvettes selected and purchased in the SDPP.

224. Woerfel was originally investigated on a charge of corruption in relation to Yengeni. The conviction of Yengeni on a charge of fraud rather than corruption had the effect of bringing an end to the corruption charge against Woerfel.

225. The Commission did not call Yengeni as a witness to explain what had happened. Its Report makes no reference to his widely publicised trial and conviction. He is referred

to on a single occasion[162] in Volume 3, but in relation to an allegation that was not germane to the criminal proceedings which led to his conviction and imprisonment.

226. In July 2001, the *Cape Times* received from EADS a list of all cars that had been discounted by DASA, and the recipients.[163] The list shows that a number of individuals who took part in the SDPP process in the selection and negotiation phases, or were employed in positions of influence in the SANDF, received discounted vehicles.[164] The most notable of those individuals were:

226.1. Vanan Pillay, who received a discount of 29.02% of the purchase price of a MB C 250TD vehicle on the 7 of July 1999;

226.2. Llewellyn Swan, who received a discount of 30.5% of the purchase price of a MB ML 320 vehicle on the 23rd of June 1999;

226.3. Siphiwe Nyanda, who received a discount of 17.26% of the purchase price of a MB E 320 AMG vehicle on the 18th of October 1998 and a discount of 15.11% on a MB S 320A vehicle on the 18 of January 2001.

227. Vanan Pillay was employed by the Department of Trade and Industry during the SDPP process. He served as a member of the International Offers Negotiating Team, which negotiated the terms and content of the contracts with the preferred SDPP bidders. This included the scale and content of the offsets program and terms of financing.

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[162] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015, Vol. 3, paragraph 478
[163] The Full List of Vehicles Supplied by EADS', *Cape Times*, 2 July 2001
[164] *Ibid* and 'VIP Car List Makes for Curious Reading', *IOL*, 2 July 2001

228. Llewellyn Swan served as the Chief Executive Officer of Armscor during the SDPP process. In this capacity, he participated in the evaluation of the bids in the SDPP process. As noted previously, Swan was involved in a number of controversial decisions in the SDPP. One such decision involved allowing GFC, which was eventually to subcontract with DASA in the corvette acquisition, to continue to be evaluated despite failing to submit mandatory DIP information in its RFO response. As is explained below, Swan was also alleged to have been employed, albeit indirectly, by the arms contractor Ferrostaal very shortly after the conclusion of the SDPP contract in December 1999.

229. General Siphiwe Nyanda served as the Deputy Chief of the SANDF from 1997 to 1998 as Chief of the SANDF from 1998 to 2005. Although he appeared to play no official role as part of the selection or negotiation teams in the SDPP, the draft Auditor General's Report states that he provided at least one recommendation to the Minister of Defence regarding the number and types of equipment to be purchased in the SDPP in late 1999.[165]

230. It was also reported in the media at least two vehicles were purchased by Woerfel and sold for a sum less than their original value.[166] It is unclear who the ultimate beneficiaries of these transactions were.

231. In 2002, it was reported in the media that Vanan Pillay had been fired from the Department of Trade and Industry as a result of the discount on his vehicle.[167] Minister Alec Erwin was reported as stating that Pillay's dismissal had taken place following an internal disciplinary proceeding.[168]

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[165] Draft Auditor General's Report Dated 18 October 2001, para 5.10.9
[166] 'VIP Car List Makes for Curious Reading', *IOL*, 2 July 2001
[167] 'Arms Deal Participant Fired', *Business Day*, 30 May 2002
[168] *Ibid*

232. In February 2007, MP Patricia De Lille and Judge Willem Heath were reported in the media as having said that they had visited prosecutors in Germany probing allegations related to the SDPP. Judge Heath stated that he had been informed that the Managing Director of Daimler Aerospace had paid an 'acknowledgment of guilt' fine of 15 000 Deutschmark for 'embezzlement' related to the supply of discounted vehicles.[169]

233. These facts were placed before the Commission in the joint submission of Feinstein and Holden. They were reported widely in the media, and appeared in Holden's volume *The Arms Deal In Your Pocket* and *The Devil in the Detail*. Certain of the facts and allegations were repeated in De Lille's submission to the Commission. Volume 2 paragraph 2522 of the Commission's Report states that De Lille repeated this claim in her evidence before the Commission.[170]

234. On 23 January 2009, the National Prosecuting Authority made a submission to Parliament's Joint Standing Committee on Public Accounts. It stated that the NPA had decided to discontinue the investigation into the luxury vehicles (referred to as the 'DASA Leg' of the NPA investigation into the SDPP) due to 'insufficient evidence.'[171] The submission indicated that the NPA had not received any documents from German prosecutors who were investigating allegations related to the SDPP.[172]

235. This matter was not fully investigated by the Commission. Volume 1 paragraph 109 of the Report states that Commission requested, as part of its broader Mutual Legal

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[169] 'Chippy Shaik in arms-deal allegations', *Mail & Guardian*, 4 February 2007
[170] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015, Vol. 2, paragraph 2522
[171] Report by NPA to Scopa on Arms Deal Investigations, Submitted by the National Prosecuting Authority to SCOPA, paragraph 59
[172] *Ibid*

Assistance request to the German Federal Office of Justice at Bonn for all documentation in the possession of German authorities relating to the SDPP, that the following information be provided:

> *'In relation to the investigation into discounted cars by European Aeronautics Defence and Space Company, the Commission requested any evidence pointing to the reasons why these discounts were made in the first place and the names of all recipients of the discounts and judicial pronouncements thereto.'*[173]

236. The Commission states at Vol 1, paragraph 115 that 'no information material to the issues the Commission was seized with was ever received from German authorities.'[174]

237. The Report makes one other reference to the luxury vehicles. Volume 2 paragraph 2522 summarises the evidence provided by De Lille on this matter.

238. Volume 3 of the Report makes no findings of fact in relation to the allegations.

239. The Commission's failure to obtain documents from Germany was compounded by its failure to examine the documents emanating from the NPA/Scorpions/DIPCI investigations in the SDPP and stored in shipping containers. The container may have included evidence relevant to this matter. The Commission made no apparent attempt to establish whether this was the case.

240. Vanan Pillay gave evidence to the Commission on 21 January 2014.[175] As noted above, he received a discounted luxury vehicle and was reported to have been dismissed from

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[173] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015, Vol. 1, Section 6, paragraph 109

[174] *Ibid*, Vol. 1, Section 6, paragraph 115

[175] Pillay's Public Hearings Transcript runs from p. 4025 to 4079 of the public hearing transcripts

the DTI as a result. He did not address the matter in his witness statement, or in his evidence in chief. He was not asked a single question about this matter.

The Commission failed to timeously access relevant information from Swiss authorities

241. In Chapter 2, Section B (3) of Volume 1 of its Report, the Commission discusses its interaction with Swiss investigative authorities. The Commission states:

> *'[91] The preliminary investigation conducted by the Commission in 2012 revealed that the Swiss authorities had conducted an investigation into allegations of money laundering after information was provided by HSBC Private Bank to the Swiss Money Laundering Report Office. The information related to an adviser of BAE who also happened to be a South African citizen. This information was shared with the South African authorities. Furthermore, it was alleged that BAE had an unmanned storage facility in Geneva where it kept all covert contractual agreements with its advisers. On the strength of this information, the Commission by letter requested a meeting and more information from the Attorney General of Switzerland, Mr Michael Lauber, and the Swiss Money Laundering Report Office. On 2 July 2012, a similarly worded letter was sent to the Federal Prosecutor in the Office of the Attorney General, Ms Maria Schnebli.*
>
> *[92] On 16 August 2012, the Attorney General of Switzerland acceded to the Commission's request for a meeting and frankly informed the Commission that without a formal request for MLA, access to the relevant case files, the investigation and the MLA proceedings that had in the meantime been discontinued and completed, would be limited. On 5 November 2014, Ms Schnebli informed the Commission that the Office of the Attorney General would be pleased to welcome a delegation of the Commission but added that the Office would not be able to share any evidence as it needed to establish first whether MLA could be granted to the Commission. The meeting did take place and was attended on behalf of the Office of the Attorney General by Ms Schnebli, the Chief Federal Prosecutor, and Mr Nicolas Bottinelli, a federal prosecutor. They informed the Commission that the request for MLA was withdrawn after partial evidence had been transmitted to South Africa. This withdrawal led to the end of the MLA. Should the Commission wish to have copies of information it should lodge a formal request in a criminal matter before the Swiss Federal Office of Justice in Bern, which is the Swiss Central Authority for the purposes of article 46 par 13 of the United Nations Convention Against Corruption. They cautioned that if accepted, the execution of the MLA could take some months, as the persons affected could appeal against the decision granting MLA.*
>
> *[93] No information of interest was given to the Commission delegation.'*

242. From this account, the following can be deduced:

242.1. The Commission was of the opinion that Swiss authorities had or might have information in their possession that was relevant to its terms of reference and would be required in fulfilment of its investigation.

242.2. The Commission was informed that this information could be sought through a Mutual Legal Assistance request to the Swiss authorities.

242.3. The Commission decided not to submit a Mutual Legal Assistance request.

243. The Commission does not explain why it failed to submit a MLA request to the Swiss authorities. The Commission was informed of the need for an MLA request in August 2012, long before the termination of the Commission's life. It did not cause such a request to be made. The Commission then took itself to Switzerland more than two years later, in November 2014, without an MLA request having been made. The purpose of that trip is with respect difficult to discern. And even after that trip, the Commission apparently made no attempt to have an MLA request made.

244. Further, the Commission was told by the SFO that the transcript of an interview conducted with Alexander Roberts by the SFO investigator, Gary Murphy, was lodged with Swiss authorities and should be requested from them. At paragraph 80 of Volume 1 of the Commission's Report, it is stated:

> *'Although the Swiss authorities gave the SFO permission to share the transcript of an interview that Mr Murphy conducted with Mr Alexander Roberts in Switzerland, this information could not be provided to the Commission as it would appear that the Commission's mandate and objectives were different. The Commission was advised to source the transcript from the Swiss authorities.'*

245. As appears from SFO documents that were submitted to the Commission, Alexander Roberts controlled an entity, Arstow Corporation, that received £15m from BAE's offshore entity, Red Diamond. Roberts, in turn, was reported to have confirmed to the SFO that a portion of the funds received from Red Diamond by Arstow was for the ultimate benefit of Advocate Fana Hlongwane. Advocate Hlongwane was a key figure in the SFO, DSO and DPCI investigations into allegations of corruption regarding BAE Systems. He was suspected of receiving funds from BAE via covert and overt means to exert influence on politicians or other officials to the benefit of BAE.

246. It appears that this request, too, was not made to the Swiss authorities.

247. The Commission thus failed to conduct a meaningful investigation into these matters, because it simply failed to obtain information of which it was aware, and which was available to it.

Failure to make reasonable attempts to obtain information from the West Indies and Liberia

248. In Chapter 2, Section C of Volume 1 of its Report, the Commission discusses its attempts to access relevant evidence from West Indies and Liberia. It states:

> *'[119] The Commission sent a letter of request for information to the Registry of Companies in the Nevis Island Administration for information pertaining to FTNSA Consulting which allegedly was incorporated in Nevis in the West Indies. The Commission received neither a response nor an acknowledgement of receipt.*
>
> *[120] The Commission also sent a letter of request for information to the Liberian Anti-Corruption Commission in Monrovia, Liberia, in a bid to obtain company records and banking transactions of Mallar Inc, which had its last known address in that country. The Commission received neither a response nor an acknowledgement of receipt.'*

249. The evidence that the Commission requested from these two jurisdictions was of vital importance to investigating allegations of corruption in the SDPP. As I have explained elsewhere, Mallar Inc was allegedly controlled by Tony Georgiades, and the recipient of funds to secure the success of both GFC and GSC bids. FTNSA Consulting, which was publicly reported to belong to Basil Hersov, received funds via the BAE Systems Red Diamond offshore entity, and was maintained as one of BAE System's 'covert advisors'.

250. The Commission's attempts to secure this evidence, as set out above, seem to have been a token nature. It seems that the Commission simply did not follow up the requests via letter to the relevant entities. It does not appear to have made use of diplomatic channels available to it through the Department of Foreign Affairs. It is not clear whether the Commission made any further attempt at direct formal or informal contact with the bodies concerned. I submit that sending a single letter to the relevant authorities, and then folding its hands, does not constitute compliance with the Commission's obligation to investigate an important line of its inquiry.

Failure to secure any information from any overseas jurisdiction, and the implications for the Commission's approach to evidence submitted to it

251. Section B of Chapter 2 of Volume One of the Commission's Report addresses its interactions with foreign entities. The Commission failed to gather or acquire a single piece of documentary evidence from any of the jurisdictions it approached.

252. The Commission was told, by DPCI officials with an insight into the SDPP investigations, that 'without the cooperation of international agencies it would be difficult to prove the allegations.'

253. In some instances, as was the case with Liechtenstein, this may have not been a fatal problem as information had already been transmitted to South African authorities upon which the Commission could rely. In others, it appears to have effectively terminated those aspects of the Commission's investigation into allegations of corruption and wrongdoing. This is particularly true of the information requested from German authorities, which was germane to investigations into the conduct of GFC and GSC, and which related to substantial evidence that could reasonably be expected to yield information relevant to the Commission's mandate.

254. In certain cases, as described above, the cause of this failure lay with the Commission.

255. In certain instances, the failure of the Commission to access information was not due to its own conduct, but due to the failure of overseas authorities to respond in time. This appears to have been the case with German authorities, who failed to execute an MLA submitted by the Commission.

256. I submit that in the Commission's failure to access this documentary evidence should have led it to accept with enthusiasm and energy, documents provided by witnesses, that addressed the evidence from overseas, and/or that emanated from investigations by overseas investigators. In the next section, I submit that the Commission's approach to evidence that was submitted to it, especially by 'the critics', compounded and aggravated its failure to conduct the investigations which it was obliged to carry out.

THE FAILURE OF THE COMMISSION TO ADMIT INTO EVIDENCE THAT WAS HIGHLY MATERIAL TO THE ENQUIRY

The Debevoise & Plimpton Report

257. The Debevoise & Plimpton Report ('DP Report') is a document compiled by the US law firm Debevoise & Plimpton on behalf of its client Ferrostaal. The DP Report's title is "Ferrostaal: Final Report Compliance Investigation." It is dated 13 April 2011. It presents the result of a detailed investigation by Debevoise & Plimpton into the conduct of Ferrostaal AG in its various markets around the world, with a focus on whether the company had engaged in corruption or other wrongdoing in conducting its business. Ferrostaal AG was a primary contractor in the SDPP, being a member of the German Submarine Consortium that won the submarine contract in the SDPP.

258. The DP Report was leaked to the international media in late 2011. It was the subject of numerous media reports in South Africa and abroad. The media reported on various aspects of the DP Report's account of Ferrostaal's activities in South Africa, which could be construed as demonstrating that Ferrostaal had engaged in corruption to secure contracts in South Africa. The DP Report is still freely available on the internet. It can be found through a simple internet search, such as 'Debevoise Ferrostaal report'. That search returns a PDF copy of the DP Report as its first result, hosted at the web address

https://kassios.files.wordpress.com/2012/10/confidential-secret-report-findings-re-ferrostal-greek-gov-case-pribes1.pdf. Ferrostaal does not appear to have instituted any legal proceedings to have the Report removed from the internet, or to take any other action against media outlets which reported on the content of the Report.

259. The Commission devotes considerable space in Volume 1 of its Report to the issue of the DP Report. This flows from the Commission's refusal to admit the Report as evidence. The Report states:

> *'The document was undisputedly compiled by a USA firm of attorneys by the name of Debevoise & Plimpton LLP on behalf of and for their client, Ferrostaal GmbH. Ferrostaal is a company that formed part of the German Submarine Consortium (GSC), which was awarded a contract to supply the South African Navy with three submarines under the SDPP. This document (referred to alternatively as the 'Debevoise report' or 'the report') is clearly a confidential attorney-client communication and should ordinarily enjoy the protection of legal professional privilege. We use the word 'ordinarily' advisedly, because in the instant case it has been contended that the report has lost the protection of privilege because it was leaked to the internet from where it has become accessible to the public.*
>
> *[14] In this case, the Debevoise report was put in the public domain stealthily without the consent of Ferrostaal; nor has Ferrostaal waived its right of professional privilege. In the circumstances, the second ruling of 8 October 2014 stands and the Debevoise report cannot be used in these proceedings.'*[176]

260. The Commission notes that attempts were made to introduce the DP Report as evidence, and that the legal representatives of Ferrostaal and of Fana Hlongwane, one of the persons implicated in alleged wrongdoing in the SDPP process, objected to this on the grounds that the DP Report was privileged. The Chairperson on two occasions held that the DP Report was inadmissible, and the Commission repeated that conclusion in its Report.

[176] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015, Volume 1, Chapter 3, paragraphs 2 - 14

261. I submit that the exclusion of the DP Report was manifestly wrong in law, and further resulted in the Commission not carrying out its functions and duties. This will be addressed in argument.

262. The Commission then compounded its refusal to admit the DP Report into evidence. It stated, in Volume 1 of its Report, that 'the Debevoise report had been made available to us on a confidential basis for the purpose of assisting us in our investigation and for that reason we have perused it.'[177] The Commission stated that after reading the DP Report, it had come to the conclusion that if the DP Report had been admitted, this would not have materially altered the findings of the Commission:

> *Having said this, we indicated in the course of the public hearings that the Debevoise report had been made available to us on a confidential basis for the purpose of assisting us in our investigations and for that reason we have perused it. Having done so, we are satisfied that even if it had been admitted in evidence, it would not have made any difference to our findings, for the simple reason that its investigations and findings reveal no evidence of any bribery, fraud or corruption in the SDPP.*
>
> *[16] Insofar as the South African leg of its investigation of Ferrostaal's compliance controls is concerned, the report deals with three aspects.*
>
> *[17] First, key consultants were employed by Ferrostaal to advise it and support its bid for the submarine contracts. In this regard, it is undisputed that Ferrostaal had engaged a number of consultants and paid them substantial amounts of money. These consultants have been named in various other documents that have been placed before the Commission. Two of the consultants, Mr Tony Georgiades and Mr Tony Ellingford, are alleged to have known some senior political leaders in South Africa, and the insinuation is that they may have used part of the money they had earned to buy political favours for Ferrostaal. Regarding the third consultant named, Mr Jeremy Mathers, the report itself concedes that nothing untoward could be said about him.*
>
> *[18] Significantly, the report concedes that there is no direct evidence that any of the consultants gave the money they received from Ferrostaal to third parties.*

[177] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015, Vol 1, Chapter 3, paragraph 15

[19] The second aspect relates to the offsets. The report raises a number of concerns about the manner in which Ferrostaal approached and handled its offset obligations. Whilst it found some of the offset projects to be rather problematic, the report significantly concedes that there was no evidence that the projects were selected for improper reasons. In short, the report does not contain evidence of any wrongdoing, least of all by any South African official involved in the offset programmes.

[20] The last aspect relates to Mr Shamin Shaik (Chippy), the DOD's Chief of Acquisition in the SDPP. The report repeats the assertion made by some of the critics that Mr Shaik influenced the award of the combat suite contract for the corvette programme to African Defence Systems (ADS), which, it is claimed, was controlled by Mr Shaik's brother Shabir. The evidence led before the Commission is very clear as to how ADS came to be awarded the combat suite contract and the authors of the Debevoise report were obviously given false information. Other than the wrong information about ADS, the rest of the concerns about Mr Chippy Shaik deal with the business relations that he had established with Ferrostaal after he had left the DOD in 2001, and nothing turns on that.

[21] Finally, we point out that there are some averments contained in the report that are in conflict with the substantive evidence, oral and documentary, placed before the Commission. In such instance, the evidence led before the Commission must prevail for the simple reason that the findings of the report are based on limited information that was informally obtained from a few employees of Ferrostaal together with the latter's internal records. Moreover, the information does not seem to have been obtained under oath. Most importantly, none of the State officials involved in the SDPP was interviewed, nor was the vast documentation made available to this Commission placed before or made available to the drafters of the report.[178]

263. In fact, what the DP report said was the following:

'Ferrostaal paid very little care to defining and monitoring the precise services of its chief consultants, Tony Georgiades and Tony Ellingford, even though these two consultants were Ferrostaal's largest payees on the project, taking in more than 25% of Ferrostaal's revenues. There is no sign that anyone at Ferrostaal ever knew with any specificity what the two consultants did (or was at least willing to state it in writing). Their contracts each contained a detailed list of services; but the lists were identical, suggesting both that there was no intent or expectation that they would provide the indicated services, and the lists were created merely for appearance's sake.

In the one instance where a Ferrostaal employee expressed doubt that a demand for payment was not properly backed up by commensurate services, the message from the very top came back loud and clear: whatever had been done by the

[178] *Ibid*, Vol. 1, chapter 3, paragraphs 15 - 21

consultant was enough, and payment was not to be delayed or withheld on any account. On that occasion, at the start of 2003, the then CFO officially objected to both a fellow Vorstand [Board] member and to the then CEO that the scant documentation attached to a €2 million invoice from Georgiadis was insufficient to justify such a large payment. The CEO peremptorily told the CFO that he was wrong ordered that the payment be made. The CFO did not raise further objections or conduct additional checks...[179]

Through his companies Mallar Inc. and Alandis (Greece) S.A., Georgiadis was paid €16.5m by Ferrostaal between 2000 and 2004. Georgiadis was introduced to Ferrostaal by Thyssen Rheinstall-Technik GmbH ("TRT"), with whom Ferrostaal had worked on the first phase of the South African naval project, which was later separated into submarine and frigate components. In 1997, Christoph Hoenings of TRT told the Ferrostaal employee then responsible for the submarines project that Ferrostaal should pay Georgiadis $20m "for the purpose of securing the German package" and that Georgiadis would use the payment to convince "key decision-makers" to support the bid. The responsible offset employee sought approval from his superior, the then head of Marine, which the latter gave, apparently, without concern.

In October 1998, Ferrostaal and Georgiadis signed an agreement whereby Georgiadis would receive 2.5% of the contract value in return for advising and supporting Ferrostaal in its efforts to win the submarine bid. That 2.5% ultimately worked out to approximately $20 million. Attached to a revised version of the contract was a list of services that Georgiadis was to provide to Ferrostaal. This list was identical to that appended to the Ferrostaal contract with the other main consultant, Tony Ellingford which indicated that the list was appended to the contract merely for appearance's sake, and raises questions as to whether Georgiadis was expected to perform any of the listed services.

It is apparent that Georgiadis' chief role was as a conduit to politicians. The record shows that he knew a number of senior politicians, including President Thabo Mbeki and possibly Nelson Mandela, and introduced Ferrostaal employees to these politicians. Indeed, the former head of Marine informed the former CFO in 2003 that "political contacts" with Mallar (and previously TRT) had a decisive influence on the tender for the submarines. The CEO's overriding of the CFO's objections to paying the €2 million invoice in 2003, set out above, shows how highly Georgiadis' services were valued at the top of the company...

Overall there is little evidence to suggest that Georgiadis did work commensurate with the fee received. By the same token, however, there is no direct evidence that he gave any of the money he received from Ferrostaal to third parties.

There are unanswered questions about a third Georgiadis company, Elmar Maritime Inc. In November 1998, Ferrostaal agreed to pay Elmar

[179] Ferrostaal: Final Report Compliance Investigation, Debevoise & Plimpton, 13 April 2011, p. 58 - 59

approximately $2 million for the transport of oil to South Africa, as part of "pre-offset obligations." It paid Elmar $1.865 million in November 2000. It is not clear how "pre-offset obligations" could have arisen more than a year before Ferrostaal had even won the submarines contract, or why Ferrostaal needed to bring oil to South Africa. Oil imports were not part of Ferrostaal's offset obligations. Nobody has been able to explain the need or rationale of this agreement and payment.

Georgiadis refused a request for a meeting...

Tony Ellingford was a former executive in the defence industry hired by Ferrostaal in 1998 to advise on the submarine contract. Like Georgiadis, he was paid €16.5 million by Ferrostaal between 2000 and 2003, through his company Kelco Associates S.A. ("Kelco"). According to consultant Jeremy Mathers, Ellingford was hired because the responsible Ferrostaal Bereichsvorstand in the late 1990s, wanted someone with "political connections" to help Ferrostaal win the contract. Mathers asked Llewellyn Swan, an old contact from the South African defence industry, for advice; Swan recommended Ellingford, who was then hired by Ferrostaal. Ellingford, like Georgiadis, also had multiple political connections, and introduced Ferrostaal to various decision-makers, including Defence Minister Joe Modise.

As noted, the list of services appended to Ellingford's contract was identical to that of Georgiadis. There is evidence of meetings arrange and intelligence gathered by Ellingford, but the amount of work done does not seem commensurate with the payments he received. It appears that he, like Georgiadis, was paid to provide political access...

There is another unexplained similarity between the documentation for consultants' services: three letters to Ferrostaal that were purportedly written by Ellingford are virtually identical to three letters purportedly written by Mathers. During his interview, Mathers remembered writing the letters, but he could not explain why nearly identical versions appeared under Ellingford's name. Mathers seems the more likely original author of these letters because they reported information which, based on Mathers' background and other letters and reports written by him, appeared to be within his knowledge. It is therefore possible that copies were made by Ferrostaal, to be signed by Ellingford and placed in his file, in order to provide documentary evidence of services rendered by him and thus seek to justify the amounts paid to him, if they were ever questioned by the internal controls organs or, indeed, a tax audit.

Ellingford did not respond to request for a meeting.'[180]

[180] *Ibid*, p.59 - 62

264. I submit that any open-minded person who was aware of the content of the DP Report - which was prepared by Ferrostaal's own attorneys who investigated the matter with the assistance of the company - would conclude that it raised serious concerns that Ferrostaal may have used illegal or unethical means to secure influence in order to win the submarine contract in the SDPP, and that these claims warranted thorough investigation. Any open-minded person reading the DP Report would also conclude that it raised serious questions as to whether the offset programmes attached to the SDPP generated any meaningful economic benefit, which is relevant to Paragraph 1.4 of the Commission's Terms of Reference.

265. I submit that in the light of the information in the DP report, it is inexplicable that the Commission (for example):

265.1. did not subpoena Tony Georgiades (who had refused to be interviewed by DP);

265.2. did not subpoena Tony Ellingford (who did not respond to a requests by DP for a meeting);

265.3. made no apparent attempt to interview or question any of the Ferrostaal employees mentioned in the DP Report;

265.4. made no apparent attempt to obtain, from Ferrostaal or Debevoise & Plimpton, any of the underlying material - notes, minutes or interview transcripts - that formed the evidentiary basis for the DP Report; and

265.5. did not cross-examine Ferrostaal representatives on the matters raised in the DP Report.

266. The Commission appears to have found it not worthy of investigation that it was alleged that:

266.1. Both Georgiadis and Ellingford were paid €16.5m for the work they performed for Ferrostaal on the submarine contract;

266.2. Attached to the contracts entered into by Georgiadis and Ellingford were identical lists of identical duties, which raised concerns amongst DP investigators that they were merely created for appearance's sake;

266.3. The investigators were unable to find any record that the payment that the two consultants received was commensurate with the work they conducted; and questions raised in this regard had been summarily dismissed by senior Ferrostal officials;

266.4. Both consultants were known to have connections to officials and politicians connected to the SDPP, and consultants introduced Ferrostaal to their connections;

266.5. Ellingford was appointed as a consultant to Ferrostaal specifically because he was perceived to have useful political connections;

266.6. Ellingford was appointed on the basis of a recommendation made by Llewellyn Swan, who was at that very time taking part in the evaluation of the submarine bid as CEO of Armscor;

266.7. At least one individual indicated that the 'political contacts' brought to the party by Georgiadis were decisive in securing the submarine bid for Ferrostaal;

266.8. The Debevoise & Plimpton investigators were of the clear opinion that Georgiadis' 'chief role was as a conduit to politicians';

266.9. The Debevoise & Plimpton investigators were of the clear opinion that Ellingford, 'like Georgiadis, was paid to provide political access.'

267. I submit that a Commission which was intent on carrying out its functions and duties would regard these as matters requiring thorough investigation.

268. The Commission's Report is entirely silent on the relationship between Llewellyn Swan and Ferrostaal. This despite the fact that Ferrostaal's relationship with Llew Swan was flagged in the DP Report, and the Debevoise & Plimpton investigators were of the opinion that Ferrostaal's relationship with Swan was 'another likely instance of payment for access to decision-makers.'[181] The DP Report noted that:

> *'The involvement of Swan was another likely instance of payment for access to decision-makers. Swan was CEO of ARMSCOR Ltd., the South African arms procurement parastatal, from late 1998 until late 1999. In that position, he was one of the key individuals in deciding who would win the submarine contract.*
>
> *In November 1999 – weeks before the submarine contract was awarded – Swan unexpectedly resigned from ARMSCOR. No later than March 2000, he was working for Ferrostaal, albeit indirectly: at that time Ellingford informed Ferrostaal that Kelco was working with a subcontractor called MOIST cc, represented by Swan. In fact, this may not have been Swan's first involvement with Ferrostaal: Mathers stated in an interview that Swan was working for Ferrostaal both before and after he was in charge of arms procurement in South Africa. The investigation found no evidence that Swan tendered his decision in favour of Ferrostaal in return for either payment or promises of payment, but Swan's position was a significant red flag that Ferrostaal ignored.'*[182]

269. Despite the facts set out above regarding Swan's relationship with Ferrostaal, and despite the fact that Swan was a member of the SDPP acquisitions team, the Commission did not

[181] *Ibid*, p. 61
[182] *Ibid*, p. 61

call him as a witness and cross-examine him. This is even though Swan was also alleged to have been the recipient of a discounted vehicle from a company linked to the SDPP, as is addressed below.

270. With regard to the DP Report's discussion of offsets, I submit that the Commission's attitude is again inexplicable in the light of Paragraph 1.4 of its terms of reference. This required the Commission to investigate not just whether a company was granted sufficient offsets credits to meet its obligations, but whether the offsets that flowed from the SDPP delivered real economic benefit to the country. The DP Report raises serious and material questions as to the company's intention to deliver economic benefits and as to whether these benefits materialised in reality.

271. Before referring to the detail of the DP Report on the economic impact of Ferrostaal's offset obligations, I note that while the Commission is correct in stating that the DP Report could point to no direct evidence that offset investments were selected for improper purposes such as to 'funnel money' to DTI officials, it appears to have ignored the very material account in the DP Report of a meeting with the Ferrostaal employee in charge of the offset program in South Africa. During the meeting, the employee indicated that offsets were used to pay *Nutzliche Aufwendungen* [Useful Expenditure/s].

272. 'Useful Expenditures' is often used as a euphemism for bribery. The phrase derives from the fact that, prior to late 1999, German companies were allowed to deduct bribes and other payments to overseas individuals from their tax obligations under the line item 'Useful Expenditures.' The payment of bribes to individuals or entities abroad was criminalised in Germany in 1999.

273. The relevant sections of the DP Report on offsets stated:

'The Investigation found no evidence that projects were selected for improper reasons, such as, for example, to funnel money to a company owned by a relative of a DTI official. But the projects, looked at individually and as a whole, are nonetheless problematic.

At a meeting in 2005, the employee formerly in charge of the offset program in South Africa alleged that a Vorstand member had said that South African offset projects had been used to pay Nutzliche Aufwendungen [Useful Expenditures]. He also said that consultants Ellingford, Georgiadis and Swan had approached him in that regard, and that he had seen an agreement regarding these payments. Debevoise was unable to obtain an explanation of this statement, as both the employee and the relevant Vorstand members declined to be interviewed. But the lack of investigation or corrective action is in keeping with the Company's general lack of follow-up when serious allegations were made, as noted in other sections of the Report.

Set out below are the offset projects that raise particular concerns, based on the circumstances of the investment or the offset companies involved.

MAGWA: Magwa was a tea plantation in the Eastern Cape province of South Africa, the home of many leading politicians from the African National Congress. Ferrostaal made the investment to the Eastern Cape Development Corporation, a quasi-governmental body. Chippy [Shaik] supposedly brought the project to Ferrostaal. Ferrostaal invested ZAR23.5 million on this project in 2005. As this was paid via a "non-refundable loan," Ferrostaal received nothing in return.

SAMES: Ferrostaal loaned ZAR 42.2 million to SAMES between 2005 and 2007, of which the majority has not been repaid. SAMES is a subsidiary of Labat Africa Ltd., a company with close ties to the African National Congress. Labat Africa was also chaired by Defence Minister Joe Modise until he died in 2001.

Atlantis Development Trust: Ferrostaal invested more than ZAR 26 million in Atlantis Development, an educational body, between 2003 and 2006. The body failed and there were allegations of fraud; before that, however, the head of Ferrostaal's South African operation had informed Atlantis Development that it would never have to repay the money provided to it.

Other: In at least two other cases the project invested in failed utterly and the entire investment had to be written off: Condomi (ZAR 1.5 million invested in 2002 and 2003) and Trimica (ZAR 9 million invested in 2005)

Ferrostaal employees referred us to the frequent use of a "non-refundable loan" to make offset investments. Functionally, there is no difference between this and a straightforward grant, which was confirmed by the accounting and tax personnel interviewed in the course of the Investigation. The examples above illustrate that Ferrostaal was prepared to support and invest in projects, including through such loans, that it seemed to have had little interest in

succeeding. One former manager responsible for offset said that this just confirmed the questionable nature of the offset business, in which DTI credits were the only real factor driving Ferrostaal's investment decisions.'

274. Finally, the Commission's approach to the material in the DP Report that discussed Ferrostaal's relationship with 'Chippy' Shaik is also inexplicable. The Commission dismisses the evidence with regard to Shaik on two grounds:

274.1. That the DP Report referred to Shaik influencing the award of 'the combat suite contract for the **corvette** programme to African Defence Systems', that the Commission had heard evidence that contradicted this, and that this meant that 'the authors of the Debevoise report were obviously given false information.'

274.2. That the matters canvassed with regard to Chippy Shaik in the DP Report 'deal with business relations that he had established with Ferrostaal after he had left the DoD in 2001, and nothing turns on that.'

275. <u>As to the first ground</u>: It appears that the Commissioners failed to read the DP Report properly, as the Report does not in fact make this allegation. The DP Report states that individuals within Ferrostaal were told by Shaik that they must award the combat suite contract in the **submarine** contract to ADS. No mention is made of the corvette contract in the DP Report. The DP Report states as follows:

*'As noted, Chippy was in charge of acquisitions at the Ministry of Defence from 1997 to 2001. As such, he was one of the key people in determining who would win the submarines contract. As was to be expected, Ferrostaal had numerous dealings with Chippy Shaik during his tenure at the Ministry. On one occasion, one interview said, Chippy told Ferrostaal and its consortium partners that they must grant the subcontract for the **submarine contract** [*my emphasis*] to African Defence Systems (Pty) Ltd ("ADS") a company controlled by Chippy's brother Schabir. According to the same interviewee, HDW, the shipbuilding*

member of the consortium, refused to do so because of ADS' partnership with a French company.'[183]

276. The Commission's Report does not show any attempt to test this allegation.

277. As to the second ground: It cannot be correct that 'nothing turns' on the business relationship between Chippy Shaik and a prime contractor in the SDPP, because this relationship actuated after Shaik left the employ of the DoD. An open-minded person would ask whether those business relationships were entered into as the result of a prior arrangement reached during the SDPP process.

278. The Commission, it appears, failed to ask such questions: the record indicates that no attempt was made to investigate them. None of these facts were put to Chippy Shaik during his appearance before the Commission. He did not deal with them in his witness statement. He offered a general denial of any wrongdoing, but he was not questioned in any depth on these matters.[184]

The German Police Report

279. The Commission states at paragraph 115, Section B (6) of Chapter 2 of Volume One of its Report that it submitted an MLA to German authorities in 2012, but failed to secure any documentation from Germany. In the circumstances, one might expect the Commission to show eager interest in any documentation emanating from German investigators or police authorities that spoke to allegations of corruption in the SDPP. However, this is not what happened when the Commission was presented with a potentially vital document emanating from German police officials.

[183] *Ibid*, p. 65
[184] Public Hearing transcripts, Chippy Shaik, 8914 – 8920, 11 November 2014

280. The document in question was submitted to the Commission by two witnesses: Dr Young and Col Johan Du Plooy. It was annex RM52 to the witness statement of Young, and annex JDP56 to the witness statement of Du Plooy. For ease of reference, I refer to this document as the 'German Police Report.'

281. Annex JDP53 to Col Du Plooy's witness statement indicates how the members of the DSO investigating team overseeing the SDPP investigation, including Du Plooy, came into possession of the German Police Report. JPD53 is of a chain of email correspondence between one Lioba Borowski and Adv Billy Downer. Adv Downer was part of the South African investigative team focussed on the SDPP. In her email of 15 August 2008 to Downer, Borowski states that she was a 'member of the police investigation team that dealt with the corvette contract and in charge of the investigations into the South African side of the assumed bribes.'[185] The email states that Borowski held the position of 'Kriminalhauptkommissarin', or detective chief superintendent, with German police in Dusseldorf. In her email of Tuesday 19 August 2008, she discusses evidence of potential wrongdoing on the part of ThyssenKrupp in relation to the South African corvette contract. She also attached 'two further word documents which I wrote in preparation of our MLA to Britain.'

282. It appears that one of the attached 'word' documents was Annex JPD56: the German Police Report. The Report is dated 13 February 2007.

283. The other 'word' document was likely Annex JPD55 to Du Plooy's witness statement. It appears that the same document was submitted by Young as Annex RMY53, although with one difference: Annex JPD55 to Du Plooy's statement is not dated, while the

[185] Annexure JPD53 to the Witness Statement of Col Johan Du Plooy to the Commission

document submitted by Young is dated 23 August 2007. Beyond this, the content is identical. The document has the same formatting as the German Police Report and has Borowski's name at its conclusion. It appears to be, in the main, a response to a submission by a law firm in London to the German authorities related to the investigation. It largely repeats the facts and allegations in the German Police Report, with a few exceptions that are not relevant here. I therefore do not deal with it in depth.

284. As the email from Borowski to Adv Downer indicates, the German Police Report acted as an unofficial summary of the evidence and conclusions of Borowski, flowing from investigations undertaken by German police authorities in Dusseldorf, which included search and seizure operations at the commercial premises of ThyssenKrupp. The following is stated in the German Police Report:

> *The origins of the investigation has been allegations by a South African businessman, Nicholas Stuart ACHTERBERG, that a person called Sven HANSEN told him about 40m DM bribe money that he, HANSEN, transported with a company jet to Geneva and paid into an account held by Thabo MBEKI.*
>
> *During the execution of our first search warrant on ThyssenKrupp companies in June 2006, we found evidence, that this Sven HANSEN in fact was Sven MOELLER. But the payment of 40m DM in cash into a Swiss bank account is not proved and presently quite unlikely to be true.*
>
> *ACHTERBERG offered to come to Germany and give evidence but failed to respond to email contacts in the end.*
>
> *ACHTERBERGS allegations led to a tax investigation into so-called "useful expenditures" in connection with the corvette contract that ThyssenKrupp claimed for tax deductible expenses.*
>
> *The following "useful expenditures" had been claimed:*
>
> - *MALLAR Inc* *22m US $*
> - *MERIAN Ltd* *3m US $*

- *Rolf Wegener*　　　　*1m DM*
- *FBS*　　　　*1.6m ZAR*

The lawyer Dr. Sven THOMAS acting for ThyssenKrupp in 1999 wrote an expertise report about how these expenses should be treated under tax legislation and admitted himself that a share of 10m US $ of the contract sum of 22m US $ for Mallar Inc. has very likely been paid to South African officials but denies the offend [sic] of bribery in connection with these payments.'[186]

285. The remainder of the German Police Report indicates that, as a result of the investigation by German authorities, evidence had emerged that a number of very substantial payments were made (or were believed to have been made) by ThyssenKrupp to individuals either directly involved in the SDPP acquisition process or linked to such persons. These individuals and companies included Chippy Shaik, Tony Yengeni, Tony Georgiades, Vice-Admiral Sampson Anderson, Admiral Putter, Yusuf Surtee, Mo and Yunis Shaik and Futuristic Business Solutions. I do not repeat, in full, the allegations against all of those persons. However, I do quote from the Report with regard to four individuals against whom the most serious allegations were made, to indicate the seriousness of the allegations and the nature of the evidence presented.

286. The following is stated with regard to Tony Georgiades:

Consultancy Agreements with Mallar Ltd

The first agreement with MALLAR Inc. has been signed as far back as 26th April 1995. In late December 1994 GFC had failed to quality to enter the next round of the tender process.

By than [sic] BAZAN of Spain and YARROW of Scotland had been chosen to be the two offers to enter the next round. In the end BAZAN had been selected as preferred bidder for the corvette contract.

In January 1995 the then Vice President Thabo MBEKI came to visit Germany.

[186] *Ibid*

After a telephone call with President Nelson MANDELA he was quoted to have uttered that 'We will put it on the table again' and 'that there is still hope for you' (i.e. GFC).

About that time probably the first contact to Antony (Toni) Vassos GEORGIADIS was made.

It is not known who led the initiative for such a contact and how GFC or rather TRT learned about his existence and the services he later performed. But it is known that GEORGIADIS had a close friendship with the than [sic] Vice President Willem de KLERK of South Africa who later married GEORGADIS' wife in 1998.

He obviously had close connections to Thabo MBEKI.

GEORIADIS helped [Chistoph] HOENINGS [a senior TRT executive] by advising him how to present the German offer in a more appropriate way to the South African decision makers.

This led to a first consultancy agreement between MALLAR Inc. and TRT [Thyssen] in April 1995 over the sum of 22m US $.

Tony GEORGIADIS signed this agreement on behalf of MALLAR Inc.

The signatories on behalf of TRT were HOENINGS and KOOPMAN.

GEORGIADIS and HOENINGS met in London to arrange/sign this agreement.

On the 17th of May 1995 GEORGIADIS sent a facsimile to HOENINGS saying:

> *'Step One: We've Done It.'*

About that time the first tender most probably had been cancelled.

In May 1996 two new consultancy agreements had been signed by GEORGIADIS (for MALLAR Inc.) and HOENINGS and KOOPMAN (for TRT).

The first agreement dated 28th May 1996 contains a commission of 17m US $.

The second one dated 29th May 1996 contains a commission of another 5m US $.

Both contracts were intended to be valid for 12 months from the effective date 28th and 29th May 1996.

The contracts contain the clause that in the event that the 'quoted price should not be realized during contract negotiations, but if a considerable price reduction should have to be granted by TRT in order to secure the contract or if the supply offered by TRT should be decreased considerably, M (=Mallar Inc.) and TRT shall find a mutual agreement on a reduction of the commission amount.'

I consider this inter alia as proof that the commission was not so much a fixed sum but a percentage of the purchase price intended to gain.

Both contracts had eventually been prolonged several times.

The latest prolongation is dated 28th April 1999 and therefore after the 19th of February 1999, the day when bribing foreign officials became a criminal offence under German legislation.

The payments to MALLAR Inc. can be traced in the TRT accounts.

Altogether the amount of 21.5m US $ has been paid to MALLAR Inc...

MALLAR Inc. is an offshore company registered in Monrovia/Liberia. Due to Liberia's legislation MALLAR Inc. is not entitled to do any business in Liberia itself.

In a letter from Mr. Fehr of Credit Suisse to TRT it is stated that GEORGIADIS "has in a sole capacity the authority to commit the company and sign on its behalf.'...

GEORGIADIS's role in the corvette deal can be described as the person who made contact to South African officials, politicians and decision makers in high up positions in the government and navy. He arranged meetings with Thabo MBEKI even after the contract was signed in connection with acquisition of the so-called 5th ship.

He frequently met with HOENINGS in Germany, South Africa and London.

He was involved in dealings with South African officials throughout the tendering process. Links to certain individuals will be dealt with later.

Concerning the so-called 5th ship which was going to be sold under an option fixed in the corvette contract of 1999 negotiations had been made about the amount of his commission for that new deal. Instead of the usual 5% of the purchase price TRT wanted to grant him only 2.5% because most of the lobbying work had already been done during the tendering process for the main contract.

More details of the new consultancy agreement have not yet been investigated as our main interest at the moment is on the corvette contract itself.

We found indications that GEORGIADIS was recommended by HOENINGS to FEORROSTAAL, member of the German Submarine Consortium (GSC), to support them during the tender process for the submarines for South Africa.

FERROSTAAL signed a consultancy agreement with MALLAR Inc, GEORGIADIS acting on behalf of MALLAR Inc., over a commission of 19m US $.

6,603,000 € were paid to MALLAR Inc. in 2000/2001 from FERROSTAAL.

These facts we received officially and legally through documents seized during the June 2006 search of TRT.

Further investigations by tax investigation officers of our team revealed more information which is unofficial and cannot yet be used as evidence as they are protected by tax secret:

Another 6,603,000m € were paid at the same time to a company called Kelco Associates, SA, resident on Guernsey (PO Box 161, Ground Floor-Dixcart House, Sir William Place, St Peter Port, Guernsey, GY1 4EZ).

The CEO of Kelco had been named by FERROSTAAL as Tony ELLINGFORD...

In our enquiry Tony GEORGIADIS is accused under German legislation for being an accessory to bribery committed by HOENINGS and other executives of the GFC. He is also suspected of being an accessory to embezzlement committed by KOOPMAN (kick-back payments). More details see beyond...

In October 2006 I contacted Companies House and applied for Company Register Information and information about the current appointments.

ALANDIS Ltd. was incorporated on 19th July 1978, company no. 01379265.

The nature of the business is described as '6340 – other transport agencies.'

Registered directors are:

- *Antony Vassos GEORGIADIS*
- *Alexander Vassos GEORGIADIS*
- *Panos GOUMAS (resigned 06.04.2002)*

- *Helen LANARAS (resigned 06.04.2002)*

Registered secretary is:

- *Madeleine NORRIS*

Antony and Alexander are brothers...

All correspondence between MALLAR Inc. and TRT has been made via Alandis Ltd. using the Alandis Ltd. letterhead except on MALLAR Inc. invoices.'

287. The following is stated with regard to Tony Yengeni:

During the June 2006 search of TRT an agreement between YENGENI and HOENINGS dated 11th August 1995 has been seized.

According to that document, YENGENI was promised a commission of 2.5m DM.

In fact I could prove that the agreement has been signed one month later on the 11th of October 1995 during a South African journey of HOENINGS, K.-J. MULLER and KOOPMAN.

YENGENI and HOENINGS were the signatories of the agreement.

HOENINGS, KOOPMAN and GEORGIADES at this time took part in a meeting in Cape Town during which the agreement was most likely arranged.

On his return to Germany HOENINGS arranged a provision for the promised commission of 2.5m DM. This provision had been entered into the accounts of TRT on the 28th September 1995 and was disbanded on the 30th of September 1997 in connection with the intention to lower Thyssen's obligations. Since than [sic] no trace of a new provision can be found in the accounts so that the YENGENI commission could perhaps be part of the money paid to MALLAR Inc. It is unlikely that TRT did not pay YENGENI the promised commission at all.

Although we have clear evidence of corruption in connection with YENGENI we cannot prosecute this fact. Although the MALLAR Inc. contract due to the last prolongation in April 1999 and payments to MALLAR Inc. do not qualify for a statutory limitation we still need an action by YENGENI after the 19th of February 1999. But by that time YENGENI seems not to have been any longer in the position to influence the South African decision on the corvette contract.

Nevertheless the facts of the YENGENI case show that employees of TRT contrary to their defender's statements did have direct contact to and themselves arranged bribery agreements with South African officials. Before the change of legislation TRT would have been able to deduct the bribe for YENGENI from their company's tax obligations. This explains why they did not disguise the provision and why the agreement was made directly with YENGENI without camouflage.

YENGENI himself claimed in front of HOENINGS that he had been responsible for the cancellation of the first tender in 1995. As chairman of the Joint Standing Committee of Defence and chief whip of the ANC he could perform strong influence on decisions relevant for GFC.

HOENINGS obviously gained information in August/September 1995 that YENGENI had been named as a possible successor of MODISE in the cause of an expected cabinet reshuffle. This fact makes clear why ten days later the agreement was signed.

We also seized correspondence between HOENINGS and GEORGIADIS about travel costs for YENGENI for a flight from South Africa to Germany, Switzerland and London. These documents reveal that GEORGIADIS booked a flight for YENGENI in October 1996 for the 30th October 1996. According to the booking confirmation YENGENI has visited Hamburg (seat of B+V), Zurich and/or Geneva and London on the 1st November 1996.

The booking confirmation is addressed to Tony GEORGIADIS and was sent to the fax number of ALANDIS Ltd.

Under the letterhead of ALANDIS Ltd. GEORGIADIS sent on the 4th November 1996 the invoice from World Wide Travel to HOENINGS with the remark: "The attached for your "confidential" file (in case he ever denies having come!)."

On the 5th of November 1996 GEORGIADIS sent another fax under the letterhead of ALANDIS Ltd. to HOENINGS. The fax contained an invoice from MALLAR Inc. dated 5th November 1996 over 16,574.00 US $ "comprising Progress Air re. Cape Town-Lansaria-Cape Town and TY's airfairs of last week."

The costs for YENGENI's flight had been 16,944.00 ZAR.

In theinvoice's sum there obviously were also payments for other services by Progress Air included.

The demanded sum had been paid by TRT on the 8th of November 1996...

GEORGIADIS took part in the meeting between YENGENI and HOENINGS on 1st November 1996.

GEORGIADIS also took part in several other meetings with YENGENI...

288. The following is stated with regard to Vice Admiral SIMPSON-ANDERSON:

I found evidence that GEORGIADIS arranged a meeting between HOENINGS, von NITZSCH and Vice Admiral SIMPSON-ANDERSON in his hotel suite at the Sandton Sun Hotel in Johannesburg on the 24th of January 1996.

There are unproven indications that the purpose of the meeting was to establish a bribery agreement with SIMPSON-ANDERSON then CINC of the South African Navy.

During another meeting in June 1996 SIMPSON-ANDERSON complained about GEORGIADIS's involvement and stated that he uses to meet people in his office and not outside, that he is under survey, that the French secret service had been informed about the meeting at the Sandton Sun Hotel in January 1996 and that he does not need intermediaries. He didn't want to see GEORGIADIS again.

HOENINGS to whom SIMPSON-ANDERSON made this remark later supposed in his internal report that this remark was made as self protection because other navy officials had been presented, e.g. KAMERMAN (still Captain of the SAN at the time but already involved in the procurement process).

As proof for the self-protection theory HOENINGS mentions that SIMPSON-ANDERSON had formerly asked GEORGIADIS to his home.

In fact we have indications that GEORGIADIS and SIMPSON-ANDERSON had lunch together the day when GEORGADIS arranged the January 1996 meeting.

SIMPSON-ANDERSON was quoted in HOENING's handwritten notes: "He (GEORGIADIS) does more harm than good.'

In connection with the meeting between SIMPSON-ANDERSON, HOENINGS and von NITZSCH in January 1996 SIMPSON-ANDERSON's predecessor as CINC of the South African Navy (SAN), retired Vice Admiral PUTTER, becomes an interesting figure.

In October 2000 he sent a written complaint to B+V stating that of a promised commission of 1m US $ he only received from GEORGIADIS 100,000 £ (approx 600,00 £ less than promised). PUTTER wrote under the letterhead of the Contact Management Consultants (Pty) Ltd, Lyttelton Manor/SA. This company I could not yet trace at CIPRO (Companies and Intellectual Property Registration Office/SA).

In his letter to B+V PUTTER refers to a meeting in Johannesburg in 1996 at which representatives of B+V (von NITZSCH was a director of B+V), GEORGIADIS and obviously at least two other persons including PUTTER himself took part.

PUTTER now wanted B+V to compensate him and "put us in the financial position we expected to be at the end of this very successful project."

The following correspondence in this matter between PUTTER and TRT N (acting for TRT) together with the remark that SIMPSON-ANDERSON made in June 1996 about his meeting GEORIADIS's hotel suite it seems to suggest itself that both, SIMPSON-ANDERSON and PUTTER were referring to the same meeting.

This would mean that SIMPSON-ANDERSON had been part of the commission agreement arranged during this meeting.

To me it is irritating why in the end PUTTER had been paid only a small quantity of the promised commission if he or the CMC acted as a front beneficiary for SIMPSON-ANDERSON as the circumstances seemed to suggest. It seems very unlikely that GFC would have dared not to pay the whole amount of a promised commission to SIMPSON-ANDERSON – if he had been the real beneficiary of the agreement PUTTER mentions.

Therefore another arrangement for the payment is most likely.

One possible explanation could be that eventually SIMPSON-ANDERSON had been paid directly by GEORGIADIS or rather MALLAR Inc. and that PUTTER only received a small compensation for his service.

It seems that PUTTER had in fact been corresponding with GEORGIADIS as he states in one of his letters to B+V. The value of his service has not yet been analysed.

I found out that PUTTER during the apartheid regime had allegedly been involved in a massacre in South Africa which was claimed to have been carried out by South African military but for which the ANC had been blamed. The trail against PUTTER in the end was cancelled. Therefore despite probably still sufficient and good relations to navy people PUTTER for me seemed not to have been in a position which would justify a commission as high as 1m US $.

Furthermore although PUTTER states that he acted as a consultant for GFC there neither exists a consultancy agreement between PUTTER and GFC nor is it understandable why PUTTER reported to GEORGIADIS and why the commission had been payable through GEORGIADIS whereas GFC could have deducted any consultancy fee from their tax obligations.

Although all these circumstantial evidences suggest themselves that SIMPON-ANDERSON had been bribed and promised 1m US $ commission it might be difficult to find sufficient evidence to prove the bribe. My hope is that we will find evidence either at GEORGIADIS or ALANDIS Ltd. or MALLAR Inc.

289. The following is stated with regard to Chippy Shaik:

MERIAN Ltd. and Chippy SHAIK

On the 9th October 1998 a consultancy agreement (dated 8th October 1998) between TRT (signatory HEONINGS) and MERIAN Ltd. (signatory Ian PIERCE) was signed over a commission of 3m US $ due for payment the moment when the corvette contract would come into force and a down payment "has been received in our account for our free and unrestricted disposal" and after all necessary approvals from the South African and German authorities had been received.

The effective date of the contract was the 28th April 2000. The payment to MERIAN Ltd. was made on 3rd May 2000 to Barclays Bank plc, St. Helier, Jersey.

The only indication for the existence of MERIAN Ltd. is the agreement, the bank account named on the payment instruction signed inter alia by HOENINGS and KOOPMAN and correspondence of TRT.

The address mentioned in the consultancy agreement is:

Merian Ltd.

8 Queen Anne Street

London

W1M 9LD

You will realize that the way of writing down the address differs from the usual way. I quoted it from the agreement.

In the registers of Companies House I haven't found a company which would fit.

Researches about the address on the internet led to the conclusion that no such company is likely to be resident there.

Therefore we guess that MERIAN Ltd. doesn't exist and never had existed in Britain. The payment instruction names the banking contact

> *Barclays Bank plc*
>
> *P.O Box 8*
>
> *13 Library Place*
>
> *St. Helier*
>
> *Jersey*
>
> *JE4 8NE*
>
> *Channel Islands*
>
> *Sort Code 20-45-05*
>
> *Swift Code BARCGB22*
>
> *Account No 85219599*
>
> *"For the credit of MERIAN Ltd."*

The payment had been made through HSBC Trinkaus & Burkhard in Dusseldorf.

On the payment order of Trinkaus & Burkhard the beneficiary is named as "MERIAN Ltd. South Africa."

This is another indication that MERIAN Ltd. might not be or have been a company resident in Britain.

Ian PIERCE who signed the agreement on behalf of MERIAN Ltd. is known as one of the directors of Futuristic Business Solutions (FBS) and also runs the "Ian PIERCE & Associates" as chartered accountants in Parklands/SA.

In connection with the MERIAN Ltd. contract HOENINGS called PIERCE in an internal report Chippy SHAIK's "Emissar." I can't find an English translation for that word but it means an envoy with a certain commission and no own decision-making powers. Thus it is clear that Ian PIERCE acted as a front man for Chippy SHAIK.

From Richard YOUNG we received information about one payment from MERIAN Ltd., to PIERCE of the amount of 10,000 US $, value date 30th March 2001. The money seems to have been transferred from the UK to SA Reserve Bank via First National Bank of South Africa Ltd.

Richard YOUNG claims that more payments had been made from MERIAN Ltd. to PIERCE but the above mentioned is the only one he could prove by presenting a transaction report.

YOUNG also presented statements fore [sic] one bank account of Chippy SHAIK but no suspicious deposit could be found.

Ian PIERCE obviously later in 2000 told Chippy SHAIK that HOENINGS had received a share of 500,000 US $ from the MERIAN Ltd. payment.

HOENINGS learned that from C. SHAIK during a meeting on 21st September 2000 in Hamburg.

In consequence HOENINGS wrote a memorandum about this fact. This memorandum we found at his private home during the June 2006 search.

From this report and other documents seized from TRT the following sequence of events can be reconstructed:

During a visit in Johannesburg from 27th to 30th July 1998 Chippy SHAIK demanded from HOENINGS the confirmation of a verbal agreement about a commission of 3m US $ that they had arranged some time before.

Shaik stated that during this meeting that GFC despite a 20% cheaper offer from Spain had been placed on the first rank after the evaluation. The Spanish offset had also been evaluated higher than the GFC's offer. Therefore it had not been an easy exercise for him, SHAIK, to push GFC on to the 1st rank.

HOENINGS confirmed the verbal agreement and offered SHAIK to arrange a written contract any time he wants to which than [sic] would be deposited in a safe with only common access for him and SHAIK.

HOENINGS informed K.-J. MULLER about this agreement and asked him to make sure that this amount was observed during the contract price negotiations (i.e. to make sure that this expenditure would be refunded by the South African government through the contract price payments which realizes the criminal offence of fraud in German legislation).

B+V and TRT agreed to share the costs for SHAIK's commission which means that the refunding from South Africa would also have to be shared.

This is interesting because regarding MALLAR Inc. commission B+V had to compensate TRT for the whole amount that they paid MALLAR Inc. in advance.

On 9th September 1998 HOENINGS met with GEORGIADIS and SURTEE in The Ritz in London. The same day he also met with Mr. MUHLENBECK (FERROSTAAL) and Chippy SHAIK in a restaurant called San Lorenzo in London.

From MUHLENBECK SHAIK also required a commission for the submarine deal.

HOENINGS says in his memorandum that he took over the wording of the consultancy agreement from MUHLENBECK so that the conclusion can be made that HOENINGS, MUHLENBECK and SHAIK met in London for the purpose of discussing and formulating the agreements with FERROSTAAL and TRT.

In fact the wording of the MERIAN Ltd. agreement differs from the normally used form. In the records of FERROSTAAL we so far couldn't find any indications for a contract with or payment for MERIAN Ltd. so that possibly another company name had been used (we are not yet investigating FERROSTAAL and the submarine deal).

It was PIERCE who gave the name and address of the company on which the agreement was to be issued to HOENINGS, presumably on 8th October 1998 via fax.

On the 9th of October 1998 HOENINGS met with PIERCE in the Ritz in London for lunch. This meeting HOENINGS disguised by naming three Deutsche Bank employees in his claim for travel expenses as participants of that lunch meeting but wrote down in his diary a meeting with PIERCE for exactly that time. Also the invoice of The Ritz doesn't fit to the entertainment of three persons plus HOENINGS but for food and drink for him and just one other person, i.e. Ian PIERCE.

The signed contract then was deposited in the bank safe no. A578 at Barclays Bank, 46 Park Lane, London, W1 1HP.

HOENINGS and PIERCE had exclusive access to the safe. HOENINGS had to open an account with Barclays Bank in his own name and make a deposit in that account before he could get the safe. The money for that deposit he received from TRT.

In April 2000 PIERCE contacted HOENINGS by telephone to remind him on the agreement with MERIAN Ltd.

PIERCE handed over a closed envelope via the office of Sven MOELLER (in South Africa) to HOENINGS with the instructions for the transaction. On 3rd May 2000 the commission of 3m US $ was transferred for the credit of MERIAN Ltd.

On the 31st of May 2000 HOENINGS and PIERCE met again in London and removed the MERIAN Ltd. agreement from the Barclays Bank safe. PIERCE furthermore "remove(d) his name from any paper work relating to this box."

Nevertheless HOENINGS kept the safe and the account. The safe was later taken over by another employee of TRT.

In his memorandum HOENINGS states that SHAIK didn't know the details of those proceedings and assumed SHAIK had trusted PIERCE who to him seemed to be a friend of many years to SHAIK.

After the transaction took place PIERCE claimed he handed over to HOENINGS 500,000 US $ in cash which had to be deducted from the commission sum.

HOENINGS writes in a second memorandum that SHAIK told him that within the group of beneficiaries of MERIAN Ltd agreement there had been discussions to offer him a share of the commission as a token of their gratitude.

HOENINGS denied that he received any money from PIERCE and reported the incident to his superior, Jurgen KOOPMAN.

It seems that SHAIK believed HOENINGS and that he made new arrangements with PIERCE concerning the commission money which now he wanted to be deposited into a Swiss account because SA authorities could perhaps trace money from MERIAN Ltd to PIERCE. It also seems that the missing 500,000 US $ through this new arrangement turned up again.

At least this incident seems not to have affected the relationship between HOENINGS and Chippy SHAIK.

This fact is no longer prosecutable under German legislation because of the statutory limitation. Our intention is to encourage South Africa to open an own investigation into this matter. Furthermore this fact is interesting in the whole context of the case.'

290. Certain of the allegations in the German Police Report were repeated, and potentially substantiated, in the Mutual Legal Assistance request filed by the Office of the Public Prosecutor in Dusseldorf with judicial authorities in Switzerland. This document was submitted as Annex AAA to the joint submission of Feinstein and Holden. It was submitted into evidence by Col Johan Du Plooy, who attached it to his witness statement as Annex JDP57. The MLA request was dated March 2007. This suggests that the MLA request was filed subsequent to the drafting of the German Police Report,

which is dated 13 February 2007 and drew upon the evidence therein. The relevant sections from the MLA request read:

> *[GFC] had, in fact, paid considerable bribes to achieve the conclusion of the agreement, in contravention of Section 2 paragraphs 1 and 2 of the Act for the Prevention of International Corruption (the Corruption Act), read with paragraphs 334 and 335 of the German Penal Code, in the course of which Thyssen Rheinstahl Technik GmbH, as per prior state of affairs, took the leading role within the consortium.*
>
> *In addition, the corresponding undertakings to pay in favour of South African officials and members of cabinet, whose names were at the time only partly name, could have resulted from a time prior to the conclusion of agreement on 03/12/1999.*
>
> *The payment of the bribe money was tied up by the fact that Thyssen Rheinstahl Technik GmbH concluded a "commission agreement" with a letterbox [shelf/shell] company, namely Mallar Inc, a company registered in Liberia, for over 22 Million US Dollars, payable over the period from April 2000 to October 2001, in terms of which at least the predominate part of the aforementioned amounted directly or indirectly flowed to South African officials and members of the cabinet after the coming into effect of the Corruption Act on 15/02/1999...*
>
> *In the framework of this investigation the investigation committee consisting of officials from the State Office of Criminal Investigation in Nordhein-Westfalen, the Investigation Service into suspected tax offences of Essen as well as the Office of the Public Prosecutor in Dusseldorf have already searched the premises of ThyssenKrupp AG as well as several daughter companies in Dusseldorf and Essen, and Howaldtswerke-Deutsche Werft GmbH in Cologne, Blohm and Voss GmbH in Hamburg, Man Ferrostaal AG in Essen...*
>
> *With the help of the seized records, proof can already be lead that the abovementioned agreements of Thyssen Rheinstal Technik GmbH were abided by and the promised funds indeed paid. In this way the consortium paid, through the middleman Ian Pierce who had signed the commission agreement on behalf of Mallar Inc., 3 million US Dollars to the South African official Schabir Shaik who acted for Armscor, so that he [Shaik], in violation of his official duty, could promote the conclusion of the agreement for the delivery of the corvettes.'*

291. Additional support for the content and findings of the German Police Report was provided by Annex JDP58 to Col du Plooy's witness statement. JDP58 consists of a German language memorandum and an English translation undertaken by National Language Service within the Department of Arts and Culture. The original German

memorandum was Annex CC to the joint submission of Feinstein and Holden. It was also submitted by Young. The email correspondence between Borowski and Downer appears to indicate that the document was also attached to their correspondence under the filename '1.pdf.' The document is a memorandum by Christoph Hoenings, dated 3 August 1998. The English translation reads:

> *South Africa*
>
> *The last trip (27-30.07.1998) was suggested by C. Shaikh, Director Defence Secretariat. During one of our meetings, he asked for more explicit confirmation that the verbal agreement made with him for payment to be made in case of success to him and a group represented by him [German word "im Erolgsfalle" does not exist, most likely a typing error for 'im Erfolgsfalle: in case of success"] amounts to 3 million US$. I confirmed this to him and offered to formulate this agreement in writing at any time and proposed thereby to put the latter in a safe that can only be accessed jointly. C. Shaik will report back on this shortly.*
>
> *Mr. Shaik has stressed that the B+V/TRT offer was pushed into first place in spite of the Spanish offer which was 20% cheaper. The Spanish offset (only DTI share without "social components") was according to him also valued higher than ours. In this respect, it had been no simple exercise to get us into 1st place according to him.*
>
> *Mr. Muller/B+V was informed by me at that time about the arrangement made and also about the conversation I just had with C. Shaikh, whereby he asked to reserve <u>the aforesaid amount</u> for following prices negotiations, to which he agreed.'*

292. The content of the German Police Report, especially when read in conjunction with the German-Swiss MLA and the Hoening memorandum, was clearly relevant to the Commission's terms of reference. However, it appears that the Commission did not investigate the claims made therein. Certainly, this was the view of Adv Sibeko and Sello in their closing submissions. They stated:

> *'Annexures "RMY52" to "RMY55" make various allegations of improper payments made by one of the members of the GFC. Whilst the Commission is not bound by Dr Young's interpretation and analyses of these documents, we*

submit that the documents contain serious allegations that require proper interrogation. The issue of the various MLA's referred to by Mr Du Plooy lends credence to the view that these allegations require further consideration and investigation.'[187]

293. RMY54 is in German. Its formatting suggests that it also emanated from the investigations undertaken by German police in Dusseldorf. RMY55 appears to be a copy of RMY53.

294. I pause to note the response of Adv Anton Steynberg, a member of the DSO investigative team, upon receiving the above documents in 2008. In an email of 19 August 2008, also forming part of Annex JDP53, Steynberg responds to the email and attachments sent by Borowski to Adv Downer. He states:

> *'Wow. This stuff is absolute dynamite! If even one tenth of the allegations are true, this investigation will be far more extensive and explosive than anything we have done to date. On my reading of the documents, several distinct lines of enquiry emerge.'*[188]

295. In order to investigate these allegations, the Commission could have subpoenaed individuals named in the German Police Report, such as Tony Georgiades, Tony Yengeni, Ian Pearce, Vice-Admiral Robert Simpson-Anderson and Admiral Putter. It could have called an additional member of the investigative team, in particular Adv Downer. It took none of these actions to investigate.

296. Chippy Shaik did appear before the Commission. However, he was only asked in the most general terms about the allegations of wrong-doing against him. At no point was he asked posed specific factual questions arising from the German Police Report.

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[187] Counsel L. T. Sibeko SC & M Sello, Written Submission of Evidence Leaders to The Commission, 17 June 2015, paragraph 91

[188] Annexure JPD53 to the Witness Statement of Col. Johan Du Plooy to the Commission

297. It appears that the Commission placed no weight on the allegations or facts in the German Police Reports, even where they appear to be substantiated by other documentation, in particular the German-Swiss MLA Request. Volume 3 of the Commission's Report makes no mention at all of the content of the German Police Report or the German-Swiss Mutual Legal Assistance request.

298. The Commission could not have made a finding that there was no evidence of corruption in the SDPP if it had accorded any probative value to the facts and allegations in the German Police Report. With regard to the allegations of corruption in the corvette contract related to ThyssenKrupp and/or GFC, the Commission made the following findings:

> *[508] Dr Young further alleged that GFC won the tender because of bribes paid. This is a wild allegation, it is not supported by any evidence, and should consequently be rejected...*
>
> *[511] General Meiring, Head of the Commercial Crime Component, Detective Service in the DPCI, recommended the closure of the GFC and BAE legs of the investigations after receiving a briefing from Colonel du Plooy. Colonel du Plooy for several years investigated the allegations of wrongful conduct relating to the SDPP, and in that whole period he could not find any prima facie evidence of wrongdoing against any person.*
>
> *[512] Mr Klaus Wiercimok, a senior in-house attorney at ThyssenKrupp since 1982, testified that in 2006 the State Prosecutors Office in Dusseldorf conducted a number of raids on the TKMS offices and on the homes of some of the company's employees. No evidence was found to support allegations made against TKMS. The investigations were closed without charges being preferred against anybody. He further said that GFC never paid or authorised a payment of $3 million to influence the procurement process of the corvette. He also said that the State Prosecutor's Office in Dusseldorf investigated the allegations and no evidence was found to support the allegations. No prosecution followed from the investigations.*[189]

[189] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015,Vol 3, paragraphs 508 and 511 - 512

299. The statements of Klaus Wiercimok are clearly contradicted by the German Police Report and the Swiss Mutual Legal Assistance Request, both of which are forthright in alleging corruption and presenting evidence of it. Inexplicably, the Commission relied on the self-interested statement by Mr Wiercimok, and did not refer to the German Police Report. The Commission did not attempt to investigate or test the content of that Report.

300. In contrast, Wiercimok's testimony was accepted without being meaningfully tested. He was not re-examined by his evidence leader or his own counsel, and he was not cross-examined by any other interested party. He was asked one question by the Chairman and a number of follow-up questions by Commissioner Musi. Those questions were in general terms, and extend to only 3 pages of the transcript. The relevant section of the transcript reads as follows:

> *CHAIRPERSON: Just a last question from me, before the final, if at all, there is any cross-examination. Are you aware of any person or entity in Germany, which has been prosecuted or successfully prosecuted, as a result of the alleged corruption in the South African procurement process?*
>
> *MR WIERCIMOK: No Judge, I have not. Indeed, I am confident in saying that no such conviction has taken place.*
>
> *CHAIRPERSON: Thank you. Any cross-examination? Thank you. Thank you, Sir, for giving, oh, just hold on. Just hold on.*
>
> *COMMISSIONER MUSI: Just a few, few points of verification, if I may. Some serious allegations have been made, before this Commission and of, of corruption and bribery and certain names have been mentioned. I just want to hear from you. Do you know a gentleman by the name of Koopman?*
>
> *MR WIERCIMOK: Yes. I do. He was managing director of Thyssen Rheinstahl Technik and he was responsible for marine activities. COMMISSIONER MUSI: And Mr Hoenings?*
>
> *MR WIERCIMOK: Yes. I know Mr Hoenings as well, he was on the, at the level immediately below the managing directors, responsible for marine activities at Thyssen Rheinstahl Technik.*

COMMISSIONER MUSI: A specific allegation that he, he signed a bribe agreement with Mr Tony Yengeni, as well as another bribe agreement with Mr Shamim Shaik, the Chief of Acquisition. Do you know anything about that?

MR WIERCIMOK: This again, was, was investigated by the German Prosecutor's office and they found no proof of the veracity of these allegations and neither did we. COMMISSIONER MUSI: I thought you were talking. I thought you wanted to say something.

MR WIERCIMOK: And neither did we.

COMMISSIONER MUSI: I understood you to say that Ferrostaal was investigated, but nothing came out of those investigations.

MR WIERCIMOK: Yes. I do not have a lot of detail in this. They were not initially in the scope of the investigation. They were later on, for a brief period. But, nothing ever came of it.

COMMISSIONER MUSI: And ThyssenKrupp was it ever investigated itself and what was the outcome?

MR WIERCIMOK: The investigations were discontinued. No charge was claimed, was, there was a thorough investigation, which took for almost two years. At the end of the day, these investigations were discontinued. No charge was preferred against any of the, of the persons originally in the, in the scope of the investigation, for, for matters, which had to do with South Africa. I can say with conviction that nobody was accused of any wrongdoing, in connection with the supply of these two defence packages in this country.

COMMISSIONER MUSI: Just something interesting. You mentioned that one of the advisors that ThyssenKrupp, or the consortium engaged was, was Mallar, a company called Mallar, owned by Mr Georgiadis. Just by way of, for interest sake, what would an advisor be expected to do, in his interactions with decision makers, political decision makers in the country, acquiring the equipment? MR WIERCIMOK: I would have thought that he knew who the decision makers were. He would know how to get meetings organised with these, with these persons, who the decision makers were and how they, generally how the process of decision making both at a political, at a political level would, would work in this country.

COMMISSIONER MUSI: You see, I am trying to understand how, how to, would these advisors be able to influence the outcome of, of a process, an acquisition process.

MR WIERCIMOK: They only advised us, as to, who to approach and who to, what to take into consideration, when making our offer. They were not able to direct, in my view, they were not able to directly influence the outcome, no.

COMMISSIONER MUSI: And the advisors would be paid for their services?

MR WIERCIMOK: Yes.

COMMISSIONER MUSI: What would, what would your response be that these, these commissions paid to the, to the advisors were in fact bribes?

MR WIERCIMOK: I have no reason to believe that that was the case.

COMMISSIONER MUSI: Was Mallar the only advisor that your 15 company employed? Were there others, if so who?

MR WIERCIMOK: There were some, in Germany, but for, obviously, for legal matters, for financing matters. But, Mallar/Georgiadis was the, was the chief advisor for South Africa.

COMMISSIONER MUSI: Thank you.[190]

301. To the extent that the lack of criminal prosecutions in Germany might be relied on for the failure to investigate this matter, I note that in Volume One of the Commission's Report, it indicated that it had received a document that gave a reason as to why the German investigations had been terminated:

> *[115] Despite the efforts alluded to above, no information material to the issues the Commission was seized with was ever received from the German authorities. The Commission only caught a glimpse of the reason why the investigation was discontinued from a document that appeared to have emanated from the Office of the Public Prosecutor of Bochum, dated 1 February 2008. An annexure to this letter dealt with the withdrawal of a prosecution of one Jens Gesinn, whom the Commission established was the financial officer of Ferrostaal AG.*

302. In his cross-examination of Dr Young, Adv Kuper for the Department of Defence referred to this document to show that the German investigation into ThyssenKrupp had been closed due to a lack of evidence. Young explained that the document referred only

[190] Public Hearing Transcripts, 9875 - 9878

to an investigation undertaken by one unit in Germany based in Bochum, and had no relevance to ThyssenKrupp as it only canvassed matters relating to Ferrostaal:

ADV KUPER: If we may proceed, what you have done is that you reminded me that I had referred to, but not read out, the responses of the Public Prosecutors Office of Bochum, and I just want to do that very quickly, before we move on. If you will turn to Volume 4 of the CROSSEXAMINATION FILE at page 745, in the letter written to the lawyers for Mr Jens Gesinn, the prosecutor under his further reasons, had said in the second paragraph: "As regards the background assumed by the author of the memo folio 7 et seq of the files (bribery of foreign officials) it is to be noted that no specific, or substantial evidence whatsoever exists that would corroborate this assumption. Neither the "experience gained in criminalistic practice" nor "unconfirmed press reports" are suited assufficient evidence of a criminal offence within the meaning of theStrafprozessordnung. The documents and deeds found in Ferrostaal AG offices, do not commit the inference as to the funds paid to "Mallar" having been forwarded to foreign officials within the meaning of that Germanstatute."

And then of course this paragraph:

"Not only is it impermissible, it is in fact wrongful to use a purported case of tax evasion, which has in fact not been perpetrated, as a pretext for excessive investigation with a view to the presumed criminal offence of bribery."

So, Dr Young, it does not seem as if I am entirely alone in my categorisations to which you refer.

DR YOUNG: Am I allowed to make response, or are you just making a statement?

ADV KUPER: Is there anything you want to say?

DR YOUNG: Absolutely. First of all, you know you just read this out, this document is in context of Ferrostaal. It does not come from the Public Prosecutor's office in Dusseldorf, which was responsible for the Tissen [sic] investigations. This has got nothing to do with the Tissen [sic] investigation, it is Ferrostaal. It says so. If you look at the details of it, it talks about the amounts of money in respect of Mallar, as being still on Ferrostaal's books. That is quite a different case to the Tissen case, where the money had been paid to Tony Jojaress [sic], and [indistinct] to Mallar, okay. The fact that is in respect of not only Bochum, but Mr Gesinn, has got nothing to do whatsoever, with one single one of the individuals that I referred to when I was traversing the three German reports. Secondly, the letter itself stands alone. Whatever has been provided to me here, as I have an English translation, which seems to come from something

else in German. In fact, the German one is written by hand. But anyway, I do not think that there is anything in this Gesinn letter that is directly relevant whatsoever, even the smallest miniscule iota that relates to the Tissen [sic] case.

303. It was alleged that the multiple investigations by German authorities may have been closed for reasons other than a lack of evidence. On 20 June 2008, the *Mail & Guardian* reported that the spokesperson for the Dusseldorf prosecutor's office, one Arno Neukirchen, had said in a statement to the newspaper that the investigation had been terminated in large part due to the failure of South African authorities to respond punctually to requests for assistance. Neukirchen was quoted as stating that 'even if further investigations might deliver sufficient grounds for suspicion, no conviction could be expected within a reasonable time, given that further investigation depends significantly on the results of the request for judicial assistance sent already to the South African authorities on July 10 2007, whose timely execution cannot be relied upon.'[191] It does not appear that the Commission made any attempt to verify the veracity of this statement with either the German spokesperson or with the journalists of the *Mail & Guardian*.

304. The German-Swiss Mutual Legal Assistance Request, the emails between Ms Borowski and Adv Downer, and the content of the Report indicate that the Report was drawn from multiple sources of evidence. The wording of the Report and the MLA indicates that the most substantial source of information and evidence was material seized during the raids on the properties of ThyssenKrupp and its sister companies.

305. The Commission failed to undertake a meaningful investigation into the allegations and facts in the German Police Report, which were highly relevant to its Terms of Reference.

[191] 'Germans Drop Arms Deal Investigation,' *Mail & Guardian*, 20 June 2008

The Draft Auditor General's Reports

306. None of the Draft Auditor General Reports ('draft reports') on the Strategic Defence Procurement Packages were deemed admissible by the Commission.[192]As a result, the Commission did not investigate the very material issues raised in the draft reports, nor did it investigate why crucial findings in the draft reports were excised from the final report.

307. Various attempts were made to admit the draft reports. Paul Holden made the first attempt during his cross-examination of Robert Vermeulen on 21 of October 2013.[193] The Chairperson made no specific ruling on the draft document at that point but allowed Mr. Holden to use the document to confirm a date with the witness.

308. Adv Snyman made the second attempt during her cross examination of Mr Odendaal, to which Adv Solomon and Evidence Leader Ms Ramagaga objected. Adv Snyman responded to the objection by stating that her clients intended to rely heavily on that draft report to point out, and to interrogate the reasons for, the stark difference between the draft reports and the final report.[194]

309. The Chairperson stated that he was not sure which of the reports was the final draft. He said that if Adv Snyman was unable to present evidence to that effect, he would not allow it. She then requested the Commission to provisionally admit the draft report pending her clients giving their own evidence for the admission of the document where they would address its authenticity and authority. The Chairperson responded by inquiring whether

[192] Public Hearing Transcript 25 November 2013.
[193] Public Hearing Transcripts, 21 October 2013, pages 2598 – 2616.
[194]Public Hearing Transcript 25 November 2013 at 3883-4.

Adv Snyman's clients were party to the drafting of the document or whether they were present when it was drafted. She informed the Commission that her clients were not part of drafting the document. The transcript continues:

> *'CHAIRMAN: Do you know reasons why this portions that you want to refer to didn't make it into the final report?*
>
> *ADV SNYMAN: We cannot categorically state that but we would draw inferences and that would be part of the submission and evidence that would be part of the submissions and evidence that our clients will be leading in phase 2 that would be evaluating 1.5 of the Chairman's [terms of] reference and their concern around that.*
>
> *CHAIRMAN: Is it possible that the drafters of this report, of the final report were not in agreement with these views which were ultimately not to make it into the final report; is that one of the possibilities?*
>
> *ADV SNYMAN: I'm afraid we can't speculate on that?*
>
> *CHAIRMAN: Therefore, I'm not going to allow you to cross-examine this witness on the basis of this document.'*

310. As a result of its not admitting the draft report, the Commission did not interrogate the stark differences between the draft report and the final report. As stated, the vast majority of the findings of wrongdoing, improper or unlawful conduct contained in the draft report were excluded from the final report. This should have caused the Commission to investigate this matter in order to establish the truth.

311. Attendant on the ruling that the draft report was not admissible was a decision that no evidence would be led on it and that no cross examination in respect thereof was permitted. The then Auditor General, Mr Fakie, had argued that the draft report had merely been edited. Yet, it is clear that the final report was not merely an edited version but rather a heavily redacted one. This too should have raised suspicions and prompted

the Commission to investigate why there were such discrepancies between the draft reports and final report.

312. I am advised and submit that the Commission was plainly wrong in finding the draft reports to be inadmissible. I respectfully aver that an open-minded inquiring individual who was familiar with the content of the draft reports would reasonably reach the opinion that there was something concerning about the significant difference between the draft reports and the final report.

313. The Commission refused to admit the draft report on the basis that Feinstein, Holden and Van Vuuren did not draft the reports and could not provide evidence to indicate which version was the final draft. This misses the point. The draft reports raised so many material concerns about the arms procurement deal that the Commission should have admitted it, even if provisionally, in order for evidence to be led and witnesses cross-examined on its content. Witnesses should have been called to give ecidence as to why such discrepancies existed between the draft and final reports. The controversy around the draft report, the nature of its content, and the lack of cogent explanations about the discrepancies should have prompted further investigations.

314. I submit that the Commission’s failure to admit the draft reports into evidence can only be reasonably understood to be due to the fact that it must have either misunderstood the significance of the information contained in the draft reports or made itself blind to the contradictions between the draft and the final reports. Such a failure could only have resulted from a failure to properly apply its mind and adopting an insufficiently open and enquiring mind as to the investigation.

The SDPP Contracts

315. The Commission failed to examine or allow examination of the SDPP contracts which had been referred to and discussed by various witnesses.

316. On 18 February 2014, Adv Skinner addressed the Commission about the declassification of the contracts. He referred to certain provisions in the contracts that dealt with the confidentiality of the agreements. He concluded that the contracts seem to be confidential and it would require governmental authority for the provisions to be disclosed. In response, the Chairperson asked the other legal representatives to comment. They did not object to the disclosure of the contract,[195] except for Adv Moerane SC (acting on behalf of Mr Erwin). Adv Moerane ssaid that he did not know how the contracts had any bearing on Mr Erwin's cross-examination and that he was not aware of any disputes with regard to his evidence and the evidence of the DTI. He denied that he had not made any reference to the contracts despite Mr Erwin's statement showing that he referred to them.[196]

317. The Chairperson at various points indicated that he did not see the need to acquire the contracts since there was no dispute around them. During the hearing on 28 January 2014 Adv Skinner discussed how he planned to deal with Mr Zikode's evidence. He stated that there may be questions arising from the contracts which would need to be put to the witness and if they reached that stage the Commission would need to adjourn since the contracts had not been declassified. The transcript is as follows:

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[195] Public Hearing Transcript 18 February 2014 at 4419-4421.
[196] Public Hearing Transcript 18 February 2014 at 4422.

'CHAIRPERSON: Advocate Skinner, the chance of the contracts that you want to refer to, is there any dispute about them and two; if the witness is aware of those terms is it necessary to see the actual contracts?

ADV SKINNER: Mr Chair, certainly I don't believe there is a dispute because it's never been indicated there is a dispute as to what is contained in the written contract, the witness has indicated in his signed statement that one of the areas that he will cover in his evidence is the SDPP contract, so I intend to ask him the extent to which he is familiar with those provisions and I may be able to get sufficient to escape having to avoid, escape having to prove the actual contract.

CHAIRPERSON: If my understanding of the evidence that has been presented so far, it appears to me that the terms of the contract which are, of the NIP contracts which are relevant to this inquiry is the methodology of appointing credits as contained in those NIP contracts and to me it doesn't seem as if there is any dispute about that. I think the previous witnesses have conceded that the methodology that they used differs to some extent with the methodology of appointing of credits as contained in the NIP agreements and if that is the position I'm not quite certain whether one needs to see those contracts or not. If my summary of the evidence is correct then I fail to understand why is the NIP agreements important to you.'

318. When Lawyers for Human Rights (LHR) asked for access to the contracts in order to cross-examine witnesses who had made reference to them, the Chairperson said that the contracts were not before the Commission and that he did not believe there was any need for access to be granted. The basis for this assertion was that there was no dispute about their content. He said that no one had given evidence indicating that they dispute a provision in the contract. I refer in this regard to the transcript of the hearing on 17 and 18 February 2014:

'CHAIRPERSON: Then the second question is I'm not quite certain if from the evidence that you have led up to now whether anything turns around the question of contracts, I've heard that you know Advocate Skinner wants to have certain portions of those contracts to be read out although I'm not quite certain if at all there is anything which turns around the contracts, not as far as the evidence that has been led to now. I'm not quite sure that what do you want to deal with the question of the contract because as I understand your evidence there seems to be a difference about the (indistinct) that was supposed to be used as contained in the contract and (indistinct) as contained in the (indistinct), that seems to be the only (indistinct) and from what I understand from the evidence that has been led that seems to be common cause that the NIP Policy

document, as far as the criteria of credit is concerned differs from the criteria of providing for the NIP contract and the NIP (indistinct). So if that is the issue what would be the purpose of trying to get those contracts?

ADV DE VOS: Mr Chair, until I see the terms of the contracts it's very difficult for me to comment on that, it's clear that the evidence by Mr Erwin, well Mr Erwin is relying on certain terms and conditions in the contract in explaining why he felt that he had a discretion and that his department had a certain discretion and to enable us to give evidence before this Commission showing either that he was correct in making use of his discretion or on the other hand that he was not correct, I obviously need the terms of the agreements as far as it turns around that particular question of multipliers and criteria that should or shouldn't be used, otherwise it would be impossible for me to cross-examine on that particular issue.

It may be that Mr Erwin is correct and then that will be the end of the story, maybe that is not and then if I don't get to see the contracts this Commission will not be in a position to weigh his evidence properly with due respect.

319. At the public hearing on 18 February 2014 Adv. Skinner addressed the Commission on the declassification of the contracts. He referred to certain provisions in the contracts that dealt with the confidentiality of the agreements and said that it would require governmental authority for the provisions to be disclosed.

320. The Chairperson invited the other legal representatives to comment on this.

321. On behalf of Armscor, Adv Solomon SC said that Armscor did not object to the disclosure of the contracts, but as it was only in *possession* of the contracts and not the *custodian* of the contracts, it was not in a position to disclose them.

322. The position of the DTI was that it had no problem with releasing the documents. However, without the consent of all the parties, it could not bring the contracts before the Commission. It submitted that the provisions of the contracts upon which the witness relied were common cause and therefore it was not necessary to see the specific

provisions in order to cross-examine the witness. This appeared also to be the *prima facie* view of the Chairperson and Commissioner Musi.

323. Adv De Vos, on behalf of LHR, pointed out that LHR had not seen any of the confidentiality terms of the specific agreements. She submitted that the contracts were not only relevant for the purposes of Mr Erwin's testimony but also for many other witnesses still to come. She said that it was very difficult to imagine how the Commission could comply with its terms of reference without actually having regard to the contracts which form the *"middelpunt"* of the investigation. She referred the Commission to the relevant section of Erwin's witness statement which highlighted the relevance of the terms of the contracts. She noted that at paragraph 23, Erwin had said that *"it is apposite however, to include in the material made available to the Commission, a fuller briefing on the NIP and its implementation"*. She submitted that "a fuller briefing on the NIP and its implementation" must imply the NIP terms of agreement. Moreover, Erwin's statement indicated that it was pertinent that variations to the terms and conditions of the contracts were raised before the Commission. The variations were made following the Inter Ministerial Committee's use of its discretion to give effect to Cabinet's policy choices. Adv De Vos submitted that it was exactly the use of that discretion that she wanted to test, and could not test without seeing the contracts.

324. The Chairperson's response to Adv De Vos was to ask her to tell the Commission which sections of the contracts she would want to concentrate on. She obviously could not do so without having seen the contracts.

325. The Chairperson did not see the relevance of acquiring the contracts. He concluded that there was no dispute regarding the actual contractual terms. That however is not the

issue. I submit that the Commiission should have examined the contracts, and allowed them to be examined, in order to determine whether there was any aspect which required further investigation.

THE FAILURE OF THE COMMISSION TO TO SEEK OR ALLOW INFORMATION FROM MATERIAL WITNESSES

326. The Commission's failures to which I have referred above were compounded by the Commission's approach to witnesses. The result of the approach of the Commission, typified by often contradictory rulings, was effectively to prevent witnesses who were critical of the SDPP from presenting evidence that that the Commission should have interrogated. The obstacles put in the way of 'critic' witnesses were not applied to other witnesses before the Commission.

Witnesses were not allowed to speak to documents that they had not authored or that described events to which they were not personally witness

327. In Chapter 2 of Volume 1 of the Report, the Commission's approach to documents is explained. The Commission divided the documents that were tendered to it into two broad categories. The first category consisted of documents (reports, memoranda, policy directives and guidelines, tender documents, minutes of meeting etc.) which were sourced from government departments that were involved in the SDPP and from other State departments and entities. The report states that this category of documents presented no problems with regard to authenticity and admissibility, and they were used extensively in public hearings.[197]

[197] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015, Vol 1, Chapter 2, Section E, Paragraph 142

328. As to the other category, the Commission stated:

> [143] *The other category consists of non-official documents that were introduced mostly by the critic witnesses. These comprise memoranda, reports, books, statements and affidavits, including newspaper articles and reports. The common denominator to all these documents is that they were not authored by the witnesses tendering them and the authors could not be called to testify. In some instances, the identity of the author could not be established. Naturally, the witnesses who introduced such documents and sought to rely on them had no personal knowledge of the contents thereof and could therefore not vouch for the truth thereof. Strictly speaking, the documents were inadmissible and in a few instances we made rulings to that effect.'*

329. I submit that this demonstrates a fundamental misdirection, having regard to the nature and function of a Commission. This will be addressed in argument.

330. Government officials and individuals who were involved in the arms acquisition process were able to tender documents and speak to their contents. But the witnesses who were critical of the Arms Deal, who for the most part were not involved in the acquisition, were not allowed to use the documents they wished to have admitted, or to cross examine witnesses in respect of those documents if they did not author them or were not party to their drafting.

331. Evidence was given by over 50 witnesses, most of whom were government officials, former members of Cabinet, or individuals who were involved in the acquisition process.

332. The Commission's approach to witnesses being able to establish a document's authenticity prevented crucial evidence being put before the Commission. The Commission held the draft Auditor General's Reports inadmissible because Adv Snyman could not prove the reports' authenticity – instead of doing what was the obvious, namely requiring the Auditor General to state whether the draft reports were genuine. The effect of the Commission's approach appears from the evidence of Adm Kamerman. During

his evidence on 27 May 2014 he referred to the Joint Submission of Mr Feinstein and Mr Holden where they had used the draft Auditor General's Report to advance and support their contentions. Adm Kamerman denied those allegations and to set out his own version. This was allowed because he had personal knowledge of the events in question, as he was involved in the procurement process. The Commission never investigated whether the draft reports were genuine: it simply excluded them. I submit that this is inconsistent with the duties of a Commission.

333. Adv Sibeko highlighted a further problem with this approach during the course of Dr Young's testimony. Adv Sibeko stated the following:

> *'I would submit with respect that the various documents that of some of which he has received through the Pie [PAIA] Process are documents in respect of which he is not the author or perhaps have personal knowledge of except for the fact that some of those documents turns to establish the very fact and allegations that he has sought to bring before this Commission.*
>
> …
>
> *Now that then begs the question whether if the witness is not able to give satisfactory objective evidence before the Commission which would demonstrate the admissibility of the documents begs the question whether the Commission should ignore these documents. We would submit that to the extent that the witness is himself perhaps not able to objectively demonstrate the authenticity of the document there is nothing that precludes the Commission through its staff and whatever other means that may be available to it, to itself establish the [authenticity] of the documents.*
>
> *As we would submit should it in the course of undertaking that exercise the Commission establish that these reports are in fact authentic would mean that when the Commission decides not to admit these documents on the basis thereof the witness is himself not able to establish the authenticity of these documents. Would that not mean that the Commission ignored important evidence that exists and was brought before the Commission but was simply excluded purely on the basis thatthe person providing the document can himself not establish itsauthenticity.*

We would submit further that the issue of placing the burden or the onus on the witness would in our respectful submission not accord with what the general principles which apply to Commissions that is the gathering of evidence. On the basis of which the Commission would in turn conduct further investigations for purposes of advising the executive on what steps to take based on what has been found during the course of the gathering of the evidence.'

334. I submit that where a document would be material if it were genuine, it was the duty of the Commission to attempt to establish whether it was genuine. The Commission fundamentally misdirected itself by not doing so, and by simply excluding the document on the ground that it was inadmissible. The result was that the Commission did not carry out the task it was required by law to perform.

335. In Adv Sibeko's closing argument he again addressed the issue of the Commission's approach to documents and their admissibility. He referred to paragraph 8 of the Directives published by the Commission in the Govt Gazette of 9 May 2012:

> *'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 or her submissions, which shall include a statement on oath by a person who is able to verify any factual allegation pertaining to the issue described in the Terms of Reference: and where applicable: a) Documents which are relevant and support the allegations pertaining to the issues described in the Terms of Reference ....'*

336. Adv Sibeko argued that this directive suggests that the only constraint regarding the documents that could be submitted would be relevance. He submitted that if a document was relevant to the terms of reference, it should be admitted.[198]

337. The witnesses who were not critical of the Arms Deal, who to a large extent consisted of people involved in the actual process, could tender documents and speak to their content.

[198] Public Hearing Transcript 22 June 2015 at 11017 – 11022

These were the documents that the Commission deemed admissible as they fell into the first category. On the other hand documents tendered by critics were to a large extent deemed inadmissible due to the fact that the witnesses were not the authors and could thus not prove the documents' authenticity. These documents fell into the second category.

338. Critic witnesses could not challenge non-critic witnesses' evidence on the basis of documents which were in the public domain, because they could not prove the correctness of those 'category two' documents. Moreover, any submissions they wished to make about 'category one' documents would be ignored on the basis that they had no personal knowledge of the events described by the 'category one' documents. Non-critic witnesses could however challenge the allegations of the critics, as they could rely on their own documents to support their arguments. The effect was that the evidence before the Commission was largely limited to that of non-critic witnesses. The Commission effectively limited itself to the evidence of those who participated in the arms procurement, who would hardly be likely to produce documents that reflected adversely on their conduct.

Witnesses could not give their opinions

339. The transcripts of the hearings show that for the most part, the Commission was not interested in the opinions offered by witnesses. The Chairperson made it quite clear that they were not interested in the witnesses' views, and that witnesses must not make submissions but must tender factual evidence. This approach was however not followed consistently. Certain people were allowed or even encouraged to give their opinions, whilst others were prevented from doing so.

340. For example, at the hearing on 5 May 2014 Adv Lebala referred Adm Howell to his evidence to the JIT hearing in which he had said that it was wrong of Mr Shaik to have remained at the Project Control Board meeting on 8 March 1999 due to his conflict of interest. The Chairperson rejected Adm Howell's views in this regard. He stated that he was only interested in facts, not opinions.[199] He did not probe why the witness had held that opinion. This was a witness who had been present at the Project Control Board meeting, whose direct superior was Mr Shaik, and who was a senior officer of Project Sitron. Given his credentials, his involvement in the procurement process and his close working relationship with Mr Shaik his view in this regard was relevant.

341. The Chairperson similarly dismissed Ms Taljaard's concern about the limitation of the final JIT Report, and her opinion that the limitation of SCOPA potentially harmed the credibility of the investigation.[200] He dismissed her opinion despite the fact it was based on her subsequent membership of SCOPA and her extensive reading and study of the Inter-Ministerial Cabinet Committee Minutes.

342. The Chairpetson similarly rejected Dr Woods's submissions that the findings of the JIT Report were somewhat fraudulent, contrived and falsified; and that the JIT did not execute the instructions of SCOPA; and that there was a strong probability of corruption in the Arms Deal. He did so notwithstanding the fact that the opinions were based on Dr Woods' intimate knowledge of the issues due to his chairpersonship of SCOPA at the time the Arms Deal first arose there.[201]

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[199] Public Hearing Transcript, 5 May 2014, p.5900 – 5903
[200]Public Hearing Transcript 7 August 2014, p. 7832
[201]Public Hearing Transcript 2 September 2014, p. 8069-70.

343. The Chairperson similarly dismissed as opinion, not evidence, Mr Maynier's testimony about the conclusions he had made from the analysis of the parliamentary documents and witnesses' evidence regarding the questions of utilization, jobs and investment. The Chairperson stated as follows:

> *"[Mr. Maynier's] analysis about what he thinks about the evidence of the DOD, I do not think it is neither here nor there. We have the evidence. At the right time if we are going to deal with submissions, we will be in a position to ask people to make submissions at that stage. But then we seem to be conflating the two processes. I do not think it is the time now for submissions. It is time to lead evidence. If MR MAYNIER knows about corruption, let him tell us about corruption and give us evidence about that. I thought this was the state where we are. When we have reached the stage where we are asking submissions, the DOD people that you are referring to, they did not come and make submissions. They came and gave evidence. They have not made submissions as yet. They were [indistinct] evidence. ARMSCOR people came and brought that evidence and did not make submissions about the conclusion that they want us to draw from other documents prepared by other people. Some of those people are people who actually prepared the document. They said it is what we did and they said that is what we are doing now. I thought we were still at that stage where we were gathering evidence."*

344. In sharp contrast to this is the Commission's approach to the evidence of Col Du Plooy. Adv Lebala asked him his opinion on whether the evidence Feinstein, Holden and Van Vuuren would have assisted the Commission.[202] Despite Col Du Plooy's statement that

[202] Public Hearing Transcript, 19 May 2015, p. 10879 - 82

he did not have evidence on whether these persons would have assisted the Commission, the Chairperson was insistent on eliciting the opinion from him.

345. When Col Du Plooy did not answer the question put to him, Adv Lebala said *"What would you do, if say the evidence was going to assist the Commission? Because I am sensing that you do not think their evidence was going to assist the Commission…"*[203]

346. Col Du Plooy said that he did not know whether their evidence would have assisted the Commission and therefore he was unable to comment. Nonetheless Adv Lebala persisted with the point, asking why the witness thought that their evidence would not assist the Commission. He stated:

> *"This team agrees with you. I do not know what the Commission thinks. But, this team thinks they will not assist the Commission. Why do you think they will not assist the Commission?"*[204]

347. Col. Du Plooy insisted that he never said that he thought that they would or would not have assisted. He indicated that he did not know. Adv Lebala asked him again: *"Let us be specific. Do you think they will assist the Commission?"*[205]

348. Eventually Col Du Plooy's counsel interrupted this line of questioning. He said that the Evidence Leader was repeating questions to which the witness had repeatedly said he did not know the answer. He said that the witness had remained constant in his version, but that *"there seems to be an attempt to bring him onto the field of speculation, which is not*

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[203] Public Hearing Transcript, 19 May 2015, p. 10881
[204] Public Hearing Transcript, 19 May 2015, p. 10882
[205] Public Hearing Transcript, 19 May 2015, p. 10882.

going to assist the honourable Commission, with all due respect. How should this witness know, precisely what that person, whom he wanted to see, would be able to convey."[206]

349. The Chairperson responded to Col Du Plooy's counsel as follows:

"I do not quite agree with your objection. I think, I am going to allow Advocate Lebala to continue on that question, because we also just want to know, whether those people would have assisted the Commission or not. He is an investigating officer. He knew why he wanted an affidavit from them. He had investigated. He went up to London, also trying to get an affidavit from Feinstein. We want to know, whether these people offered him the information that he gave, whether there are things that Mr Feinstein would have assisted about. I am not quite sure what the answer is now. So, Advocate Lebala is entitled to continue this cross-examination. We also want to understand that. I am sorry, not cross-examination. He must continue trying to find the answer, which we all understand from this witness, as far as, particularly as far Mr Feinstein is concerned. He wanted to take an affidavit from him. If he wanted to take an affidavit from him, or there were certain things that wanted from him."

350. By excluding the opinions of witnesses who had extensive studied the matters under investigation, the Commission limited its ability to perform the function which it was by law obliged to perform, namely to discover the truth.

Newspaper articles were excluded

351. Although the Arms Deal had been reported on and analysed extensively in the media, no journalists were called to testify and the content of the media reports was dismissed as

[206] Public Hearing Transcript, 19 May 2015, p. 10882.

allegations that could not be corroborated with evidence. It does not appear that the Commission interrogated the content of such reports or used the reports as a basis from which to conduct further investigations. The following examples from the transcripts illustrate the Commission's approach in this regard.

351.1. The Chairperson dismissed Dr Woods' reliance on the *Mail & Guardian* article which reported on the Debevoise & Plimpton investigation, on the basis that he was not convinced of the evidential relevance and value of the article without the author (journalist) of the article testifying.[207]

351.2. He also rejected Dr Woods' reliance on an article written by one James Myburgh, which discussed the Public Prosecutor's investigation in Dusseldorf. He said that there was no evidence to support the allegations in the article.[208] The Chairperson ultimately ruled that unless evidence was put before the Commission which supported the allegations in the newspaper articles, names contained therein could not be mentioned – including names that were already in the public domain, and names of some witnesses at the Commission.

351.3. Mr Crawford-Browne submitted a Sunday Times article stating that Admiral Green had informed Parliament that the arms equipment which had been purchased was effectively useless. Admiral Green denied this in his evidence. The Commission did not probe this further, and did not obtain the parliamentary transcripts to resolve this question.

[207]Public Hearing Transcript 2 September 2014, p. 8015.
[208]Public Hearing Transcript 2 September 2014, p. 8025-7

Critic witnesses were not provided with documents

352. During the course of the Commission's tenure, 'critic' witnesses were continually faced with the problem of not receiving documents from the Commission despite requests. As a result, they were unable meaningfully to contribute to the Commission's proceedings.

353. In its initial summons to Mr Holden dated 16 January 2013, the Commission stated that he would have access within a reasonable time to inspect documents in the Commission's possession that would be relevant for his testimony. The Commission later reneged on this, and told Holden that he would only have access to his own submissions and writings which were already in his possession.

354. LHR (on behalf of Messrs Feinstein, Holden and Van Vuuren) wrote to Adv Mdumbe, requesting access to the additional documents which had been alluded to during meetings with the Evidence Leaders on 25 February 2013. Extensive correspondence followed regarding access to certain documents in possession of the Commission. LHR did not receive most of the documents they had requested. The documents they received arrived too late for use in the cross-examination of the witnesses.

355. I submit that both fairness and the search for truth required the Commission to make documents in its possession available to would-be witnesses and to those who were cross-examining witnesses, and require those giving evidence to the Commisson to do so as well. This was necessary for a genuine and open-minded attempt to find the truth.

356. The lack of access to documents deprived the LHR clients from meaningfully engaging with the Commission. It was fundamentally unfair to expect LHR's clients to take part in the Commission, whether through giving evidence or undertaking cross-examination,

without access to relevant documents. The Commission could not fulfil its task of uncovering the truth without allowing equal access to documents which would allow all parties equal opportunity to engage meaningfully.

357. On 20 June 2014 new summonses were issued to Messrs Holden, Feinstein and Van Vuuren. The new summonses did not include the statement in the summons of 16 January 2013 that they would be able to inspect documents relevant to their testimony. In a letter dated 25 June 2014, LHR asked the Commission whether this omission reflected a withdrawal by the Commission of its undertaking that Holden, Feinstein and van Vuuren had the right to inspect documents which the Commission had which may be relevant to their testimony – and if so, why it was withdrawn without giving their clients a hearing in that regard, and what the reasons were for the withdrawal.

358. LHR wrote again to the Commission on 8 July 2014 pointing out that they had not received a response to their letters of 17 and 25 June 2014. They emphasized that their clients could not prepare adequately for their evidence without access to the documents requested. They asserted that it was fundamentally unfair to require their clients to give evidence when they had not been given access to documents which were promised to them, and to other documents which they reasonably required. Some of these documents had been requested more than a year ago. Those requests, and repetitions of those requests, had never been answered. They indicated that their clients could not be required to appear before the Commission until they had access to those documents, and a reasonable time to study them.

359. On 10 July 2014 Adv Mdumbe responded to LHR. He stated that the Commission thought it would be prudent first to seek the comments of the custodians of the documents

requested before responding to LHR's request. He attached the DOD's response to his letter and stated that the Commission was in broad agreement with the DOD's comments. He contended that the Commission obtains relevant information for the purpose of its investigations and not for the benefit of third parties. He noted that some of the documents requested had already been provided to LHR's clients. He said:

> *'3. ... we point out that the Commission obtains the relevant information for the purpose of its investigations and not for the benefit of third parties. The terrain for the testing and assessment of the information so obtained is the Commission's public hearings and it is the Commission that must test and assess such information, and not interested parties. The Commission cannot be expected to make all the information it obtains available to interested parties. For this reason, the Regulations give the Chairperson of the Commission power to control access to and dissemination of the information in its possession. Nonetheless, the Commission acknowledges that it has a duty to assist people earmarked to testify before it and to provide them with the information that will assist them in this regard. But the information requested must be relevant to the evidence that the witness will give. It certainly cannot be all the information in the Commission's possession.*
>
> *4… Regarding the averment that the parties who were involved in the arms procurement would have produced only the documents that favored their versions, we have to point out that each witness testifying before the Commission is required to produce only the documents that are relevant to his/her evidence. None of the witnesses who have already testified before the Commission were required to produce documents that were not relevant to their testimony. The same would apply to your clients. Otherwise, the Commission has been provided with many other documents which were not relevant to the evidence of the witnesses who have already testified. And the Commission will not hesitate to demand production of a document which may contradict the evidence of a witness if it becomes aware of the existence of such a document.*
>
> …
>
> *6.3. Of particular interest is your clients' request to be furnished with the documents listed in Items 6 and 7 as well as the mutual legal assistance requests, responses thereto and related correspondence. The question that arises is for what purpose do your clients need these documents. ...*
>
> *6.4. In this regard, we endorse the views expressed by the DoD's attorneys in paragraph 9.1.3 of their letter. Quite clearly your clients do not require the information because it is relevant to their testimony. Rather they need the information and the documents for their own parallel investigations into the same subject matter of the Commission's mandate. This is tantamount to usurping the functions of the Commission and is untenable and unacceptable. Your clients are not expected to conduct any*

investigations on behalf of the Commission but to merely provide the Commission with information about matters within their knowledge. And of course they may provide the Commission with documents that are not relevant to their evidence but are otherwise relevant to the Commissions' Terms of Reference and they may also point to the Commission where possible relevant information may be found. And if they have investigated any relevant matters there would be at liberty to share their findings with the Commission.

6.5. Apart from the fact that many of the documents requested under Items 1, 2 and 4 have already been disclosed and are in the Commission's public records, the rest of the documents requested are not required for their relevance to the evidence that your clients may provide but rather for the purposes of their own investigations.'

360. It appears from this that the Commission, ahead of the appearance of LHR's clients, expressed an adverse opinion about their motives or the nature of their evidence. The issue was whether LHR's clients were entitled to documents which they maintained were relevant to their evidence. LHR's clients were to give evidence in respect of all the terms of reference. The scope and content of their submission and books demonstrated that the documents were relevant to their evidence. The Commission did not identify any documents that were not relevant to their evidence.

361. LHR responded to Adv Mdumbe on 23 July 2014**.** It emphasized that the requests of the LHR clients were for access to documents which were relevant to their evidence. LHR pointed out that its clients had no involvement in the arms procurement process, and their evidence would be about the activities of others. It consisted principally of the information which they had gathered and analysed in this regard. The fact that the Commission subpoenaed LHR's clients to give evidence suggested that the Commission was of the view that the product of their work might be helpful to it in its inquiry. They submitted that the effectiveness of the Commission's inquiry would be compromised by refusing knowledgeable witnesses access to materials in the possession of the Commission which may be relevant to their evidence. All documents which either

confirmed or contradicted their clients' evidence would be relevant and thus ought to be furnished.

362. On 15 August 2014 LHR wrote again to the Commission, to set out matters that needed to be resolved before LHR's clients gave their evidence. The letter said:

> *'2. As the Commission knows, our clients were not party to or involved in the process of arms procurement. They have conducted extensive research into this matter and have published much of the product of their work. This must have been known to the Commission when our clients were issued with subpoenas to give evidence.*
>
> *3. As the Commission also knows from our clients' submission and draft witness statements, they are not the authors of the documents on which they rely in their research and analysis.*
>
> *4. The Chairperson has ruled (for example during the evidence of Mr David Maynier on 11 and 12 August 2014) that a witness will not be permitted to rely on a document of which he is not the author.*
>
> *5. We respectfully disagree with this approach. We submit that where a document is placed before the Commission which on its face appears to contain information which is relevant to the enquiry which the Commission is mandated to undertake, it is the function of the Commission to investigate the matter, including through making enquiry of the apparent author or owner of the document. A witness ought to be encouraged to make available and refer to all such evidence of which he or she is aware, in order to enable the Commission to undertake its task. The Commission may in due course, after it had made further inquiry (including by exercising its power of subpoena), make a finding on the weight to be placed on such document.*
>
> *6. We point out that the original subpoenas issued to our clients stated that they would be given access to documents in the Commission's possession relevant to their testimony. This obviously refers to documents of which our clients are not the authors. It is difficult to understand what the purpose would be of giving our clients access to such documents, if they are prohibited from referring to and relying on them.*
>
> *7. If the Commission refuses to permit our clients to refer to documents of which they are not the author, or of which the author has not yet been called, then we cannot see what purpose would be served by our clients giving evidence.*
>
> …
>
> *12. A document which is consistent with the evidence which our clients will give is obviously relevant to their testimony, in that it confirms the correctness of their evidence. A document which contradicts the conclusions which our clients have*

reached is similarly relevant to whether their evidence should be accepted, and our clients need to be given the opportunity to deal with it.

13. We again ask the Commission to confirm that our clients will be given access to documents in its possession which either confirm or contradict their evidence.

14. This too has to be addressed before our clients give evidence. No purpose would be served by giving them access after they have given their evidence.'

363. On 27 August 2014 Adv Mdumbe responded that the Chairperson took a decision that he would treat documents that are introduced by a witness who is not the author thereof, the contents of which are not within his/her personal knowledge and who cannot attest to the authenticity thereof on a case by case basis. He stated that when the document is introduced the Chairperson would decide if it is admissible based on the circumstances of each case, including the document's relevance to the terms of reference and the purpose for which it is sought to be used.

364. In a letter dated 28 August 2014 LHR pointed out that its clients had been requesting documents since January 2013. Despite the undertaking by the Commission in the January 2013 summons, it was clear from the Commission's response to the LHR letters that their clients would not be given access to documents from Parliament, the Hawks and other organs of state. The Commission had unilaterally repudiated the undertaking given. By refusing access to such documents the Commission had undermined the ability of LHR's clients to participate meaningfully at the Commission.

365. LHR stated that the effect of the Commission's previous rulings that witnesses could not testify about issues not within their personal knowledge was that LHR's clients would be prevented from giving the evidence which the Commission was aware they wished to give.

366. In light of this situation, LHR indicated that its clients had elected not to participate any further in the Commission.

367. The result of the Commission's attitude to the LHR's clients was that the Commission deprived itself of the opportiunity to hear the views of well-informed critics who had undertaken an extensive study and analysis of the matter, and had published extensively on the matter. The manner in which the Commission made it impossible for the LHR's clients to contribute effectively to the Commission's performance of its mandate. The consequence was a further failure by the Commission to carry out the task which the law required it to perform.

Critics received witness statements and documents too late to cross-examine other witnesses

368. The Commission's Practice Guidelines were issued on 16 August 2013. They set out the manner in which witness statements, evidence bundles and documents would be distributed; the parties who were entitled to such documentation; and the way in which cross-examination would be conducted. The relevant sections of the guidelines read as follows:

> *1. '... [O]n every Friday afternoon, before close of business, the names of the witnesses to be called during the following week will be announced with the statement of the issues that each will be addressing.This is to enable interested parties to decide when to attend the proceedings.*
>
> *2. ... The record of the proceedings will be transcribed overnight and will then be put onto the Commission's website from where everybody can have access to them.*
>
> *3. Copies of documents or bundles of documents to be used in evidence by a witness about to testify, will be furnished ahead of the evidence, to the following categories of people or entities:*

3.1. Those who have made submissions to the Commission and written statements to the evidence leaders and are earmarked to testify before the Commission. Only such documents as are relevant to the issues raised in their statements will be made available.

3.2. Those who have not made written submissions to the Commission but have had consultations with the Commission's evidence leaders and their statements obtained and are earmarked to give evidence before the Commission.

3.3. People and/or entities who are directly implicated in the evidence to be tendered by a witness who is not on the witness list.

4. People and/or entities not falling in any of the above categories who can demonstrate that they have a meaningful, positive contribution to make towards the work of the Commission and need the documents for that purpose, may apply in writing to the chairperson for copies of such documents.

5. Any party wishing to cross-examine a witness must, at the conclusion of the witness' evidence-in-chief, direct a request to do so to the Chairperson. This may be done orally from the Bar or, in appropriate circumstances, it may take the form of a written application wherein the reasons for the request are briefly stated. The Chairperson may, before deciding the request or application, hear oral submissions from the applicant or his/her/its legal representative and the evidence leaders.'

369. Notwithstanding the aforementioned guidelines, there are numerous examples of the Commission not providing witness statements and document bundles in time for critic witnesses to be able to cross-examine witnesses. There was extensive correspondence between the Commission and LHR, and between the Commission and Dr. Young, to this effect. I refer here to the most pertinent correspondence as well as examples of this issue being raised in the hearings.

Obstacles to the full participation of LHR's clients

370. The LHR's clients were in terms of the Commission's guidelines entitled to be furnished in advance with statements and documents, because they were people *'who are directly implicated in the evidence to be tendered by a witness who is on the witness list.'* This was by virtue of the fact that government witnesses gave evidence which was critical of

them in accusing them of either not telling the truth or not being competent to determine the truth. This was harmful to their professional reputations.

371. In this section of this affidavit, I give examples of obstacles to the full participation of the LHR clients.

372. From the outset, concerns were raised about not being able to cross-examine witnesses without witnesses' statements and document bundles. In a letter to the Commission on 7 August 2013, LHR raised concerns regarding Adv Lebala's intention to proceed with the evidence of the SANDF witnesses without their being in possession of the witness statements. LHR contended that this would impede the ability of interested parties to cross-examine such witnesses. It would be impossible to make prior applications for leave to cross-examine if a summary of the content of the testimony was not made available in advance of the evidence. They submitted that if witness statements were not made available in advance, it may be necessary for applications to be made for witnesses to be recalled for cross-examination after they had been excused.

373. At the hearing on 17 October 2013 Adv Snyman indicated on behalf of Messrs Feinstein, Holden and Van Vuuren that they wished to reserve their right to cross-examine Mr. Vermeulen because they were still awaiting the witness's statement and bundle of documents and could not proceed without the documentary evidence.

374. LHR's clients were finally granted access to the witness statement and documentary bundle of Mr. Vermeulen following the conclusion of his evidence in chief on the 17th of October 2013 (a Thursday). However, it was also ruled that Mr. Vermeulen would have to be cross-examined the following available day, namely, Monday the 21st of October. This gave LHR and its clients three days to prepare for cross-examination.

375. In the circumstances, Mr Holden felt it was impossible to brief his counsel adequately on the content of Mr. Vermeulen's statement and bundle and their implications. He therefore cross-examined Mr. Vermeulen himself, a situation was far from ideal. Holden stated to the Commission that if he and his counsel had been granted additional time beyond the three days afforded to them, the cross-examination could have been undertaken by his advocates. The Commission's unwillingness to consider a cross-examination at a later stage prevented this.

376. Following Mr Ferreira's examination-in-chief, the Chairperson asked whether anybody wanted to cross-examine him. Adv Snyman stated that as the transcripts had not been posted on the Commission's website it was impossible for her clients to decide whether they ought to cross-examine Ferreira. She therefore stated that they would like to reserve their right to cross-examine the witness. Once they had a chance to go through the transcripts they would be able to indicate whether they would like to cross-examine.

377. The Chairperson responded that it was not a good enough reason to reserve the right to cross-examine, that the record was not available.[209] The Commission had a programme which had to be followed. Adv Snyman pointed out that the only transcript posted on the website was from the hearing on the Monday, and no transcripts had been posted from Tuesday through to Thursday. She further stated that she understood that her clients' submissions were referred to over the past few days, and they needed to see the record to decide whether to cross-examine. In the end the proceedings were adjourned for the transcripts to be made available to LHR.

[209]Public Hearing Transcript 15 November 2013, p. 3576-7

378. At the hearing on 18 November 2013 Adv Snyman cross-examined Mr Ferreira. Once she had completed the cross-examination she tried to raise with the Chairperson that Ferreira had referred to Armscor's Internal Audit Report, and there appeared to be a third bundle of documents which LHR never received. The Chairperson did not respond to this.[210]

379. When Mr. Odendaal finished giving his evidence-in-chief at the hearing on 21 November 2013, the Chairperson asked whether anyone wished to cross-examine him. David Cote (on behalf of LHR) stated that they only received the documentation for the witness that morning, and it was therefore it was impossible for them to determine whether they wished to cross-examine. He stated that the documentation ran to around 820 pages, and they had not received an additional 32 pages.

380. On 17 February 2014 Mr Erwin appeared before the Commission. When the Chairperson asked whether anyone wanted to cross-examine him, Adv De Vos SC stated that she wanted to do so. She pointed out that she had only received the witness statement that morning shortly before the proceedings started. She indicated further that there was a problem as far as reference to two sets of documents was concerned. The first problem was the Affordability Report which Mr Erwin dealt with in his evidence, and which she wanted to use to cross-examine him. She said that she noticed that it was yet to be declassified thus she was in need of some guidance in that respect. The second problem was that the contracts which Mr. Erwin dealt with in his evidence had not been provided. In the end the proceedings were postponed until the following day.

[210]Public Hearing Transcript 18 November 201, p. 3632-3

381. At the hearing the following day it was indicated that the Affordability Report had been declassified, therefore LHR were expected to cross-examine Mr Erwin. LHR declined to cross-examine because they needed the contracts to be able to cross-examine effectively.

382. In an email to Adv Mdumbe on 9 April 2014, Adv Snyman recorded concerns regarding access to the statements and evidence bundles of the witness Andrew Donaldson. She indicated that they had only been provided with Mr Donaldson's statement and some of the annexures, because the remaining annexures were still in the process of being declassified. LHR only received the remaining documents (some of them apparently not yet declassified) on 9 April 2014, after Mr Donaldson had begun giving his evidence. Again, LHR's clients and other critic witnesses were deprived of access to documents in order to adequately prepare for cross-examination.

383. Admiral Kamerman gave his evidence-in-chief on 26 and 27 May 2014. At the conclusion of the evidence-in-chief the Chairperson asked whether anyone wanted to cross-examine him. Adv Snyman indicated that LHR wished to do so, but two issues needed to be addressed before they did so. She tried to explain the two issues that she wished to raise, but the Chairperson prevented her from doing so and continued to enquire whether other legal representatives wished to cross-examine the witness. After re-examination by Adv Cane, the Chairperson asked Adv Snyman what she had wanted to say. The transcript records the discussion:

> *'CHAIRPERSON: Before I excuse the witness, let me find out from Adv Snyman what she wanted to say before the witness was re-examined. I understood it as saying that you don't intend cross-examining now, but then wanted to make some other points, can I hear you on those points?*
>
> *ADV SNYMAN: That is correct thank you Chair. The chief aspects which I wish to address the commission on as to why we can't cross-examine this witness now I will proceed to make, and firstly providing the interested parties with two*

days or even effectively one night to read and analyse the witness statement of 108 pages with so many annexures which ran to 663 pages and contained detailed material disables the party from preparing and conducting a proper cross-examination on such detailed material. It appears to us that the manner in which Adm Kamerman has been treated is inconsistent with and more favourable than the manner in which our clients have been treated in at least two respects.

First, it is clear that this witness has been given advance access to the draft witness statement of Richard Young and the joint submission our clients Andrew Feinstein and Paul Holden before writing his witness statement, and appearing before the commission. While the so-called critics or our clients have not been treated in this manner.They are required to prepare, to cross-examine without advance access to the submissions and statements of other witnesses, nor the documents which they rely on. The second aspect is that the witness has, or appears to have been granted access to documents in the possession of the commission, presumably at his request.

We however are still awaiting the provisional documents we have requested from the commission over a period exceeding 12 months.

CHAIRPERSON: So now can we deal with the question of cross-examination of this witness, you say you can't because one the witness was given documents in advance which your clients does not have, two, you say that you were not given enough time to look at the statement of the witness, those are the two issues that ...(indistinct)... ...(indistinct)... some long document there ...(indistinct)... I'm not quite sure how long that is going to take, is the two points that you are raising that you are saying to me that you are unable to cross-examine this witness at this stage because of those two points?

ADV SNYMAN: I haven't finished making my second point which would take me probably another 15 seconds. We are still aware, this is continuing my second point, we are still awaiting the provision of documents which we have requested from this commission over a period exceeding 12 months including documents that would be of relevance to this witness, and without access to such documents a proper examination would be impossible.

Our clients cannot rely on documents in the possession of the commission, because we are not getting access to them, and our clients cannot rely on documents which they have sourced outside of the commission, such as the draft auditor general's report because the commission has ruled such documents inadmissible. So it is under these circumstances it is not possible for our clients to conduct a proper cross- examination, they are disabled from doing so, despite the very serious allegations made by this witness against our clients. We therefore decline to cross-examine Adm Kamerman at this juncture and reserve the right to request to cross-examine this witness at a future date once we have received the requested documents which we have requested in correspondence related to this commission over the last 12 months. Thank you those were the aspects which I wish to address this commission on.

CHAIRPERSON: Thank you, Adm Kamerman I suppose from here you are going back to Germany?

ADM KAMERMAN: Indeed I do sir, I have no choice, in fact I just came from New Zealand to hear that I must be back behind my desk.

CHAIRPERSON: Thanks a lot for coming here to come and testify, you are excused.

…

COMMISSIONER MUSI: I'm rather a bit uncertain what Adv Snyman …(indistinct)…, don't you have the statement of the witness …(indistinct)… don't you have it?

ADV SNYMAN: Commissioner Musi we have them, we received them yesterday morning at 10:30 as the proceedings began.

COMMISSIONER MUSI: But now you're talking about other documents that you say you can't cross-examine because you don't have some other documents, …(indistinct)…

ADV SNYMAN: There are a range of documents, they referred to the documents which we have been requesting over the last year, two in particular would be the draft Auditor General's report and the Debevoise & Plimpton report, but it is not just that those documents are not included in the witness's own annexures because seemingly that any party or interested party request to cross-examine the documents outside of those attached to what would be favourable for the witness to disclose, it would make sense that …(indistinct)… as we have been requesting them in order to prepare to cross-examine this witness and others.

Commissioner Musi if I may add, I understand that this weekend there were discussions amongst the secretariat and the commissioners in order to respond to …(indistinct)… most recent request for access to documents, which is a repeat request of the documents that we have been requesting for the last year, it would be very helpful for us to have this response to our request for access to information, so that we know and be in a position to advise when we would be able to apply to cross-examine the particular witness, but we are still waiting for a response from these requests, the response to these requests for documents.

COMMISSIONER MUSI: I'm interested in your inability to cross-examine this particular witness. You've got the statement of the witness, you've got all the documents that have been used in his testimony and you're still not able to cross-examine, why so?

ADV SNYMAN: Commissioner Musi I can take it no further than what I have already submitted.

COMMISSIONER MUSI: Thank you.'

384. On 12 June 2014, on completion of Adv De Vos's cross-examination of Mr Manuel, she pointed out that her clients had not received documents which they had been requesting to cross-examine witnesses. In respect of Mr Manuel, she stated that she needed access to the minutes of the Cabinet meeting of November 1998 in which the final bidders were approved. The only result of this request was an argument between Adv De Vos and the Chairperson as follows:

> *'CHAIRPERSON: Is there any specific issue that you want [indistinct] to cross-examine Mr Manuel?*
>
> *ADV DE VOS: I would not know unless I see the minutes.*
>
> *CHAIRPERSON: [indistinct]. You complain that you are [not] able to cross-examine effectively because you do not have a particular document, where in actual fact you do not even know what is in that document. I find that strange.*
>
> *Secondly, can you get the list by the end of the day today from your client, of documents that they allege that they are still awaiting from the Commission?*
>
> *ADV DE VOS: Chair, I have taken instructions on that point. My clients will prepare a list. They will not be able to have it ready by the end of today. They have been preparing a list to submit to this commission and the secretariat over the last few days in any event. They are going to need another day or two to do so. My instructions are they will be able to present the list by the beginning of next week.*
>
> *CHAIRPERSON: Ja, I also find that a bit strange, because for the past twelve months they have been asking for documents and they are still waiting for them. One would expect that they know what documents they are waiting for. I believe they are still going to investigate which documents they require from the commission.*
>
> *I find that a bit strange. In any event we can get their list by Monday, Tuesday. I will really appreciate that because you want to avoid this statement that has been made by the [indistinct] that you are unable to cross-examine because you*

do not have documents, when in actual fact [you cannot] tell us which documents are those.

ADV DE VOS: May I just respond to the issue of the fact that you find it strange that the list is not available. It is precisely because the documents has been given to the lawyer of human rights in drips and drags, through evidence by witnesses who cannot give a precise list. We have a list of documents we want, and every time a witness gives evidence, we have to tick off on our list which documents we have now received.

We have received bundles this week of documents and we have received bundles last week of documents, which will now correlate with the list that we are requesting. So it is not a question of us not knowing what we want. We know exactly what we want. We just have to do the sums and then we will present the commission with the list.

Obstacles to the full participation of Dr. Richard Young in testing evidence of witnesses

385. I have been advised by Dr Young that he was confronted with very similar problems in gaining access to documents and witness statements in order to cross-examine witnesses. Two of the most pertinent examples were of Mr Nortje and Admiral Kamerman.

386. The Commission's guidelines do not require an interested party to make an application to cross-examine a witness prior to that witness appearing before the Commission or before witness statements and documents are distributed. Nor does it require parties wishing to cross-examine a witness to furnish discovery affidavits of the documents they intend using in the cross-examination. However, the Chairperson insisted on Dr Young making applications to cross-examine witnesses long before such witnesses were scheduled to testify, and to furnish discovery affidavits to prepare the witnesses for cross-examination.

387. Dr Young had made two applications to cross-examine Mr Nortje, the first in October 2013 and the second in November 2013. He had to withdraw the first application because, despite numerous requests for relevant documents and witness statements, the documents

and witness statement he was finally given were inadequate: the witness statement hardly traversed anything of import that was not already in the public domain, and was of no use for his cross examination of Mr Nortje.

388. The second application to cross-examine Mr Nortje was substantive. It was followed by a series of requests for and correspondence between Dr Young and the Commission regarding access to all documents and the declassification and discovery of certain documents in order to fully prepare for cross-examination of Mr Nortje and Admiral Kamerman.

389. At the hearing on 18 February 2014, the Chairperson stated that Dr Young would not be allowed to use any documents in cross-examination which had not been included in his draft (non-commissioned) discovery affidavit,[211] and any document that had not timeously been made available. Dr Young discovered and produced 1061 relevant documents, but still the Commission did not provide access to the documents he requested. Dr Young had to withdraw his second application to cross-examine Mr. Nortje because of the lack of documents necessary for him to fully prepare for the cross-examination. He only received Mr Nortje's updated witness statement and witness bundles on 24 March 2014. The transcript of the Commission's proceedings necessary for his cross examination was only published on the website on 25 March 2014.

Critics were not provided the same resources in drafting their witness statements

390. At the Commission's first sitting on 5 August 2013, Adv Kuper SC on behalf of the DOD made the following statement: 'there is no confusion on the side of the legal team representing the department as to the primary role of the Evidence Leaders and the

[211] Public Hearing Transcript 18 February 2014, p. 4444-5.

exclusive role as the Evidence Leaders in the preparation of witness statements and in the leading of witnesses.' However, not all witnesses were provided with the same assistance from the Evidence Leaders in drafting their witness statements.

Dr Young

391. Dr Young received a letter from Adv Mdumbe dated 14 June 2013, informing him that they hoped to forward him his statement before the end of the month. He sent reminders via email to Adv Mdumbe soon thereafter, asking when he could expect the draft witness statement which he needed in order to address the evidence in chief of both Mr Nortje and Admiral Kamerman, since he was not given a proper opportunity to cross-examine them.

392. On 25 June 2014 Dr Young emailed Adv Skinner SC stating that he had received a summons to appear before the Commission commencing 21 July 2014. He pointed out that prior to receiving the summons he had informed the Commission that he would be unavailable during that period because he would be undergoing a corneal transplant the following day, and thus would not be able to prepare his evidence. In any case he needed full and proper witness statements and evidence bundles to give his evidence. He said he had still not received anything from the Commission. On 17 July 2014 Dr Young's attorneys wrote to the Commission to similar effect. They submitted a number of further reasons why he would not be able to testify on 21 July 2014.These included:

    392.1. The Evidence Leaders only requested his discovered documents and started preparing his evidence two weeks before. As a result, their client's evidence had not been adequately prepared.

392.2. The affidavit on which their client's evidence was to be based was over three years old. The draft witness statement produced was also hopelessly out of date. Their client had repeatedly stated that he was prepared to update his witness statement. No draft was produced for or settled by their client. This needed to be done before his evidence commenced.

392.3. Their client discovered 1061 documents, of which some 200 would be relevant to his evidence. No bundle was produced or made available for him to prepare his evidence. As a result, it would be impossible to lead his evidence sensibly.

392.4. Their client had requested specific documents in terms of the Commission's rules from Armscor and the DOD, which he client believed were relevant to the Commission and which were referred to in other discovered documents. Their client's request for one particular document, which was sought since 2001 from the DOD and since 2013 from the Commission went unanswered. Their client required these documents in order to testify.

393. Dr Young's attorneys pointed out that their client had repeatedly informed the Commission that he would be unable to testify on 21 July 2014. The Commission had refused to be accommodating to their client, although it had been accommodating in respect of other witnesses. Further, their client was required to produce a witness statement and bring an application in order to cross-examine a witness before the evidence of a witness was led. They stated that their client had not been made aware that any such application had been made regarding other parties cross-examining him.

394. Adv Mdumbe responded on 18 July 2014 stating that the issues they had raised would be dealt with at the hearing on 21 July 2014. He asked them to furnish him with a copy of

Dr Young's identity document so that he could finalise his booking to travel to Pretoria for the sitting on 21 July 2014.

395. At the hearing on 18 July 2014 Adv Mdumbe stated that Dr Young was scheduled to give evidence on Monday 21 July. He said that they had received a letter from Dr Young's attorneys and that he thought it would be prudent to deal with the issues raised in the letter in the presence of Dr Young. He indicated that he would be finalizing travel arrangements for him to travel to Pretoria. The Chairperson stated that the issues that Dr Young had raised must be discussed in the public domain, Dr Young must therefore attend the Commission on 21 July.

396. Dr Young's attorneys responded to the email sent by Adv Mdumbe on 18 July**.** They stated that they found the content of the email very puzzling, as it ignored the reasons why their client would be unable to attend the hearing on Monday 21 July. Moreover, they stated that it was strange that the Commission would wait until the Friday afternoon before the hearing to make travel arrangements. They contended that what was even more disturbing was that the Chairperson was reported to have stated at the hearing on 18 July that their client had been served with a subpoena and that he expected their client to attend on Monday, whatever his circumstances. This contradicted what Adv Mdumbe had stated in his email of 18 July, that the issues raised in their letter would be dealt with on 21 July.

397. It therefore appeared that the Chairperson had knowledge of their letter, and had reached a decision that notwithstanding their client's submissions, he expected their client to attend the Commission. They pointed out that they had advised that their client would provide a note from his surgeon dealing with his medical condition. The Chairperson

made a decision without calling for the document, indicating that either he did not apply his mind to the content of their letter before making the decision, or he regarded it as irrelevant in reaching his decision. They submitted that in either event the decision was not rational or procedurally fair. Moreover, it would be pointless for Dr Young to cause a legal representative to attend the Commission and make submissions on his behalf as a decision had already been made.

398. At the hearing on 21 July 2014 Adv Skinner stated that Dr Young was not present. He stated that Dr Young had told him that he was willing to give evidence provided he was properly prepared and able to do so. Adv Skinner informed the Commission of the two letters and the medical note that had been sent by Dr Young's attorneys which were read into the record on instruction of the Chairperson. Adv Skinner submitted that the Commission should hold over Dr Young's evidence until he was able to come and testify to the Commission. Adv Mdumbe responded about the administrative or logistical processes they had gone through to get Dr Young to come and testify. This led to a heated debate between the two counsel.

399. The events of the hearing of 21 July 2014 precipitated the resignation of Dr Young's Evidence Leaders, Adv Skinner SC and Sibiya. In their resignation letter they recorded the following:

> *Further to the events of 21 July 2014 we wish to point out the following:*
>
> *1. It was quite apparent that we had been deliberately excluded from what was to take place that morning. At no time did Advocate Mdumbe either indicate to us that for the first time in the history of the hearings he was to play an active role by reading a document or even ask us for a contribution towards such document. He did not attempt to verify that the information contained therein was accurate. It came as a complete surprise when he was called upon to deliver his comments particularly as no regard seems to have been to our memo of 10 July 2014 setting out fully the position. Further, the entire approach consisted*

of an attack on Dr Young and completely ignored the fact that he had suffered a physical impediment which seriously affected the most recent consultations and preparing his evidence and witness statement.

2. We must also point out that certain of the comments are inaccurate as set out hereafter.

(a) The mention in the letter from Dr Young's attorneys of Dr Young enquiring from ourselves about travel arrangements and not receiving a response was an error by the attorneys which we pointed out to Dr Young during the consultation. The evidence leaders played no role in the travel arrangements as Advocate Mdumbe was well aware. In fact on 12 July 2014 Advocate Mdumbe stated "I will ask the team to make the necessary arrangements [for Dr Young's travel] on Monday. What do you make of Dr Young's response to my query about travel time and date? I am not sure I quite understand his response".

For Advocate Mdumbe not to point out that it was at all times the Commission who was making travel arrangements has created in the mind of the public the impression that the evidence leaders were dilatory or failing in their duty to bring an enquiry by Dr Young to the attention of the Commission.

(b) The response further glosses over the fact that the Commission only made the travel arrangements for Dr Young very late on Friday 17 July 2014 at a time when it had already been advised repeatedly by Dr Young, his attorneys and ourselves that he would not be attending in Pretoria on 21 July 2014.

(c) The response is further incorrect when it indicates that "shuttle vouchers" were forwarded to Dr Young. Despite the letters from Dr Young's attorneys and specific statements by the evidence leaders both to the Chair and Advocate Mdumbe that Dr Young would not be able to drive at night (and the instruction by the Chair to Advocate Mdumbe that a shuttle should be arranged) the voucher which was forwarded to Dr Young late in the evening of Friday 18 July 2014, was for the hire of a vehicle and not for a shuttle.

(d) The response regarding the dates allocated to the hearing of Dr Young's evidence makes no mention of the fact that when we as evidence leaders were informed for the first time (on 17 June 2014) that the Commission had decided to commence with the evidence of Dr Young, we immediately indicated that Dr Young had already explained his unavailability at certain periods. It accordingly was not a case where the Commission allocated dates and then Dr Young indicated he was not available but that the Commission took the decision to allocate dates to him knowing full well that he would not be available.

(e) The estimate of time from Dr Young's evidence was based on our knowledge at the time. The transcripts of Admiral Kamerman's evidence were only available at about the time the Commission informed us of the decision to call Dr Young first. Although we have been repeatedly told that his evidence is of a very limited nature and will not take too long, we disagree and we believe Dr

Young has been unfairly criticised in this regard when he states his evidence could not have been completed in the time allocated.

(f) It is a gross miss-statement to state "Consultations with Dr Young never stopped". Paragraphs 9 and 10 of Advocate Mdumbe's response indicate that there were no consultations between 5 June 2013 and 8 July 2014. The clear implication of this is that consultations had stopped because all the evidence leaders were focusing on the witnesses to be called in Phase 1.

(g) The response further does not indicate that Advocate Mdumbe specifically informed Dr Young that the evidence leaders would prepare a witness statement for him - in fact Advocate Mdumbe went so far as to specify that this would be done within the course of less than a month and made such statement without ever making an enquiry from ourselves. As Dr Young has repeatedly pointed out, if in the course of 2013 he had been asked to prepare his own witness statement, he would have had more than sufficient time to do so. He was however entitled to rely on the fact that he had been informed that a statement would be prepared for him. As we have explained, it is correct that it was only very recently (after the meeting of 17 June 2014) that we recommenced urgently preparing Dr Young's statement.

(h) The statement that "no other witness has been consulted with as extensively as the team has with Dr Young"carries with it a clear suggestion that we as his allocated evidence leaders are being dilatory and spending too much time consulting. This is not the first time this allegation has been made by the Commission. We note that Advocate Mdumbe distances himself from the fact that he attended certain of the initial consultations himself. He is accordingly well aware that those were preliminary consultations to obtain an overview of Dr Young's information and were not part of actually taking/drafting a statement. We were employed as experienced independent advocates but our assessment of the time needed to properly prepare a witness (rather than proffer "half-baked" evidence) is continually disregarded.

(i) The response of Advocate Mdumbe makes no mention of the reasons furnished by Dr Young for withdrawing his application to cross-examine Frits Nortje. This clearly creates the impression that Dr Young was vacillating or being inconsistent.

(j) The section on "Impact on Commission Processes" is again in our view misleading. It creates the impression that Dr Young was simply ignoring the directives given by the Commission. No mention is made of the fact that it would have been extremely difficult for any person wishing to cross-examine a witness to decide to do so until he had seen the full statement of the witness. The very brief summaries which were placed on the Commission's website at a late stage were of no real assistance. It would have meant that Dr Young would have had to attend in Pretoria for both the witnesses Nortje and Kamerman, receive their statement virtually as they commenced evidence, not have an opportunity to consider it and prepare cross-examination and then make an application to do so. In our view this would not have been realistic. Our concern is that the

response of Advocate Mdumbe creates the impression that it is Dr Young who had been delaying the hearing. Our understanding is that the delay in Mr Nortje testifying was not caused by Dr Young but by the representatives of Armscor seeking time to peruse the documents which Dr Young had indicated he intended to refer to.

(k) The request on 3 March 2014 to meet with Dr Young was not made by the evidence leaders who had been allocated to Dr Young. We further have a difficulty with the response of the Chair quoted by Advocate Mdumbe. With respect it was not an instance of Mr Nortje's evidence being adjourned "because he wanted to accommodate Dr Young" - it was more an instance as set out that the representatives of Armscor wished an adjournment. Further it was not a case that the evidence leaders were "going to spend another four or five months talking to Dr Young before we can call Mr Nortje". For Advocate Mdumbe to have made reference to these passages without setting out the entire context created an extremely adverse impression of Dr Young.

(l) Dr Young has pointed out that he accepts that the Commission ruled on 24 March 2014 that Armscor and the Department of Defence were not required to make discovery. He has however pointed out that his request is different - in the light of the ruling he is not calling upon such entities to make discovery but is seeking documents, which he is aware are in the possession of the Commission or Armscor or the Department of Defence, since such documents are relevant to the evidence which he will give.

(m) While it is correct that Dr Young has yet to submit an application to cross-examine Admiral Kamerman, he has indicated that he intends to make such application. As was pointed out in the letter from his attorneys, nobody has made application to cross-examine Dr Young. The fact that mention is specifically made of Dr Young not submitting an application to cross-examine Admiral Kamerman again places him in an unfavourable light which in our view is unfair.

(n) The concluding remarks are in our view entirely unwarranted. While Dr Young did participate as a witness at the JIT, that was some 14 years ago. He is not contending that he is "a total stranger who has still to amass information regarding specific allegations" - he is merely pointing out that he has a huge number of documents and much information and that the Commission had informed him that he was not required to draft a witness statement. Accordingly his contention is that he has had insufficient time since he was informed of the allocated date for his evidence to meet with the allocated evidence leaders and compile a comprehensive witness statement.

(o) In our view too it is unfair and self-serving to state that "he who alleges must prove (it's a simple principle of the Law of Evidence)". Dr Young does not bear a burden of proof. He has made the averments contained in his evidence at the JIT, his affidavit in the Constitutional Court application by Mr Crawford-Browne and in his draft statements furnished by him to the Commission.

(p) In our view it is by no means unreasonable for him to specify that there are documents in the possession of the Commission which will either prove the correctness and accuracy of his allegations or at least offer support thereto. Without such documents he would be reduced to a position where he would merely be making a bald allegation and under cross-examination would undoubtedly be challenged and criticized on the basis that he is not advancing any proof but merely making an allegation.

(q) It is accordingly completely unsatisfactory for Advocate Mdumbe to have ended his submission by stating "all that is needed from him is to repeat such allegations formally at the enquiry". This is a gross over-simplification and again creates an entirely incorrect impression.

3. We must also express our strong reservations regarding the entire approach of Advocate Mdumbe's document. It was well-known to the Commission that Dr Young would not be present. The document that was read out constituted a clear attack upon him made in public at a time when he would not be able to respond. This placed us as his evidence leaders in a most uncomfortable and embarrassing position as it was clearly seen as us supporting what was being stated. The issues set out in the previous paragraphs could and should have been properly canvassed with us and the failure to do so has compromised our position as evidence leaders.

4. We also found it significant that copies of the letters from Dr Young's attorneys which were addressed only to the Commission and ourselves as his evidence leaders were given by the Commission to the legal representatives for the Department of Defence prior to the hearing on 21 July 2014.

5. We have reiterated on several occasions our view that Dr Young is an extremely important witness. Indeed he is the only witness (with the possible exception of Johan du Plooy) who will testify as to their knowledge of bribery/corruption in connection with the Strategic Defence Procurement Package. For his evidence not to be called would in our view be a travesty. It is not the case that the Commission has "bent over backwards" for Dr Young - on the contrary the reverse is the position. He has made himself available for the various consultations which we and other evidence leaders have had with him and has spent many hours collating documents for his evidence. This has taken place while he has been trying to run his business and run a farm and attend to numerous other matters. We must, with deep regret, indicate that we cannot associate ourselves with any decision not to call the evidence of Dr Young.

6. We must also express our extreme discomfort at the prima facie views expressed to us in chambers regarding the acceptance of the evidence of Rear Admiral Kamerman. From the time we have spent consulting with Dr Young, we believe that there are at the very least serious grounds on which Dr Young will be able to attack Kamerman's credibility and demonstrate that he has not been candid when giving his evidence.

7. We have already referred to the fact that in our view we have been side-lined over the last few months. A clear instance of this is that a meeting was held in Cape Town with Dr Young on 3 and 4 March 2014. Despite the fact that we were his evidence leaders, we were not invited to such meeting by the Commission. To make matters worse, Dr Young at such meeting handed to Advocate Mdumbe and to the representatives of Armscor and the Department of Defence a disk containing his 1 061 discovered documents. We were not informed of this by the Commission nor was a copy of such disk made available to us. It was a matter of huge embarrassment when we consulted with Dr Young and he enquired whether we had had sight of particular documents contained on that disk. We then for the first time learnt of the existence of the disk and had to acknowledge that we had not received a copy and had not seen the documents in question. Dr Young then kindly made a further copy of the disk available to both of us.

8. It was clearly impossible in the time available to us to peruse the approximately 20 000 pages contained on such disk. While we acknowledge that not all the documents would be referred to by Dr Young in his evidence, it still placed us in an impossible position where we had a consultation and no knowledge of any documents discovered by Dr Young.

9. Further, the refusal of the Commission to allow us to spend time reading the transcripts of evidence has meant that we are operating in a vacuum with insufficient or no knowledge of what evidence has been led that needs to be raised with the various "critique" witnesses. This too has compromised our position as independent advocates.'

400. On 12 January 2015 Dr Young emailed Adv Mdumbe stating that he was not happy with the quality and content of the witness statement that had been drafted by his previous Evidence Leaders and that he needed assistance to fix it. He had only met with his new Evidence Leaders twice. He pointed out that other witnesses had months with their own legal teams and many weeks with the Evidence Leaders.

401. The above events suggest that the Commission had no intention of enabling Dr Young to participate meaningfully in the proceedings of the Commission. Expecting Young to appear before the Commission without finalizing his witness statement, without access to documents, and without time to meet with evidence leaders had the effect of truncating the evidence he was able to put before the Commission.

402. Furthermore, Dr Young was deprived access to documents in the possession of the Commission which he contended would either prove the correctness and accuracy of his allegations or at least offer support thereto.

Colonel Du Plooy

403. On 18 May 2015, Col Du Plooy's counsel addressed the Commission and requested additional time for Col Du Plooy to prepare his evidence. He stated that Du Plooy had countless documents, some of which may be irrelevant, circumstantial or direct evidence. There were aspects raised by previous witnesses that Du Plooy had not had a chance to deal with in his own statement due to a lack of time. He stated that they needed to properly consult with the Evidence Leaders so that Du Plooy could properly deal with the evidence already before the Commission, to assist the Commission to get a proper perspective of that evidence. He pointed out that although he was counsel to Du Plooy the Evidence Leaders were in control of his evidence and Du Plooy was their witness.

404. The Chairperson responded by stating that Col Du Plooy was one of the first witnesses the Commission had contacted, and most of the documents before the Commission were received from Du Plooy. He pointed out that Du Plooy knew four years ago that he was meant to testify so he should be properly prepared to testify.[212] He said further that Du Plooy's statement had nothing to do with the other evidence that had been led before the Commission.[213]

405. Du Plooy, in his response, disputed the assertion that he had ample time and that his testimony had nothing to do with the other witnesses' testimonies. He pointed out that it

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[212] Public Hearing Transcript 18 May 2015, p. 10739.
[213] Public Hearing Transcript 18 May 2015, p. 10743

was not possible for him to attend the Commission and listen to each witness to determine whether their testimony was applicable to his own evidence, as he has a full time job. He stated that he had asked the Commission many times over the past few years as to what aspects he was expected to testify about and to provide him guidance in that regard. However, he had never received that guidance until about a month ago, when he had his first meeting with the Evidence Leaders and they informed him he would have to testify on this date. He stated that he had been subpoenaed previously but it had been postponed a few times so it had been hard for him to know when and what to prepare.

406. Adv Lebala averred that Du Plooy was concerned about the testimony of four witnesses – Adv Hlongwane, Gen Meiring, Chippy Shaik and Christine Guerrier. The Chairperson responded that the evidence of those four witnesses was very short and could be read overnight. He stated that they would start with evidence and if the witness wanted to go through the evidence of those witnesses, he could do so that night.

407. The result was that Du Plooy was not given sufficient time to prepare his testimony and go through previous witnesses' testimonies with the Evidence Leaders. During his evidence, the Chairperson and Commissioner Musi intervened, stating that they had direct evidence from previous witnesses to the contrary. Du Plooy tried to indicate that previous witnesses had had an opportunity to put their views to the Commission and if he had the opportunity to go through their evidence he would have been in a better position to deal with it.[214]

[214] Public Hearing Transcript 18 May 2015, p. 10779.

408. Despite the fact that Du Plooy's counsel indicated at the outset on 18 May 2015 that Du Plooy had not had a chance to go through the aforementioned four witnesses testimony, Adv Lebala put their evidence to him.

Phase 2 Witnesses could not meet Evidence Leaders during Phase 1

409. On 4 September 2013 Adv Mdumbe wrote to David Cote of LHR, stating that 'the Commission has requested the evidence leaders to focus on consulting with government officials and former Ministers who have been subpoenaed to give evidence during the first phase of proceedings. As you may be aware, this phase has already commenced and the Department of Defence is currently giving evidence. Evidence leaders have been advised to arrange consults with other witnesses after the completion of this phase.'

410. The effect of this ruling was that witnesses in Phase 2, including LHR's clients, would not be able to meet with their Evidence Leaders to finalise their witness statements until Phase 1 of the proceedings was completed. Taken together with the Chairperson's ruling that parties could only be granted access to documents so as to cross-examine witnesses once they had submitted their witness statements, this had the result that individuals appearing in Phase 2 could not effectively cross-examine witnesses appearing in Phase 1 of proceedings.

411. While LHR's clients had not submitted a witness statement (which required the participation of their Evidence Leaders), Holden and Feinstein had made a substantial joint submission to the Commission. This joint submission was referred to and quoted from on numerous occasions during the proceedings, and put to many witnesses for response (most of which was negative).

412. LHR wrote to Adv Mdumbe on 9 September 2013 raising concerns about their clients not being able to meet with Evidence Leaders during Phase 1. They pointed out that they had made provisional arrangements to meet the Evidence Leaders in order to review their evidence and obtain access to relevant documents, but were informed that the meeting had to be cancelled as a result of an instruction by the Commission that the Evidence Leaders must focus on Phase 1 government witnesses, and that their clients would only be consulted with after the completion of that Phase. LHR pointed out that the Evidence Leaders would then be leading evidence without having been able to consult with witnesses who mught be critical of what the witness intended to say. They contended that evidence could not conceivably be presented in an even handed manner if the Evidence Leaders systematically introduced evidence having consulted only government witnesses, and having deliberately not consulted the 'critics'.

413. At the hearing on 17 October 2013 Adv Snyman stated that her clients wished to reserve their right to cross-examine Mr Vermeulen as they had not received the witness statements and documents. The Chairperson stated that he did not recall her clients having made a statement to the Evidence Leaders: they had only provided the Commission with a submission. Therefore, he stated, he did not know what evidence they were going to lead, and for that reason it would not be correct for the Commission to give them all the documents in its possession as he was certain that her clients would not be in a position to testify about everything that the Commission had.[215]

414. Adv Snyman responded that because her clients had already made submissions to the Commission they were of the view that they would be entitled to receive witness documents and statements. In any event, her clients had made arrangements to meet with

[215]Public Hearing Transcript 17 October 2013, p. 2507.

the Evidence Leaders during that week in order to make their statements. However, directives had then been given that they could only meet with the Evidence Leaders after the conclusion of phase 1, which effectively precluded them from making formal statements to the Commission.[216]

415. During Holden's cross-examination of Vermeulen on 21 October 2013, he tried to refer the witness to the Debevoise & Plimpton Report. The Second Respondent enquired where the Report came from. Holden stated that he intended to deal with the issue of the document's origin and validity in his evidence. He noted that the Report had never been contested by Debevoise & Plimpton. The Chairperson stated that he had never seen evidence which suggested that the content of the Report was never contested.

416. On 25 November 2013 Adv Snyman tried to refer Mr Odendaal to the Draft Auditor General's Report.She was faced with various objections. She pointed out that her clients would be relying on the report in their own evidence. She stated that if her clients had had the opportunity to meet with the Evidence Leaders, they would have explained the importance of the draft report. The Chairperson stated that he did not understand how the meeting with the Evidence Leaders would have changed the situation in respect of the document. The document was deemed inadmissible.

417. Although the Commission released a media statement which gave phase 1 witnesses the opportunity to deal with matters which fell under phase 2 during their phase 1 evidence, phase 2 witnesses were not permitted to raise phase 2 issues when cross-examining phase 1 witnesses. This was because the Chairperson stated that submissions, whilst forming part of the record, do not constitute evidence. Such submissions would only constitute

[216]Public Hearing Transcript 17 October 2013, p. 2515-6.

evidence once they had been put before the Commission and tested through cross-examination. Because phase 2 witnesses' submissions would only become evidence in phase 2, they were not entitled to cross-examine on phase 2 issues during phase 1.

418. As a result of this attitude, LHR was granted permissionto cross-examine Mr Esterhuyse, but the cross-examination waws limited to the matters on which he gave in chief. LHR was refused permission to cross-examine him on phase 2 issues. The Chairoerson said that if when the LHR clients testified if they disclosed evidence that required a response from Esterhuyse, he would be recalled.[217]

419. The instruction that phase 2 witnesses could only meet with Evidence Leaders after phase 1 had been completed compounded the problem of a one-sided presentation of the evidence to the Commission. Much evidence went untested. It was then said to be "common cause".

The Commission Erroneously Found That a Range of Evidence was Common Cause

420. The transcripts of the hearings contain statements by the Commission that certain evidence was common cause. Such a finding could be justified if cross-examination had been permitted but not undertaken, or if all the parties agreed that the evidence reflected the correct position. For reasons which I have given, and others which I traverse further below, the large majority of non-critic witnesses were not questioned in this manner.

421. During examination-in-chief on 30 April 2014 Adv Sibeko asked Mr Esterhuyse about the value system equations. Mr Esterhuyse was a key figure in the procurement process,

[217] Public Hearing Transcript 8 May 2014, p. 5970-1.

and he developed the Best Value 50/50 equation. Once he had answered the question the Chairperson interjected and said the following:

> *"CHAIRPERSON: (Indistinct) I do not quite understand why this evidence in leading us to, all those things that he is talking about (indistinct) have already testified, and explained to us exactly how they arrive at those various indexes.*
>
> *Now we are repeating the same thing here, one person says I do not think we should have done that, I do not think we should have done that, when people who were in those project teams have already testified. And their evidence (indistinct). I am not quite sure now you know what are you trying to achieve now by going through what other (indistinct) have already testified about."*

422. This illustrates the Chairperson's willingness to accept evidence that had already been given by witnesses which had gone untested. Any witness who spoke to the same evidence thereafter, who did not have direct knowledge, was considered not to have any evidence worth providing. Mr Esterhuyse was integral to the procurement and had been involved in the evaluation process. His evidence was important to understanding how it was decided which bidders would be awarded the tenders. Howeverm, his evidence was regarded as inconsequential as other witnesses had discussed the equations.

423. Admiral Kamerman's examination in chief provides telling examples of the Commission's apparent willingness to accept untested evidence as common cause. Adv Lebala made numerous assertions as to what was common cause, and the commissioners did not dispute any of this. Notwithstanding the fact that the Commission knew that Adm Kamerman was a contentious witness, whom Dr Young and the LHR clients were eager to cross-examine, most of his witness statement was considered common cause.[218]

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[218] Public Hearing Transcript 26 May 2014, p. 6242.

424. At the hearing on 26 May 2014 Adv Lebala stated that paragraph 89 of Kamerman's statement was common cause. This paragraph dealt with the critical performance filter and the evaluation of the German MEKO A200. In dealing with this issue Adm Kamerman pointed out that this was an issue with which Feinstein and Holden had taken issue, as they alleged that the German design did not comply with the critical minimum performance filter and thus should not have been allowed through for full evaluation. Adm Kamerman's witness statement said that the German design was superior to the specifications they were required to meet, which resulted in it being allowed through to the next round. This paragraph could hardly be regarded as common cause.

425. Paragraph 128 of Kamerman's witness statement dealt with the allegations made by Feinstein as to the irrationality of the arms acquisitions. Adv Lebala stated that Kamerman's response to those allegations was common cause.[219] Yet Kamerman had himself referred to Feinstein's views, with which he differed. He said that Feinstein's *"vision of an emasculated SANDF on the grounds of our already '…overwhelming military dominance in the Sub-Saharan region…" is as naïve as it is dangerous. South Africa has commitments and obligations to provide military support as part of the AU and UN stabilization of the dangerously failed states in our own sub-continent (which operations have amply shown that we are not the superpower that he imagines the SANDF to be). The readiness for war underpins peace, as the history of human conflict has always shown."*

426. At page 6390 of the transcript Adv Lebala assured Kamerman that it had become clear before the Commission that "nomination" as understood by Young was incorrect: *"I*

[219] Public Hearing Transcript 26 May 2014 at 6358.

assure you that the Commission [indistinct] that nomination as understood by Mr Young is not correct. According to Mr Young the State has selected and prescribed South African companies, including ADS in the contract baseline to the main contractor. Now that has been corrected and you seek to deal with that, but I assure you it has become clear before the Commission, I don't want to expand on it…". Yet at that time, Young had not yet appeared before the Commission to give evidence, and he had only submitted a draft witness statement.

427. At page 6392 Adv Lebala asserted that paragraphs 140.5 and 140.6 were common cause. Paragraph 140.5 stated: *"The GFC was selected by Cabinet on 18 November 1998 as the Preferred Supplier and had offered to form a consortium with ADS to supply the required minimum 60 % of the combat suite from local industry, 'without committing to any sub-contractor or supplier.' The GFC was instructed to expand its offer to include an offer for the combat suite on 12 December 1998, against a SA Navy User Requirement Specification (URS) document wherein all suppliers are explicitly listed as 'Candidate Suppliers' only, with the Main Contractor free to offer any alternative it felt fit. The GFC formed a consortium with ADS, obtained quotations and made a series of combat suite offers to the State as part of its overall vessel offer during the negotiation phase. On numerous occasions during this phase, the GFC was explicitly instructed / requested to offer cost-effective alternatives to its proposed equipment or suppliers."* Paragraph 140.6 stated: *"the competition was open and fair. For example, ADS listed by the State as the sole 'Candidate Supplier' of the Navigation Distribution System, lost that sub-contract in fair competition to CCII".*

428. Yet at that time the "critic" witnesses were still to give evidence. The LHR witnesses had not yet withdrawn, and were due to give evidence. It could hardly be common cause that the competition was open and fair. This was one of the matters in issue.

429. Adv Lebala also contended that Adm Kamerman's witness statement regarding the BAeSema allegations was common cause.[220] In other words the part of his testimony which contradicted Dr Young's allegations about BAeSema was "common cause" before Young had a chance to present his evidence. Adv Lebala also asserted that regarding Adm. Kamerman's statement which dealt with his alleged failure to prevent ChippyShaik from violating acquisition processes was common cause.[221]

430. At page 6437 Adv Lebala drew Adm Kamerman's attention to the 'nature of the risk attaching to all databus systems'. In dealing with this issue in his witness statement, Adm Kamerman had stated that the critics misunderstood the nature of the risk associated with the databus. With regards to this issue Adv. Lebala stated that *"I don't know whether I should traverse that because you know the Commission has heard so much about it, and what is significant is that your statement clarifies everything and simplifies it by building it concretely you know…".*Adv. Lebala then referred to the specific risk attaching to the CCII Databus and the categorization thereof. The Chairperson interjected and stated*: "The previous witness dealt with these issues fairly efficiently, we now understand exactly what it means, we understand why the product of Richard Young was put into a particular category, unless if at all the witness wants to emphasise certain issues in this particular clause."* Adv Lebala stated that most of

[220] Public Hearing Transcript 27 May 2014 at 6413.
[221] Public Hearing Transcript 27 May 2014 at 6413.

this had become common cause and emphasized that pages 98 and 99 of the witness statement which dealt with the categorization of the risks was common cause.[222]

431. Again, there was no basis on which a person with an open and appropriately enquiring mind could accept that these matters were common cause, or that the Commission already, without hearing other evidence, "understands exactly what it means… why the product of Richard Young was put into a particular category", when Young had not yet testified. Considering that the 'Report on Diacerto Bus' had found that C^2I^2's system was no more risky than the system offered by Detexis (and, indeed, that C^2I^2's product was considered superior), it remains confusing that C^2I^2 was classified as a 'Category B' subcontractor for which the state would assume no risk. Similarly, the fact that the state had already paid for C^2I^2's technology development made it odd that it refused to back C^2I^2. Given this controversy, and given that the Commission knew that Dr Young was interested in cross-examining the witness and that the critics had raised concerns about Dr. Young being put into'Category B', it is inexplicable that the Chairperson made the statement which he did.

432. During the cross-examination of Mr Naidoo by Adv De Vos on 9 June 2014, she referred him to the Joint Investigation Report which stated that some essential functionalities of the aircraft in the LIFT and ALFA package were not included in the contracts, and that funding had to be found outside the Cabinet approved funding package for those functionalities. In response Mr Naidoo stated that he was not aware of any further funding requirements outside of the budget of the department concerned. Adv De Vos said that her clients believed that there were certain extra costs involved

[222] Public Hearing Transcript 27 May 2014 at 6442.

and that the additional costs were not included in the SDP contracts but flowed from them. The following was then said:

> *CHAIRPERSON: I am sorry, Advocate De Vos, I am not quite sure what is the basis of your clients' belief. Can you share that with us so that you know when the witness answers and then we can all understand properly exactly where were they coming from? Because up to now I do not seem to be, the Commission does not seem to be having any evidence of such a belief.*
>
> *ADV DE VOS: Mr Chairman, the question or the line of questioning that was being put to the witness, has to do with the report of the Joint Investigation, or the Joint Investigation Report. Where it was reported that essential functionalities of the aircraft, that is the Hawks and the Gripen, were not included in the contracts and that those had to be leased and that caused additional costs to the Department of Defence and we are just trying to establish what the amount of those additional costs are. I understand from this witness that he is perhaps not in a position to give us this evidence, but I note… I am just making sure of that fact.*
>
> *CHAIRPERSON: Ja, then to respond again to what you have said to me, we have not heard such evidence. The Chief of the Air Force was here, he never gave such evidence, so I am not quite sure where your clients' belief comes from, that essential parts of some of those aircrafts were removed. We were never told that. The evidence that we have is that those aircraft are in such a good condition that the Air Force believes that they were the best weapons, the best aircraft that the world can offer. So the evidence that we have does not really support what you are trying to put to this witness. I am not quite sure whether that question is a fair question. The question that you put to him, it must be based on the evidence that we have. That evidence that you are trying to refer to, I do not know where it comes from."*

433. I pause here to note that paragraph 4.7.9 of Chapter 4 of the Joint Investigation Report states that 'during the negotiation phase the packages were reviewed in order to stay with the amounts approved by Cabinet. This resulted in some essential functionalities of the aircraft in the LIFT and ALFA package not being included in the contracts. Funding will have to be found outside the Cabinet approved package funding for these functionalities.' Although the Joint Investigation Report was silent on the exact functionalities that were excluded, and the leasing agreements that were entered into subsequent to the primary contracts, they were discussed in detail in the Draft Auditor General's Report and in the

Joint Submission of Feinstein and Holden. These documents were before the Commission.

434. It is surprising that the Chairperson stated that he was unaware that essential functionalities were removed from those aircrafts since such information was in the Joint Investigation Report. He stated that no such evidence was before the Commission, yet the Joint Investigation Report was already before the Commission. His insistence that the Commission had not heard such evidence before and that the questions posed by Adv De Vos contradicted the evidence before the Commission suggests that he was willing to accept the evidence of 'non-critic' witnesses without having heard from 'critic' witnesses. It is also difficult to understand the insistence that questions put to a witness had to be based on evidence already before the Commission. Adv. De Vos' clients had not yet testified. The effect of the Chairperson's ruling was that she would only be allowed to use the evidence given by previous witnesses, all who had been non-critic witnesses.

435. During the cross-examination of Mr Kasrils, Adv De Vos stated that in her clients' submissions to the Commission they had said that as far as the evidence that they could gather was concerned, the offsets were a disaster. She asked the witness to comment on this. Befire he could do so, the following ensued:

> *CHAIRPERSON: Advocate De Vos, I am not going to allow that question and I will tell you why. There are witnesses from [indistinct] [DTI], witnesses from Armscor who came and testified about offsets and about the benefits. That evidence is on record, whatever view that Mr Ronny Kasrils has, is totally irrelevant.*
>
> *We now know [indistinct] [how they performed]. In fact I think one of the Armscor officials said to us that some of the offsets, they exceeded expectations. They exceeded expectations. So I do not think that is a fair question put to Mr Kasrils in the light of the evidence that we have now.*

…

ADV DE VOS: The idea as I understand it, for people to give evidence before this commission, is to get difference viewpoints before the commission, and it may very well be that there were witnesses explaining that some of the offsets were a success, but it may also very well be that the viewpoints of my clients in the end are the correct ones.

It is not to say that the evidence that is already presented is the end of the road, and clearly this commission has not made up its mind yet as to what the real position is. So all I am putting to this witness which I submit I am entitled to do, is a view point of my clients who are taking part in this commission.

If I am not allowed to do it, then is does not make real sense for me to cross-examine the witness. If we were in a normal trial situation, my witness has not given evidence yet. I am in a position and I should be allowed to give my witness's version, whether it is acceptable or not to the court, to the other witness to comment on that.

I think it is just fair in view of this witness's evidence that the offsets were such an important part of the decision making process that he must consider the possibility that this commission may find because obviously this commission has not found it yet that the offsets were not a success and I would like to comment on that.

CHAIRPERSON: Ja, if you want to put any version to this witness in all fairness put all available versions. There is evidence which seems to not to agree with what your clients are saying. Put both of them to the witness and he can respond.

ADV DE VOS: I submit it is not my duty to put the other version to this witness. That is why we have evidence leaders and they can always in re-examination put that to the witness.

CHAIRPERSON: I am not sure whether I agree with you. In that case, I am going to put to the witness what is on record already. When you say to the witness that DTI officials came and testified and told us about their ID's the people from the arms procurement told about the [indistinct].

Their view is that both [indistinct] [NIPs and DIPS] they have exceeded the expectations, and the thing that they have [indistinct] [succeeded to a great extent] in creating jobs and attracting investments. That is part of the evidence which had already been led before us.

Not [now] you can answer the question bearing that in mind what the evidence is before this court up to now.

436. It appears that the Commission accepted that the offsets were a success without having heard any 'critic' witnesses. The Chairperson went so far as to say that the Commission 'now know[s] how they performed'.

437. During the examination in chief of Mr Shaik on 11 November 2014 the Chairperson referred to allegations about Mr. Shaik asking for bribes to be paid from Bell Helicopter. Mr Shaik responded stating that at no stage did he request money from any bidder including Bell Helicopter. The following was then said:

> *CHAIRPERSON: Yes, I just thought let me put this submission to you so that you can respond. You know we are aware of the fact that Bell Helicopter went right through the whole process.*
>
> *MR SHAIK: Yes sir.*
>
> *CHAIRPERSON: They were evaluated like all the others and unfortunately they could not make it at the end.*
>
> *MR SHAIK: That is correct sir.*
>
> *CHAIRPERSON: I just thought that you know because we are aware of this allegation maybe we should give you an opportunity to respond to that.*

438. This suggests that the Chairperson had already decided that Bell Helicopter was evaluated like all the others, and just did not make the cut. The inference that can be drawn from this is that the Chairperson had already made his mind up that the allegation of corruption was false.

439. During the examination in chief of Col Du Plooy on 18 May 2015 he tried to explain the inferences he had drawn, from his investigations, that government officials were improperly influenced in awarding the SDPP contracts. In support of these contentions

he referred to the Schabir Shaik trial and the judgment in which it was found that there was improper influence by Thomson CSF, in that it had made an agreement with Schabir Shaik to pay Mr Zuma money in exchange for protection from investigation into the Arms Deal bidding process as well as help in securing further government contracts. Commissioner Musi interjected and said the following: *"Well, well, maybe we have direct evidence from the former President Mbeki. He specifically said that they were not influenced, by anybody, coming to those decisions. He acted on the recommendations of the Committees and did the evaluations. That is direct evidence"*. In response, Col Du Plooy tried to refer to the affidavits of Gen Steyn, Esterhuyse and Griesel. He pointed to how the formula that they had used to determine the company which would be appointed in the BAE matter was changed. He referred further to Mr Esterhuyse disagreeing with the minutes produced by Chippy Shaik. He tried to draw a conclusion about what all these incidences pointed to. He was interrupted by the Chairperson, who said the following:

> *"CHAIRPERSON: Colonel, let me help you. Maybe, do not talk about things that you do not understand. The question of that, the minutes of that Durban Convention, we have got a lot of evidence on that. Four, five, six people have testified, in detail about that. The question of the non-costed options, we have evidence. In actual fact, if I must, if I still recall very well, it says that the South African Air Force has requested that to be done. If you want to talk about that, then you must comment about the evidence that has already been led, by the South African Air Force. Do not speculate. Do not speculate about that and even your question on those minutes on a meeting of 31st of August [indistinct], the Inter-Ministerial Committee meeting. Do not speculate. The Ministers have come here. They have testified. We have got copies of those minutes. Things that you do not know do not talk about it and do not speculate, if you speculate, it does not help us much."*

440. I submit that this is not the approach which the law requires of a Commission.

441. Col Du Plooy was a senior investigator who had spent years investigating aspects of the Arms Deal. He was instructed by the Second Respondent not to talk about things that he did not understand.

442. During Dr Young's closing argument on 23 June 2015 he referred to the oral evidence of Pierre Moyot during the Schabir Shaik trial, where he testified that Thomson-CSF and ADS actively sought political backing at the highest political levels. This accords with records emanating from the trial that Mr Mbeki met with senior executives of Thomson International at its head office in Paris. In response the Chairperson enquired as to what role Mr Mbeki played in awarding the sub-contracts. Young referred to the encrypted fax where Moyot referred to Mbeki as having given his assurance that Thomson-CSF would be awarded the contract for the combat suite and its sensors. The following was then said (the transcript is poor here, and the portions in square brackets are corrections).

> *CHAIRPERSON: We now know the process that got followed in order to award the Combat Suite and the Subsystems. What role did Mr Mbeki play there, if any?*
>
> *DR YOUNG: Well, it is a global role of... I mean, if he is prepared to state that he is prepared to guarantee them the Combat Suite and the sensors, and met with him in head officer Paris, and as according to the evidence that was led that took a role, and that was the evidence of Captain Nick Marais, that orders came down through to the joint project team that there were instructions to maximise the French content, that all jugs the positions [juxtapositions], or move dovetails very, very closely, with tht [that] fact that instructions were given and things were made to happen through, for example through Chippy Shaik. So, there is nothing that our evidence has given that shows that that is illogical, or incredible, or propostorous, or any other adjective that... [intervene].*
>
> *CHAIRPERSON: I think that is a theory which is not supported by all the facts [known facts]. It is a theory which is not supported by all the facts [known facts], and I will tell you why. People who were involved in those [indistinct] [assessment], they came and gave evidence, and none of them mentioned that [indistinct] [they ever got] with any instruction from anybody. Admiral*

Kamerman came and testify none of them ever said that the decision is [indistinct] [they received instructions] from anybody.We have never heard any evidence from all the witnesses of ARMSCOR and the DoD, who ever said that former President Mbeki gave instructions to do A, B, C and D. That is why I am calling it a feel [theory] which is not based on any facts, because all these witnesses, none of them came out with that theory, you are the one who comes up with the theory. Now, you say to us he could have influenced the awarding of the Sub Systems. I find that a bit strange.

DR YOUNG: With respect, Chairman, I am not coming up with that now, that was my evidence in March. Just to remind you, [indistinct] ...[intervene].

CHAIRPERSON: Even if you stated it in March, it does not change from the theory. Even when you started in March people came here, about 47 people came and testified. None of them ever said they were given instructions by the former President to do A, B, C and D, and those are people who were involved. You, as outsider, know that they were given instruction, when in actual fact they deny that they were ever given instruction from anybody to do what you [indistinct] [are suggesting that they have done]. I find that a bit strange, but you know, it is not time to argue. You have made a submission, maybe let us get to the next point.

DR YOUNG: Okay, well that is good. I think possibly in the context, is that the only of those 47 witnesses to which you referred, I cannot think of any one, maybe there are two of them, whose place it would havebeen to actually give that, or maybe Chippy Shaik. There will be three, that will be Admiral Kamerman, Frits Nortje and maybe [maybe] Chippy Shaik. But, two points is that it would not be in Admiral Kamerman's interests to give such evidence. He was not cross-examine, okay, through no fault of my own or anybody else's. Certainly in the circumstances that is something that would have happened.

But, what I have done, and hopefully it is incontrovertible as I can, as I have listed in my written submissions many points where Admiral Kamerman's evidence is just purely untrue. In fact, I have to be honest, I have to use the term, a number of it are pure lies, and lots of them. Pure, pure lies. I am afraid to say that based on that, on[e] cannot think that on a negative [indistinct] that he did not even bring up that point, that he would have educed that in evidence and said "Well, actually I did get instructions from Thabo Mbeki to do that", because he knows that will be a wrongdoing.

So, I am afraid to say, and it is not meant to be legal argument, Chairman... [intervene].

443. The Chairperson took the view that the evidence thus far by non-critic witnesses was 'known facts', and anything which contradicted those facts was merely a theory. The

witnesses would hardly suggest wrongdoing which implicated them. Their evidence necessarily had to be treated with reserve and subjected to appropriate scrutiny. Instead, it was accepted unreservedly.

444. The Commission accepted evidence which had not been tested, as common cause before any 'critic' witnesses had testified. Any version given by 'critic' witnesses which contradicted what 'non-critic' witnesses had said was dismissed. Evidence given by 'non-critic' witnesses was recited by the Commission as if it was fact. I submit that this is not the open and enquiring mind which the law requires.

THE FAILURE OF THE COMMISSION TO TEST THE EVIDENCE OF WITNESSES BEFORE IT

445. The Commission's failures were compounded by its failure meaningfully to test the evidence of many of the witnesses who appeared before it. I do not attempt to address every instance where this was the case, as this would produce excessively burdensome papers. Instead, by way of illustration, I refer to two witnesses and one party whose evidence was of great importance if the truth was to be established: Chippy Shaik Adv Fana Hlongwane and BAE Systems.

446. In a letter to the Commission on 9 September 2013 LHR raised concerns about the manner in which the proceedings were being conducted, as it resulted in the evidence given by government representatives going unchallenged. They pointed out that a one-sided presentation of evidence would not enable the Commission to determine the truth.

447. In a letter on 13 September 2013, Adv Mdumbe denied that a one-sided presentation of evidence was made. He said that the fact that the state witnesses had not been cross

examined did not make the proceedings one-sided or unfair. Neither could the failure to cross-examine the witnesses be blamed on the Commission.

448. I need first to address the Commission's procedure with regard to witnesses who gave oral evidence. As a point of departure, the Commission took the attitude that all the witnesses were the Commission's witnesses. The tracscript shows that the system of introducing their oral evidence was the following:

448.1. The Evidence Leaders assisted the witnesses to place their version of the evidence before the Commision.

448.2. As I have explained, there were many constraints to effective cross examination by those representing the 'critic' witnesses. Most of the witnesses were not cross-examined on behalf of or by the 'critics'.

448.3. The legal representative of the witness was given an opportunity to 'cross-examine' the witness. This in many instances allowed witnesses to introduce additional evidence or reasoning in support of their evidence-in-chief.

448.4. The Evidence Leaders could not cross-examine their own witnesses, whether by way of evidence in chief or re-examination, even if the evidence of the witness was not consistent with other information in the possession of the Evidence Leaders

448.5. The Commission did not test the evidence of the 'non-critic' witnesses in any meaningful way. If failed to ask questions of witnesses or, when it did ask

questions, it did not do this in a manner which resulted in any meaningful testing of the correctness or veracity of the evidence which had been given.

The Commission's Record of Re-Examination and Cross-Examination

449. Fifty-five witnesses gave oral evidence to the Commission. All of the witnesses were led by the Evidence Leaders. (One further witness, Hennie van Vuuren, appeared before the Commission but refused to testify because of the manner in which the Commission was conducting its investigation. Feinstein and Holden did not appear, having declined for that reason to do so.) Volume 2 of the Commission's Report summarises the evidence given by witnesses.

450. The legal representatives of SAAB and BAE Systems submitted statements to the Commission on the final day of the hearings. SAAB and BAE Systems did not give evidence under oath.

451. I have previously referred to rulings made by the Commission during the public hearings, which I submit resulted in a failure by the Commission to carry out its duty. The ruling in paragraph 4.1 of the minutes of 1 March 2013 was one of the stated reasons for the resignation of two Evidence Leaders, Adv Barry Skinnner SC and Carol Sibiya, on 22 July 2014. I have quoted in extenso their joint letter of resignation. It confirmed that the Chairperson had ordered that Evidence Leaders were not allowed to cross-examine or re-examine witnesses. The relevant section of the letter read:

> *"11. The role of evidence leaders has been diminished to the point where they are serving little purpose and are not independent.*
>
> *12. The Chair has made it clear that in his view the evidence leaders have no right to re-examine a witness after the legal representative of such witness has re-examined. In this regard we would refer to the minutes on 1 March 2013. In*

paragraph 4.1 of the minutes of such meeting it was noted that the regulations are silent on the right of the evidence leader to re-examine but that the meeting was of the view that this right should not be taken away from the evidence leaders. In our view this is crucial. There has been very little cross-examination and accordingly the re-examination of the various civil servants/members of the defence force by their legal representatives, while clearly permissible in terms of the regulations, has naturally been designed to protect the status and credibility of such witnesses. This was all the more reason why the evidence leaders should have been permitted to re-examine each witness to point out any discrepancies in the evidence.[223]

452. This was not always consistently applied, as nine witnesses were re-examined by the Evidence Leaders. However, in the main, witnesses were not re-examined by the Evidence Leaders.

453. As a result of this ruling, the only persons who were able to test the evidence of witnesses were the Commissioners and other interested parties. The Commissioners conducted only the most limited cross-examination and questioning of witnesses. In most instances, they asked no questions of the witnesses.

454. The result was that truth of the evidence of witnesses was not tested by the the questioning or probing of the Commission or its representatives.

455. Counsel for Mr Feinstein, Mr Holden and Mr van Vuuren were permitted to conduct some cross-examination. However, as I have explained above, the Commission's rulings prevented them from conducting a proper cross-examination. In any event, they cross-examined only a limited number of witnesses.

456. I attach a summary index of the Commission's transcripts ('**FA8**'). The index shows the witnesses who appeared before the Commission, and the page numbers of the public

[223] Sibiya, C. And Skinner, B. Letter of Resignation from The Commission, 22 July 2014, paragraphs 11 – 12, page12 - 13

record at which they were examined by their own counsel, cross-examined by other interested parties, or examined by the Commissioners. (By 'examined by the Commissioners' I refer to questioning that went beyond simply asking for clarity on statements made by witnesses, or asking, for example, for directions regarding the location of facts within documents. I refer for example to putting to a witness detailed allegations in documents, in the public domain, or elsewhere that are inconsistent with the evidence of the witness; testing the veracity of the evidence through the usual methods used by tribunals; or asking the witness to express a view on a contested fact or set of facts.)

457. The index shows

457.1. which of the 55 witnesses who gave oral evidence were asked questions by the Commisioners. In many instances, these questions did not amount to testing the witness's evidence. I illustrate this below by reference to the testimony of Chippy Shaik.

457.2. which of the witnesses were re-examined by the Evidence Leaders who led their evidence.

457.3. which of the witnesses were questioned by interested parties.

458. I am advised that this analysis will be dealt with further in argument.

Failure to test the evidence of Chippy Shaik

459. Chippy Shaik appeared before the Commission on 10 and 11 November 2014. His evidence in chief is at pages 8701 to 8915 of the transcripts.

460. Mr Shaik was one of the most important witnesses to appear before the Commission. He was Chief of Acquisitions for the Department of Defence and a central figure in the SDPP process. He was accused of wrongdoing in relation to a number of the contracts in the SDPP. These allegations included:

460.1. That he solicited a $3m bribe from a member of the German Frigate Consortium. This bribe request was recorded in a memorandum by Christoph Hoennings, a GFC executive. A further memorandum indicated that this amount was paid. Documents emanating from investigations by German authorities, in particular MLA requests submitted by German authorities to other jurisdictions, alleged that the amount was paid via an offshore entity.

460.2. That he instructed representatives of Bell Helicopters to enter into a business relationship with Futuristic Business Solutions in order to secure the Light Utility Helicopter contract.

460.3. That he instructed Thomson-CSF to ensure that African Defence Systems was partially owned by Nkobi Holdings, owned by his brother Schabir, and said that if they failed to do so he would ‘make things difficult’ for them. Thomson-CSF was, at the time, endeavouring to supply the combat suite to the corvettes.

460.4. That he attended and participated in meetings as part of the SDPP selection process in which ADS, partially owned by his brother, was either discussed or was germane to proceedings, and that he failed to properly declare his conflict of interest or recuse himself from proceedings.

460.5. That he attempted to facilitate meetings between an industry association named SASUBCLUB and representatives of ADS. He allegedly used the meetings to attempt to secure additional contracts for ADS. This occurred at the very time when the preferred bidders for the submarine contracts were being considered.

460.6. That he and Llew Swan directly threatened and intimidated staff members who had opposed the selection of Turbomeca to supply the engines to be used on the Light Utility Helicopters.

460.7. That he (together with others) made a number of decisions that violated good procurement practice, such as ruling that bidders which had failed to meet critical mandatory requirements in their RFO response be allowed to continue in the selection process for the corvette and submarine acquisitions. According to the prevailing rules, these bidders should have been disqualified and their bids rejected.

461. Mr Shaik's witness statement focussed mainly on the acquisition process regarding the selection of the LIFT, in response to the evidence given by Gen Pierre Steyn. His statement included a general denial that he was involved in any way in deselecting suppliers, in particular C^2I^2, as subcontractors. He also denied that he failed properly to deal with his conflict of interest related to his brother's company. His witness statement was silent on numerous corruption allegations made against him.

462. Mr. Shaik's evidence in chief was also silent on the allegations of corruption against him. These issues were only addressed under questioning at the end of his testimony. He was asked a small number of questions by his evidence leader, Adv Sello, and by the Chairperson. The relevant section from the transcript reads as follows:

'I propose to move to our next issue. Now Mr Shaik a number of books have been tendered to the Commission I will deal with that first and the authors of these books are Messrs Coden [Holden], Van Vuuren and Feinstein. At some point both Mr Coden [Holden] and Mr Feinstein made joint submissions and they tendered these books as evidence. They subsequently have taken the view that they would not give evidence before this Commission. In these books a number of allegations pertaining to alleged wrongdoing on your part are made. In the light of the fact that these authors or the authors of these allegations have refused before the Commission to have these allegations tested. Would you like to deal with these allegations before this Commission?

MR SHAIK: No, I would not. None of these allegations have been proven in front of this Commission. None of these authors have come to the Commission to prove their allegations. They tend to make these allegations in the public domain. They have requested a Commission but they have not come to present their allegations.

ADV SELLO: I will then move onto other allegations. Another witness, Mr Terry Crawford-Browne, also wrote a book and in his book "Eye on the Money" and I must say Mr Crawford-Brown did appear before this Commission and he stated that he stands by what he stated in his books. So that would include allegations made against you. We have considered the books and we were seeking to establish specific allegations made against you personally and to seek clarification from him. What we could locate appears on page 130 of the book "Eye on the Money." In the penultimate paragraph on that page is a short paragraph I propose to read it into the record and I am asking you for your comment. That paragraph reads and I quote:

> *"Early in 1998 when I monitored a committee meeting of the Joint Standing Committee of the Defence I was briefly delighted to hear Chippy Shaik apologise that Parliament has spent so much time, effort and public money on the arms acquisition program. He said that the Defence Department now realise that South Africa simply could not afford the equipment and that he was coming to Parliament [inaudible] instructions. I would like your comment on that statement?*

MR SHAIK: Could you repeat the date and the time that comment was made?

ADV SELLO: It starts with "Early in 1998 when I monitored a committee meeting of the Joint Standing Committee on Defence."

MR SHAIK: That is not possible because early in 1998 I do not even think we issued the RFO's ...; RFP's yet. So no decision to acquire, no idea of what the cost would be could have come out in early 1998. It is not possible at all for me to make a comment. I was not even the Chief of Acquisition at that time. So if my memory serves me correctly the RFO's would have only gone out maybe in April 1998. So I could not have made that comment.

ADV SELLO: Just to round up he refers to early 1998 and basically the issue here is your apology that Parliament has spent so much time, effort and public money on the arms acquisition program. I accept your response that you could not have made the statement in early 1998 because as you say the RFO's might not even have gone out. Do you recall making such an apology to the Joint Standing Committee on Defence at any time?

MR SHAIK: It would be bizarre to make an apology in advance for something that not have happened. So, no, I have not made an apology.

ADV SELLO: By any time Mr Shaik I am including 1999 and post .. [intervenes]

MR SHAIK: No, I have made no such apology. It is not my decision to acquire it is a decision of state. These are not equipment that I acquire for myself. These are equipment for the Department of Defence so I cannot apologise for the requirement the Department of Defence. So, no, I did not make an apology.

ADV SELLO: And lastly and this issue I raise because [inaudible] raised quite often and to give you an opportunity to deal with it if you are able to. There is an allegation that you solicited or caused to be paid to yourself from one of the bidders an amount of 3 million dollars for efforts allegedly made by you in ensuring that such bidder is successful in this SDP. What is your comment to that?

MR SHAIK: I solicited no such offer nor did I receive no such money as described in these various allegations.

ADV SELLO: And was any money associated with the SDP's received by any company that you own or have a share in or any interest in?

MR SHAIK: No, I have no such interest in any company.

ADV SELLO: And the question is ...; is your answer that no company in which you have an interest has received or solicited a payment of such ... [intervenes]

MR SHAIK: That is correct.

ADV SELLO: Chair and Commission Musi that is the evidence of Mr Shamin Shaik.

CHAIRPERSON: Mr Shaik besides what Advocate Sello has dealt with is there any out of the bidders that you asked money from because if I am not wrong there is an allegation that one bidder's [inaudible] was requested to pay a bribe and when he failed to pay the bride then they ended up losing the bid and if I recall it was Bell Helicopter. Did you at any stage asked for any money from Bell Helicopter?

MR SHAIK: No sir at no stage I requested money from any other bidder including Bell Helicopter. On the Bell Helicopter matter that was a matter relating to the involvement of the Canadians and the United States. My understanding at that time was that Bell Helicopter from the US, Chicago, could not tender directly they had to go via Bell Helicopter Canada and allegations were made. The Joint Investigative Team did an investigation on that and it was found not to be true because the ultimate decision not to select Bell Helicopter was an Air Force decision and had nothing to do with me.

CHAIRPERSON: Yes, I just thought let me put this submission to you so that you can respond. You know we are aware of the fact that Bell Helicopter went right through the whole process.

MR SHAIK: Yes sir.

CHAIRPERSON: They were evaluated like all the others and unfortunately they could not make it at the end.

MR SHAIK: That is correct sir.

CHAIRPERSON: I just thought that you know because we are aware of this allegation maybe we should give you an opportunity to respond to that.

463. The evidence leader, Adv Sello, appears to suggest that the allegations of corruption and wrongdoing made against Mr Shaik appeared only in the books of some of the "critic" witnesses. This approach was also adopted by the Commissioners as questioning continued. The preceding sections of this affidavit have demonstrated that the allegations of wrongdoing against Mr. Shaik emanated from numerous sources. They include the trial materials in the criminal cases against Schabir Shaik and Jacob Zuma, the draft Auditor General's Report, the Joint Investigation Report, a Mutual Legal Assistance Request between Germany and Switzerland, the German Police Report, and multiple media reports.

464. Following this questioning, Mr Shaik was further re-examined by his own counsel, Adv Cassim. This led the Commissioners to ask some follow-up questions, as follows:

"COMMISSIONER MUSI: I just want to make a comment maybe you might change your mind about responding to allegations made by the authors who refused to come and testify. I remember their counsel when this matter ...; Mr Van Vuuren was here their counsel when asked that these people have made allegations and they wanted those allegations to be tested, if they do not come to testify how are those allegations contained in their books to be tested. His response was that the witnesses against whom the allegations are made can come and testify and deny it. I just thought that if these allegations are put to you and you give your response to those allegations it might be a better scenario in the sense that your evidence will be conclusive on those allegation. Whereas if you have not responded on those allegations they still remain. They have not been challenged and they may be repeated in the future. Do you not think it might be advisable that you deal with those allegations and respond to them so as to put them to bed so to speak?

MR SHAIK: Commissioners I have moved on it is now 15 years from the time this has started. It is now 12 years plus from the time I have left the Department. I reside in Australia. I have tried my best during the time I was in the Department to work with the various investigative units. My understanding is that these authors will continue writing books. I have moved on with my life and it is difficult to deal with all the negative issues because it is not one or two. There is almost every single issue. There is an issue about the Navy do not need boats. The Navy needs patrol ... [incomplete]. So the level of the negativity or the level of the disagreement is so wide and varied and it encompasses so many different people that it is almost an impossibility to sit down and have some rational discussions at times. So I have decided that I have made myself available. Those that wanted to present evidence and proof the evidence have the same right that I have but they chose not to do so.

COMMISSIONER MUSI: Is it perhaps your view that you do not have to respond to allegations whose authors are not brave enough to substantiate them?

MR SHAIK: Yes sir.

COMMISSIONER MUSI: Thank you that is all.

CHAIRPERSON: Lastly from me there are various allegations [inaudible] which are levelled against you do you think that any of those allegations which are incorrect in any of those books [inaudible]?

MR SHAIK: Sir most of those allegations, I have not read all the books so I cannot comment on all of books but the allegations are untrue.

CHAIRPERSON: So the allegations are untrue. Thank you.

465. The Commission thus solicited, and accepted, a blanket denial by Mr Shaik of all allegations about him in books about the SDPP which he said he had not read. It did not put to him allegations in other documents or reports.

466. The transcript illustrates that the evidence proffered by Mr Shaik in his witness statement and in his oral evidence was not tested. He was not asked any meaningful questions about the content of his evidence.

467. In addition, he was asked about the multiple allegations of corruption involving him in only the most general terms. The questions served mainly to provide him with an opportunity to make a general denial. Commissioner Musi's questioning appeared designed only to provide him and the Commission with a blanket reason for not directly addressing the specifics of the multiple allegations of wrongdoing against him.

468. The cross-examination was no real cross-examination at all. The Commission failed in its duties fully to investigate the matter. It was, as a result, in no position to determine the veracity of the claims of wrongdoing.

Failure to Test the Evidence of Advocate Fana Hlongwane

469. Adv Fana Hlongwane appeared before the Commission on 11 December 2014. His appearance covers pages 8939 – 8984 of the transcript. Pages 8939 – 8954 relate to an application by his counsel that the no photographic or film footage be taken of him during his evidence. (This request was withdrawn by his counsel after consultation.) Adv Hlongwane's evidence is at pages 8954 – 8984 of the transcript.

470. Adv Hlongwane was an important witness. He was the only 'middleman' or 'consultant' called to give evidence.

471. He had been the subject of persistent allegations of corruption related to the SDPP. He was also the subject of two related investigations and proceedings: by the Scorpions and by the Asset Forfeiture Unit. I describe the substance of these allegations to demonstrate that they were serious and material, and required full investigation.

472. In the first set of proceedings, in 2008 the DSO applied for (and obtained) a warrant to search the properties of Adv Hlongwane and his companies. The products of the search formed part of the DSO/DPCI papers contained within the shipping containers made available to the Commission. The search warrant application was supported by an affidavit submitted by the SFO. The SFO affidavit, signed by the investigator Gary Murphy, described how BAE Systems had made use of 'overt' and 'covert' advisors in multiple jurisdictions. The 'covert' advisors entered into contracts and were paid via the offshore entity Red Diamond, which was controlled by BAE Systems.

473. Regarding the Red Diamond system, the SFO affidavit stated that 'whilst the SFO accepts that confidentiality would be maintained through such a system, I suspect that a primary reason behind the inception of Red Diamond was to ensure that corrupt payments could be made and that it would be more difficult for law enforcement agencies to penetrate the system.'[224]

474. According to the SFO affidavit, Adv Hlongwane entered into both 'overt' and 'covert' arrangements with BAE Systems to receive funds. The 'overt' arrangements included two consulting agreements: one between Hlongwane Consulting and BAE Systems and entered into on 9 September 2003, and the other between Hlongwane Consulting and

[224] Murphy, G. 2008. Affidavit submitted as Annexure JDP-SW12 in the High Court of South Africa (Transvaal Provincial Division) in the matter of *Ex Parte* the National Director of Public Prosecutions (applicant) in re: an application for issue of search warrants in terms of Section 29(5) and 29(6) of the National Prosecuting Authority Act, No. 32 of 1998, as amended,, para 14

SANIP, a BAE-controlled South African entity, which commenced on 1 August 2003. Hlongwane Consulting received over £10m via the first consultancy between September 2003 and January 2007, and over R51m via the second consultancy.

475. The SFO investigator noted, with regard to the first consulting contract, that 'BAE have not provided the SFO with any written reports to justify the size of these payments.'[225]

476. Adv Hlongwane also received funds, according to the SFO, via three covert routes. They were the following:

476.1. Approximately £290 000 through Commercial International Corporation ("CIC"), a company incorporated in Jersey and controlled by Adv Hlongwane. He was paid as a result of a consultancy contract entered into on 11 November 1999, the month before the finalisation of the SDPP contracts. The agreement was amended in July 2001, resulting in a one-off payment of $200 000.

476.2. Approximately R60m via Arstow Commercial Corporation, a company registered in the British Virgin Islands and controlled by Alexander Roberts. Arstow received approximately £15m via Red Diamond. It entered into the covert agreement with Red Diamond on 14 April 1999. Mr Roberts stated in an interview that over £5m had been paid via Arstow to Adv Hlongwane.

476.3. An amount of over $1m via Jasper Consultants Ltd, which was controlled by another of BAE's covert agents, John Bredenkamp. DSO investigators were able to confirm that the accounts of Hlongwane Consulting received $1m from Jasper Consultants Limited. The SFO was however uncertain whether these

[225] *Ibid*, para 29

payments were related to the BAE Hawk/Gripen campaign or a consultancy with Airbus.

477. The SFO affidavit concluded as follows:

> *I believe that the varied ways in which Fana Hlongwane has received payments in relation to the Hawk/Gripen contract is highly suspicious. BAE operated a covert method of payment through the Red Diamond systems, however it appears that even this system was insufficiently opaque to disguise payments to Fana Hlongwane. As such, BAE chose to use Red Diamond and Arstow to transfer money to Mr. Hlongwane.*
>
> *I suspect that this secretive arrangement was designed to facilitate any or all of the following:*
>
> *(i)* *The onward payment of monies by Fana Hlongwane to South African government officials who could influence the decision making process on the selection of the Hawk and Gripen; and/or*
>
> *(ii)* *Payments to Mr Hlongwane himself for influence brought by him whilst he was special adviser to the Minister of Defence; and/or*
>
> (iii) *The onward payment of monies by Mr Hlongwane to South African government officials to ensure that the tranching arrangements were honoured.'*[226]

478. This conclusion was amplified in an affidavit by a DSO investigator which was submitted to the High Court in an application for search warrants to be issued against, amongst others, Adv Hlongwane and John Bredenkamp. The affidavit stated:

> *155. 'There is very least a reasonable suspicion that Fana Hlongwane and/or Hlongwane Consulting and/or Ngwane Aerospace and/or Tsebe Properties and/or Trevor Wilmans received and obtained or agreed to receive or attempted to receive money from the directors of British Aerospace Systems PLC and/or BAE Systems Holdings (South Africa) (Pty) Ltd and/or BAE Systems (Gripen Overseas) and/or HQ Marketing and/or Red Diamond and/or advisors employed by BAE and/or HQ Marketing and/or Red Diamond and/or any person or entity within the BAE group and/or Arstow Commercial Corporation*

[226] *Ibid*, paragraphs 55 - 56

and/or Commercial International Corporation (CIC) and/or Osprey Aviation and/or SANIP and/or Kayswell Services and/or Hudersfield Enterprises and/or Jasper Consultants and/or Johan Bredenkamp and/or Julien Pellisier and/or Richard Charter and/or Alexander Roberts to influence him to misuse his position to benefit the grouping, or to reward him for having done so...

159. There is at least a very reasonable suspicion that Fana Hlongwane knew that some covert means were to be employed to channel payments to him and his companies. BAE employed the least transparent system possible by setting up an offshore entity, named Red Diamond that was controlled by HQMS as a nominee company in order to pay its covert advisers. Red Diamond would appear on banking and other documentation and would therefore mask the involvement of BAE. This alone raises the suspicion that the payments were understood by all parties to be bribes, and that the means by which such payments were made may amount to money laundering.

160. BAE have paid very large amounts of money (approximately £103 million or R1.5 billion) to a number of consultants/advisers under the South African Hawk/Gripen campaign and have provided the SFO with almost no written evidence explaining the nature of the services provided by these consultants/advisers including work done by Fana Hlongwane and/or Hlongwane Consulting and/or Ngwane Aerospace and/or Trevor Wilmans.

161. I believe that the varied and covert ways in which Fana Hlongwane has received payments in relation to the Hawk/Gripen contract is highly suspicious. If his relationship with BAE was a legitimate one, I can see no reason why BAE did not pay him all monies directly.'[227]

479. The High Court found that the evidence presented by the DSO and the SFO was sufficient to satisfy suspicions of wrongdoing and thus issued search warrants against properties controlled by Adv Hlongwane.

480. The Commission confirmed at paragraph 58 of Volume 1 of its Report that it received the documents emanating from this application on 20 July 2012.

[227] Du Plooy, J. 2008. Affidavit presented in the High Court of South Africa (Transvaal Provincial Division) in the matter of *Ex Parte* the National Director of Public Prosecutions (applicant) in re: an application for issue of search warrants in terms of Section 29(5) and 29(6) of the National Prosecuting Authority Act, No. 32 of 1998, as amended, para 155 and 159 - 161

481. The <u>second set of proceedings</u> against Adv Hlongwane emanated from the NPA and related to the seizure of funds controlled by Adv Hlongwane in Liechtenstein. Evidence was tendered indicating the exact methods of payment through which Adv Hlongwane was alleged to have received funds from Arstow Commercial Corporation, which had received funds from BAE directly and from Red Diamond.

482. The NPA (in a founding affidavit signed by Adv William Downer) applied to the High Court for a preservation order in respect of the funds in Liechtenstein. The affidavit stated:

> *'The property currently is subject to a judicial freezing order handed down on 11 September 2009 by the Court of Justice of the Principality of Liechtenstein ("Liechtenstein"). The freezing order will expire on 14 March 2010 and unless the NPA obtains an order in South Africa preserving the property prior to that date, there will be no legal obstacle to the property being withdrawn and dissipated or clandestinely moved elsewhere. Moreover sufficient time (preferably ten business days) must be provided between the obtaining of a preservation order and the expiry date of 14 March 2010 so as to allow the Liechtenstein authorities to enforce the preservation order against the property. Accordingly, the NDPP seeks (on an urgent basis) a rule nisi operating as an interim preservation order, pending the determination of the application for a preservation order.*
>
> *In addition, and contingent upon the interim preservation order being granted, the NDPP seeks the issue of a letter of request in terms of Section 23(1) of the International Co-operation in Criminal Matters Act 75 of 1966 ("ICCMA") requesting the assistance of the Principality of Liechtenstein ("Liechtenstein") to enforce the interim preservation order and the final preservation order, should it be granted.'*

483. The founding affidavit stated the following as the 'reasonable grounds' on which the application should be granted:

> *204. I submit that when the affidavit of Ms Saller is read together with this affidavit, there are reasonable grounds for believing that the funds in the Gamari bank account in Liechtenstein are the proceeds and/or the instrumentalities of corruption, fraud, racketeering and money-laundering offences related to the Arms Deal. The facts upon which such grounds are based include the following:*

204.1 The selection by the SA Government of the combination of BAE and SAAB as the preferred suppliers of the LIFT and ALFA aircraft was surprising because they did not offer the best value for money, when measured against a pre-determined system for assessing technical capability and cost. This followed an instruction from Modise that a separate recommendation be formulated where the acquisition cost of the LIFT aircraft left out of account.

204.2 Hlongwane was Modise's special advisor until April 1999 and consequently able to influence and/or pay off people who were able to influence the selection of BAE/SAAB as the preferred supplier of the aircraft and the terms of the contract negotiated with the SA Government.

204.3 Westunity was established in January 1999, i.e. at a time when Hlongwane was still Modise's special advisor and less than two months after BAE/SAAB had been selected by Cabinet as the preferred supplier of the aircraft. At the time of its establishment, BAE/SAAB was negotiating the terms of the contract with the SA Government.

204.4 Westunity was owned by Hlongwane, initially personally and later through Meltec (which was established for that purpose). Westunity's purpose was to contract with Arstow for the provision of Hlongwane's services to Arstow. Westunity and Meltec were dissolved in 2004. Upon Meltec's dissolution, its assets were transferred to Gamari.

204.5 Arstow's purpose was to facilitate payments by BAE and (after April 1999) Red Diamond of commission on the sales of BAE's products. Roberts, the beneficial owner of Arstow, had contracts with BAE and Red Diamond which entitled him to commission of, initially, 1.5% of the total value of aircraft delivered to SA, possibly reduced later to 0.5%.

204.6 Between 5 May 1999 and 15 July 2001 about GBP 9,9 million was paid by Red Diamond into Arstow's accounts with Liechtenstein banks.

204.7 Between 5 October 1999 and 30 July 2001 Arstow paid Hlongwane GBP 4 903 000, including the following: In June and July 2001 GBP 4 050 000 was paid from Arstow's accounts with Liechtenstein banks to Westunity's account with a Liechtenstein bank (two payments totalling GBP 3 455 000) and to a Hong Kong bank account of a Hong Kong company Shun Hing which may be beneficially owned by Hlongwane and is used to channel funds to Hlongwane (one payment of about GBP 590 000). The payments from Arstow to Westunity, including the GB 4 050 000, totalled GBP 4 305 000.

204.8 Roberts's explanation to the Liechtenstein authorities is that he paid Hlongwane the GBP 4 903 000 because of Hlongwane's contacts to the new black economic business establishment.

204.9 In a statement to the Liechtenstein authorities Hlongwane denied being bribed, saying that while he acted as consultant to Arstow as well as Modise, he was never a civil servant and accordingly he could not have been bribed.

204.10 In addition to the payment of about GBP 590 000 directly from Arstow, Westunity paid Shun Hing two further payments totalling GBP 600 006,35. Westunity also paid: Meltec a total of GBP 1 501 180,66 in two transactions; Commercial International Corporation Ltd, a company incorporated in Jersey whose beneficial owner was Hlongwane until its de-registration on 3 July 2003, a total of GBP 165 009,38 in three transactions; and Hlongwane himself a total of GBP 151 400,98 in 6 transactions.

204.11 Meltec paid Gamari a total of GBP 438 654,92, CHF 78 919,90 and EUR 104 301,30 in four transactions and Hlongwane himself a total of GBP133 920,49 in six transactions. As at 15 September 2009, the balance in Gamari's account with Banque Pasche (Liechtenstein) S.A., Vaduz stood at GBP 437 594.00.

204.12 The complex contractual matrix, namely BAE, Red Diamond, Arstow, Westunity and Meltec, and the complex payment matrix, namely BAE, Red Diamond, Arstow, Shun Hing and Gamari, were designed to hide the involvement of Hlongwane and others in the contracting with the SA government for the supply of aircraft.[228]

484. The High Court granted a temporary preservation order.

485. Paragraph 55 of Volume 1 of the Report states that in May 2012 the Commission requested from the NPA documents including 'information relating to the preservation order issued by the North Gauteng High Court relating to the freezing of assets belonging to a South African citizen in Liechtenstein.' It is reasonable to conclude that this is a reference to Adv Hlongwane. Paragraph 58 states that the NPA provided the Commission with 16 lever arch files of documents. It does not say whether they included the Downer affidavit. If they did not, the Commission could easily have obtained it from public sources, as it was reported in the *Mail & Guardian* and posted to the internet on 26 March 2010 as part of an article entitled 'Fresh evidence of arms

[228] William John Downer, Founding Affidavit in the Matter Between the National Director of Public Prosecutions and Fana Hlongwane for an ex parte order in terms of section 38(1) of the Prevention of Organised Crime Act 121of 1998, paragraph 204

payoffs.' The documents are still on the *Mail & Guardian* website at http://mg.co.za/article/2010-03-26-fresh-evidence-of-arms-payoffs. It should also be noted that at Paragraph 98 of Volume 1 of the Report states that 800 pages of documents emanating from Liechtenstein authorities, and which formed the evidentiary basis upon which Advocate Downer drafted his own affidavit, had been 'requisitioned' by the Commission.

486. It is reasonable to assume that the Commission had available to it all of the papers in the AFU application. If not, this is further evidence that the Commission inexplicably failed to gather relevant information in conducting its investigation. The fact of the application was a matter of public knowledge, and the affidavit was available on the internet.

487. On 19 March 2010, shortly after the NPA had obtained the interim preservation order, the then NDPP Adv Menzi Simelane decided to abandon it. In explaining his decision, he said:

> *In the meeting with the legal representatives of Mr Hlongwane the NDPP indicated that he required of them to submit detailed information indicating the basis for the monies in Mr Hlongwane's account in Lichtenstein. They needed to show on a balance of probabilities that the money was not obtained from criminal activities. Put another way, they needed to rebut the suspicion of criminal activity.*
>
> *They did not have to prove beyond a reasonable doubt that the money was obtained legally. For this purpose they were advised to submit a formal memorandum supported by annexures, if any.*
>
> *The NDPP did not prescribe to them what to submit. They were advised (at their request) that the purpose of the submission would be to enable the NDPP to make a decision on the preservation order obtained earlier. They instead wanted to go ahead, as per the court order, to file their responding papers to court and "fight the matter" as they believed that they had a strong case. The meeting reflected on the merits of their argument and considered further options. It was agreed that in light of the importance of the matter and its*

sensitivity, it would be prudent to deal with the issues exhaustively especially where the necessary information was readily available and could be submitted to the NDPP...

The following day the submissions were given to the NPA. They contained a memorandum explaining Mr Hlongwane's attitude to the matter and annexures.

The annexures consisted of Mr Hlongwane's consultancy contract with Mr Modise and also his consultancy agreement with BAE Systems. In essence, the latter contracts also showed rights and obligations of the contracting parties including monies due when performance requirements were met. Lastly, they also contained papers filed in arbitration proceedings by Mr Hlongwane against BAE Systems seeking to enforce payment for monies allegedly due to him (it appears that BAE Systems paid only a portion of the money).

The NDPP advised Mr Hofmeyr that having read the documents there is no reason for the retention of the preservation order. The undertaking by the parties was also no longer necessary. In other words, the NPA could withdraw the preservation order as agreed the day before at the meeting, but that this time, an undertaking was not necessary from the parties. In line with this view, the NDPP instructed that the preservation order be abandoned.

Furthermore, the NDPP was persuaded on the papers submitted that the suspicion of criminality that informed the application for a preservation order, was rebutted by the information provided.[229]

488. There was plainly disagreement in this regard within the NPA and in particular the Asset Forfeiture Unit. It is obviously not possible to determine the truth of the matter without investigating it. This is a matter which the Commission was required to investigate. It did not do so, except in the most token manner.

489. Adv Simelane's belief that the consultancy agreements demonstrated a legitimate business relationship is inconsistent with the gist and content of the detailed allegations in the NPA and SFO affidavits. It is also unclear how consultancy agreements between Adv Hlongwane and BAE in 2003 could prove a lack of criminality where the funds seized in Liechtenstein had moved from Red Diamond to Arstow to accounts controlled

[229] RE: NDPP's Decision to Abandon the Preservation Order Against Mr Fana Hlongwane, http://www.politicsweb.co.za/documents/why-i-let-fana-hlongwane-off-the-hook--simelane

by Adv Hlongwane in 2001, two years before his 2003 consultancy agreement with BAE. Again, this is a matter which obviously required investigation by the commission, including through testing the evidence of Adv Hlongwane.

490. I note that subsequently, the Constitutional Court set aside the appointment of Adv Simelane of the grounds that in appointing him, the President had not considered Adv Simelane's conduct in appearing before the 'Ginwala Commission', and the adverse findings against him made by that Commission. The Constitutional Court held that, while it would not make a ruling on whether Adv Simelane was a 'fit and proper person', *'all the criticisms of the evidence and approach of Mr Simelane by the Ginwala Commission have, on the face of it, a sufficient basis in the evidence before it. So are all the criticisms expressed of Mr Simelane in the Report of the Public Service Commission.'*[230]

491. Adv Hlongwane's 15 page witness statement to the Commission said that he could only address paragraph 1.5 of the Commission's Terms of Reference. He denied any wrongdoing. The relevant extracts from his witness statement in this regard stated:

> *'6. It is common cause that no evidence has been presented to the Commission indicating that I and/or my companies influenced the award of the SDPP contracts, in any way or form, and that I and/or my companies did not participate in the process leading to the award of such a contract. Nor is there any evidence implicating myself and/or my Companies in any corruption or other wrongdoing in relation to the SDPP contracts.*
>
> *7. At the outset I wish to state the following:*
>
> *7.1. I was never employed by the Government of South Africa*
>
> *7.2 I became involved as a consultant to BAE in order to assist BAE with the implementation of their NIP programme. My Companies' rationale for its*

[230] CCT 122/11, paragraph 78

involvement as consultant to BAE is fully explained in the BAE submission to the Commission. My Companies' involvement was underpinned and supported by contract and documentation which is already before the Commission.

8. I can further categorically state that I did not pay any gratification to anybody who was involved in the procurement process in order to influence such a person relating to the award or conclusion of any of the contracts awarded and concluded in the SDPP.'[231]

492. Adv Hlongwane argued that he could not be considered a government employee, even though he had been employed as Special Advisor to Minister Modise, because he was an independent contractor.

493. With regard to his relationship with BAE, he stated:

20. I provide a summary of my Companies' involvement with BAE, as a consultant to assist them with the implementation of the NIP programs.

21. On or about 10 September 2003 my company duly concluded the written Consultancy agreement with SANIP. This agreement was entered into legally between two private entities. The parties agreed to the Commercial terms and conditions, which included the remuneration and quantum thereof. My Companies therefore have no duty to justify the terms and conditions which the parties agreed on. The quantum of remuneration agreed between two private entities can never be a criteria applied by third unrelated parties, to determine whether there is anything untoward.

22. In the consultancy agreement it was correctly recorded that my company was able to assist SANIP to market and implement projects pursuant to the South African government's NIP Programme promoting exports, local sales and investments from the Republic of South Africa.

23. All of the BAE NIP obligations were discharged up to and including Milestone 3. No penalties were imposed by BAE by the Department of Trade and Industry.

494. Adv Hlongwane's statement also asserted that multiple investigations, including those undertaken by the Joint Investigation Team, the DSO, the SFO and DIPCI, had not

[231] Witness Statement of Fana Hlongwane to the Commission, 2014, paragraph 6 - 8

‘produced any evidence of misconduct by me relating to the SDPP.’[232] This, he said, should be acknowledged alongside the fact that witnesses appearing before the Commission who were involved in the selection process, had denied any wrongdoing in relation to the SDPP. He dismissed the evidence of the critics, stating that ‘during evidence all of these “critics” admitted unequivocally that they had no personal knowledge and/or any evidence to substantiate the allegations and/or accusations against me. Some of the “critics” refused to appear at the Commission and testify and to be subject to cross-examination.’[233]

495. Adv Hlongwane’s statements raised a number of important questions that the Commission was obliged to investigate if it was to carry out its duty. The witness statement was silent on a number of important facts. I point out the following in this regard:

495.1. The witness statement appears to suggest that the relationship between BAE Systems and Adv Hlongwane began in 2003 through the agreement between Hlongwane Consulting and SANIP. This is contradicted by the SFO affidavit, which states that Adv Hlongwane’s relationship began in at least late 1999. Adv Hlongwane’s statement appears to imply that the 2003 consultancy was the only relationship between his Companies and BAE Systems, and that his role was focussed exclusively on advice related to BAE’s NIP program.

495.2. If Adv Hlongwane legitimately advised SANIP on BAE Systems’ NIP programs, his assertion that he could only assist the Commission with paragraph

[232] *Ibid*, para 19.3
[233] *Ibid*, para 19.1

1.5 of its terms of reference appears to be incorrect. If he had knowledge of BAE's NIP program, and provided the services he suggested, he would have been in a position to testify to paragraphs 1.3 and 1.4 of the Commission's Terms of Reference.

495.3. The witness statement makes no mention of a second 'overt' consultancy agreement between Hlongwane Consulting and BAE Systems, dated 9 September 2003 and backdated to January 2002. According to the SFO, Hlongwane Consulting was paid more than £10m between September 2003 and January 2007. Importantly, this agreement was 'varied' on 5 September 2005 to 'allow for a US$8m ex gratia payment "*in full and final settlement for all additional work regarding Gripen Tranche 3.*"[234] The BAE/SAAB acquisition was conducted in three tranches. The South African government retained the right to cancel tranches 2 and 3, which envisioned the purchase of additional Gripen aircraft. This gives rise to a reasonable suspicion that Adv Hlongwane undertook work for BAE on matters unrelated to the NIP program, and on matters directly related to the eventual size and selection decisions related to the SDPP.

495.4. The failure to address the second 'overt' consultancy agreement is inexplicable. It appears that Adv Hlongwane conflated or confused the two in his witness statement. As the SFO affidavit makes clear, the agreement between his companies and SANIP was dated August 2003, not September 2003 as

[234] Murphy, G. *Op cit*, para 26

suggested in Adv Hlongwane's witness statement. The second 'overt' consultancy agreement was dated September 2003.

495.5. The witness statement was entirely silent on the approximately R60 m transferred from Arstow Commercial to Adv Hlongwane. It was also silent on the fact that this relationship appears to have begun much earlier than 2003. The evidence on this was substantial, and appeared in both the SFO affidavit and in the papers regarding the preservation order sought in Liechtenstein.

495.6. The witness statement was also entirely silent on the payment of moneys from Jasper Consulting to Adv Hlongwane. Jasper Consulting was alleged, in the SFO affidavit, to be controlled by another of BAE's 'covert' advisors.

495.7. The witness statement was also silent on moneys received by Adv Hlongwane in late 1999 from Commercial International Corporation (CIC). However, attached to the witness statement was a document comparing two different versions of the Murphy/SFO affidavit. Adv Hlongwane suggested, in his oral evidence, that references to CIC appeared in one document and not the other. He said that this indicated that there may have forgery or misrepresentation in the document containing reference to CIC. He said that 'manufactured and fabricated evidence was presented to the judge' for him to order the search warrants.[235]

495.8. I submit that a person intent on enquiring into and determining the truth would not have accepted Adv Hlongwane's claim that the amount of money paid by

[235] Public Hearings Transcript, p. 8973

one company to another could not create reasonable suspicion, especially as he failed to provide any evidence of any legitimate work done in order to receive hundreds of millions of rands from BAE Systems through covert and overt streams. If a company pays a politically exposed person large sums of money with no proof of commensurate work, a reasonable enquirer will want to investigate the matter, and will want evidence of the work which was done for such large sums of money.

496. When Adv Hlongwane gave evidence, there was only one occasion on which a version was put to him which differed from his witness statement. That exchange appears at pages 8976 to 8981 of the transcript. It was put as a single question from his evidence leader, Adv Mphaga, consisting of a broad reference to submissions by the “critics”. Adv Hlongwane’s lengthy response was in broad generalities, and did not refer to any specific piece of evidence. The transcript reads as follows:

> ***ADV MPHAGA****: Thank you. Before we adjourned, I was trying to refer you to the joint submission which was made by Andrew Feinstein and Paul [indistinct]. But in particular I wanted to refer you to page 101, paragraph 2. You will see there they mention that much larger payments were made directly to Hlongwane himself through his company, Hlongwane’s Consulting and [indistinct]. They refer to certain payments which were made, and I think that the critics or witness who gave evidence amongst others Dr Woods and also Crawford Brown, they have also made reference to the fact that you have received large payments and seemingly their evidence was 5 that it is not justified in that the were not [indistinct]. We will deal with the issue relating to the quantum once and for all.*
>
> ***ADV HLONGWANE****: Thank you chair. In respect of the issue of quantum [indistinct] entities. How the two [indistinct] agree within a legal context. I do not think [indistinct] have any right to question that. However, it would be strange indeed [indistinct] based on quantum. I say this because there is many cases, I read in the paper all the time everybody is congratulated on quantum. But for some strange reason that I am sure the commissioners will help me on. I am [indistinct] for quantum. You may be tempted to think that [indistinct] are suited by quantum and others not suited by quantum. [indistinct] the narrity of the democratic dispensation is [indistinct] relations. I have many friends in the*

taxi industry, but surely our people cannot [indistinct] to the taxi industry will kill each other. The narrative of democracy is that we should improve all of us.

We should live like all other people, and you cannot criminalise a business man purely because of quantum. I can give examples I saw in the papers. [indistinct] huge amounts of money. The Sunday Times running a huge headline of the [indistinct] quantum, quantum, quantum. But it was celebrated.

So maybe the commission will assist me. Why is it an issue, as I asked the question before, there are many other people who received greater quantums. Why is there a problem in our case? I have a small problem there, but I am sure that the commissioners [indistinct] they will be able to tell me what is it that I must tell my children. Have I ventured into sacred holy land that I am not supposed to go into? Is this a mechanism to say that you must not venture into that area again to be taught a lesson. Did I go through without a Visa into the state that is reserved for others? Because when you begin to look at the issues, with respect to the commissioners and I have got the greatest of respect for the commissioners and the way they are doing. But the fundamental question to me is no evidence has been led about my influence or doing anything untoward. If no evidence has been led, again I say it with respect, I am here now, yes. 1.5 does not apply to me, but if the issue is quantum, then my fellow consultants should be here with me, canvassed by the same major. I am here, they are not there. I am justifying myself. So commissioners, I will not and I do not support the inferiority mindset I am supposed to be a victim of. I accept my rights. We fought for deliberation which entailed as the commission states the right to trade, economic activity, regardless of colour, regardless of race, regardless of gender etcetera. We cannot hear the [indistinct] commissioner, a situation where a historical poverty and poor relations are [indistinct]. We cannot do that. This commission cannot indistinct] that I will insist upon that. [indistinct]. This was an African project by the democratic government to redefine the defence and security architecture and it must do so on its own. [indistinct]. Our program must be commented on. People come here and they bring [indistinct], they arrange press conferences to comment on our procurement program. It was indeed the case that [indistinct] showed pictures of African children, a human carrying bag running away from [indistinct]. But what you have done for us with our civil security, it created a situation where no South Africans run away from [indistinct]. Our people are safe. Thanks to the same procurement by the World Cup and the recent [indistinct]. Everybody looked up with pride. Admired our success. Now the issue here as the term of reference, as it was stated at the beginning, as a nation you need to draw a line and move on, but indeed move on [indistinct] the new Voortrekkers in this new South Africa.

It is about [indistinct] with the greatest of respect addressing the property in power relations. We need to address poverty. You cannot start with reconciliation and not [indistinct]. You cannot do that. So all of us, black and white, must address the challenges and the challenges is poverty and [indistinct]. In that process the racial [indistinct] will be addressed. Commissioners, the notion that any [indistinct] any other person must justify themselves for what they earn in a private commercial transaction. I read all

the time young men [indistinct], big bonuses and it is celebrated. It is called business [indistinct]. It is called brilliance. This court is doing very, very well. In my case it is corruption. Undue benefits. Somebody came here and gave evidence that what qualifications do I have to justify the amounts paid by [indistinct]. Commissioner, I must say I [indistinct] if British Aero Space failed to consult that global networks about who it is that they should employ. Maybe they employed somebody from Soweto. It should be from a different space. So you get this refusal to accept democratic outcomes. You get this unintended kind of clarity that brings you to this. You further get the [indistinct] of this thing called the commission. It goes further. For the first time when we look at the [indistinct] of this commission, we begin to see there is transformation. All credit to the commissioners because [indistinct] cannot do anything right. The evidence leaders are earning too much now. All of a sudden the evidence leaders are earning too much. So we cannot support the narrative [indistinct] black and white. This country belongs to [indistinct]. My fundamental issue commissioner is [indistinct] are not being asked by anybody how do they justify their ability to live in London in Palms, but they must from London ask me being here to justify why [indistinct]. So it fits to pay me what they pay me. They pay for services rendered. They have the necessary qualifications and from all evidence led on the [indistinct], they met all their obligations and were given the appropriate certificates by the government of the republic. So to make a confession chair, for the reasons that I have just given, that is why I was reluctant about coming to this commission. I do not feel that I should justify myself. Why should I? If the principle is justification, then it must be [indistinct] justify themselves. Then there is a commission for the justification of quantum. If that is the case we will consider that. So my last point on this issue is as judges please save us and [indistinct] from funny law and fundamentally flawed presidents arising out of illegally obtained information. We are becoming a laughing stock to the world. This cannot be the foundations of the [indistinct]. It is fundamentally problematic and the commission must address this. We have these examples of [indistinct] getting a search warrant to raid somebody's premises and misrepresenting the people that they were going to raid and those people are attorneys of the particular client. When the learned judges [indistinct], instructed them to return the documents, they went to the SCA. While the trial was taking place in a place called Maritzburg, and in that trial they used a document that was supposed to have returned. Now we have a situation that [indistinct] is taken and used. What kind of foundation of law are you going to build. I will not pronounce on judgements, but I am saying there is a fundamental problem because if the input is fundamentally flawed, the output would be. [Indistinct] how then do we deal with this particular [indistinct] of unlawful conduct in the administration of justice. The existence of [indistinct] of these law enforcements [indistinct] as was shown by the recent [indistinct] and many other examples.

Thank you chair.

497. The Commissioners did not put a single question to Adv Hlongwane. He was not re-examined by his evidence leader. He was not cross-examined by any interested party.

498. Substantial evidence relevant to Adv Hlongwane was contained in the documents which were the result of the DSO and Asset Forfeiture Unit investigations. None of this was put to him. The Commission simply did not test his evidence. I submit that it was required to do so in order to carry out its function.

Failure to Require and Test Evidence by BAE Systems

499. I have referred above to the voluminous allegations against BAE Systems. I refer in particular to the Department of Justice and Department of State settlements, and the 2008 affidavit of Gary Murphy.

500. Paragraph 128 of Volume 1 of the Report records that BAE Systems 'made a submission to the Commission through its attorneys of record on 26 July 2012.' Paragraph 130 states:

> *'further attempts to get information from BAE came to nothing. The reasons were not that BAE refused to cooperate, but that:*
>
> *The South African authorities seized BAE's material in South Africa in the course of their own investigations.*
>
> *The UK's SFO compiled a substantial archive of material in the course of its lengthy and wide-ranging investigation into the SDPP. BAE understood this was derived from many sources, including material obtained with the assistance of, and through close liason with, the South African authorities as well as the extensive disclosure made to the SFO by BAE itself.*
>
> *Employees who had knowledge of the SDPP have, without exception, left the company.'*

501. BAE's submission to the Commission of 26 July 2012 thus formed the entirety of the "evidence" that BAE put before the Commission.

502. BAE's submission, upon which Adv Hlongwane relied in support of his denial of any wrongdoing, briefly addresses the corruption allegations levelled against it:

> ***6. Advisers***
>
> *BAES engaged advisers in relation to BAES and Saab. BAES paid approximately £115m to advisers in connection with the sale of civil and military aircraft (including Hawk and Gripen) in South Africa and in fulfilling its offset obligations.*
>
> *Some campaigners have suggested that the payment of these commissions is evidence in itself that there was corruption in the procurement process. The Institute of Accountability has suggested to the Commission that an admission of bribery was made in the UK's House of Commons in 2003. In fact, the statement made by the then Secretary of State for Trade and Industry, Patricia Hewitt MP, on 9 June 2003 in relation to BAES' sale of Hawk aircraft to South Africa, was "EGCDs application process requires certain details of agents' commissions to be disclosed to EGCD in order that it can follow its due diligence procedures. In this case such due diligence procedures were followed and no irregularities were detected. For reasons of commercial confidentiality specific details of the commission paid cannot be revealed.' The Institute for Accountability's letter to the then Evidence Leader of the Commission dated 14 November 2011 submitted that the word "commissions" meant "bribes." These assertions do not accurately characterise the statement made by the Secretary of State. They also reflect a misunderstanding of the nature of the procurement process.*
>
> *The use of advisers by international companies exporting to countries where they have no material in-country capability or staff was, and is, commonplace across many industries. This approach offers a lower cost base for long lead time programmes compared to basing staff in-country, ultimately leading to a lower cost of sales to the customer. It is widely accepted that Offset obligations require contractors to employ advisers to perform roles which include providing local knowledge of market-specific procurement processes and practices.*
>
> *In the 1990s, BAES' sales strategy worldwide was to incur no cost in-country itself but rather to engage local advisers upon whom those costs fell. Further, the advisers assumed all the financial risk of the procurement process, saving BAES a fixed overhead which, in the case of South Africa, BAES estimates (based on the costs of other overseas offices) to have been in the order of approximately £4.2 million annually.*
>
> *BAES' work in South Africa began in 1991 and has run for more than 20 years. The SDPP contracts were worth in excess of £2 billion and incorporated very significant Offset obligations. The actual spend on advisers in relation to BAE*

and Saab was well within what any company bidding for contracts of this sort would have expected to incur.

This is not to say that BAES would adopt exactly the same approach for a similar procurement process today. BAES undertook a comprehensive review of its relationship with its advisers globally including those acting in relation to the SDPP. In its report, the Woolf Committee considered that BAES' revised process for the appointment, selection and management of advisers was "leading-edge practice."

The conduct of advisers relating to BAE and Saab products in the course of the SDPP has been subject to a number of detailed investigations over the years. None of these investigations has demonstrated unlawful conduct on their part.

7. Investigation and Settlement

As is well known, in July 2004 the SFO began investigating allegations against the BAES group. That investigation included an investigation of the sale of Hawk and Gripen aircraft to South Africa. In the course of the five years of that investigation BAES disclosed hundreds of thousands of documents to, and made relevant employees available for interview by, the SFO, at a cost to BAES of tens of millions of pounds. BAES believes that the SFO obtained documents from others in the UK, South Africa and elsewhere, and interviewed many individuals. In 2007, the US Department of Justice also began an investigation of BAES' business.

In February 2010, BAES agreed with the SFO and DOJ the basis upon which the investigations should be concluded. In the UK, BAES agreed to plead guilty to one charge of failing to ensure that the books and records of one of its subsidiaries were reasonably accurate in relation to a transaction in Tanzania and to make a payment to the benefit of the people of Tanzania. In the US, BAES agreed to plead guilty to making false statements to the US Government and certain export control violations. None of the charges against BAES related to its activities in South Africa. BAES did not plead guilty to any offences of bribery or corruption.

BAES understands that the South African authorities have also investigated allegations concerning the sale of Hawk and Gripen aircraft to South Africa. In 2001, the Joint Investigation Team reported that it found no evidence of improper or unlawful conduct by the Government. It appears that the matter has also been investigated by the Scorpions but BAES had not been informed that that investigation made any adverse findings.'

503. I draw attention to the following with regard to the BAE Systems statement:

503.1. The description of the charges agreed to between BAE Systems and the US Department of Justice does not address the narrative of facts which BAE Systems had admitted, including the creation of an offshore entity used to pay advisors around the world and that these payments were made 'even though in certain situations there was a high probability that part of the payments would be used in order to ensure that BAES was favoured in the foreign government decisions regarding the sale of defence articles.'

503.2. The statement is entirely silent on the US DoS settlement, which (as I have noted) confirmed that the offshore entity described above was also used to make payments to secure the South African contracts. This contradicts the claim by BAE Systems that the US Department of Justice settlement had nothing to do with South Africa.

503.3. The statement makes no attempt to describe or provide any evidence of legitimate services provided by its 'overt' and 'covert' consultants that was sufficient to justify the payment of £115m to them. The statement only offers a general view that such payments are typical in large procurement contracts. No evidence is provided to support this claim.

503.4. The statement makes no attempt to explain why BAES made use of complicated offshore structures to pay advisors. The SFO suspected that these structures were devised to secure maximum secrecy and to hide BAES's relationship with its advisors.

504. No-one gave evidence under oath in support of the statement by BAE. All that happened was that on 29 June 2015, the final day of the Commission's hearings, Adv

Meiring on behalf of BAE Systems, read the BAE Systems statement into the record. He concluded by stating that 'this written submission was made three years ago by BAE. BAE's instructions to me that they remain [indistinct] and they stand by that, and there is nothing that has unfolded over the course of the Commission, or otherwise, that necessitates any amendment or addition to that.' This was the final act of the Commission before the Chairperson's closing statement.

505. Adv Meiring was not asked a single question by the Commissioners, or by the Evidence Leaders or any other interested party.

506. The BAE Systems statement was thus not tested. BAES was not required to give evidence in support of its submission. I submit that the Commission patently did not comply with its obligation to enquire into the matters within its terms of reference – particularly where the BAES statement raised questions which were not even asked, let alone answered.

Failure to test evidence regarding the jobs created through the NIP program

507. Paragraph 1.3 of its Terms of Reference, required the Commission to investigate 'whether job opportunities anticipated to flow from the SDPP materialised at all' and 'if they have, the extent to which they have materialised'. The job opportunities were anticipated to flow from the NIP and DIP obligations incurred by the SDPP contractors (referred to as 'obligors.')

508. The Commission's findings on this issue are contained in Volume 3 of its Report, in particular Chapter 5, Section 1.3. The Commission found that 'it is fair to conclude that

the SDPP projects created or retained the number of jobs that were projected. The SDPP assisted the country in creating or saving the much needed jobs.'[236]

509. The Commission's approach to this topic demonstrated two different failures to investigate. First, the Commission failed to undertake any detailed independent evaluation of the NIP and DIP programs. Second, this was compounded by the Commission's failure properly to test the evidence of the DTI witnesses who appeared before it. The Commission accepted the testimony without questioning it in any meaningful way, and without taking cognisance of compelling conflicting evidence.

510. As to the first: The Commission made no attempt to conduct an audit of the figures presented to it, in particular the NIP figures. This was necessary in order to establish whether the offset credits and job figures awarded to contractors were rational, supported by evidence, and accurately reflected the underlying economic performance of the NIP programs.

511. This failure was particularly notable as the DTI itself had never conducted or caused another party to conduct a full audit of the entirety of the NIP program. At least one internal audit was reportedly undertaken by the DTI in 2012. It dealt with only a portion of the NIP projects. I discuss this below. But no *independent* audit of the *entirety* of the NIP program was ever conducted.

512. This issue was raised by Evidence Leaders Advs Sibeko and Sello in their final written submission to the Commission dated 17 July 2015. In that submission, they addressed

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[236] *Report of Commission of Inquiry Into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission)*, December 2015, Vol. 3, Chapter 1.3., paragraph 340

paragraph 1.4. of the Terms of Reference, which required the Commission to establish whether 'off-sets anticipated to flow from the SDPP have materialised at all.' Their comments with regards to paragraph 1.4 of the Terms of Reference can be read to apply equally to paragraph 1.3 of the Terms of Reference. They stated:

> *From this the Commission can accept that there is currently no evidence that a full and independent audit has been conducted on the NIP Obligations. It is our considered view that it is imperative to conduct such an audit. It is only on the basis of this audit that a proper determination of whether off-sets anticipated to flow from the NIP have materialised at all and if so, the extent to which they have materialised; and if they have not, the extent to which they have not materialised and the steps that ought to be taken to realise them.*[237]

513. The failure of the Commission to have a full and independent audit undertaken is of particular consequence when one has regard to the totality of the evidence before the Commission, and its findings on the matter. The Commission's findings regarding the jobs created through the NIP program were, in full, the following:

> *[300] The DTI managed the NIP projects flowing from the DSPP. In some projects they measured jobs created, but their main focus in managing the projects was based on the criteria mentioned in the contracts, namely awarding credits for investment, local sales and exports only.*
>
> *[301] The criteria mentioned in the contracts made no mention of job creation. The projects were not measured on the number of jobs to be created, although the individual business plans would in some cases mention the jobs to be created. Sometimes the obligors would mention the number of jobs created in their claims documentation.*
>
> *[302] In managing and monitoring the SDPP projects, the DTI relied on both the contracts and the NIP guidelines.*
>
> *[303] Mr Masizakhe Zimela, Chief Director IPS in the DTI, and Mr Sipho Zikode, Deputy Director General of the DTI, testified that a report prepared by the DTI at the end of 2013 indicates that:*

[237] Counsel L. T. Sibeko SC & M Sello, Written Submission of Evidence Leaders to The Commission, 17 June 2015, paragraph 130

• BAE (Hawk and Gripen) projects created 22 422 jobs and saved or retained 5 768 jobs

•GFC (corvette platform) projects created 2 340 new jobs and saved or retained 920 jobs

•GSC (submarines) projects created 6 606 jobs and saved or retained 4 889 jobs •Thales (combat suite) projects created 4 875 jobs and saved or retained 706 jobs

• Agusta (LUH) projects created 2 652 jobs and saved or retained 258 jobs.

[304] Mr Zimela testified that the information in their possession indicates that the various SDPP projects created 38 895 jobs (12 965 new direct jobs and 25 930 indirect jobs), and saved 12 541 jobs.

[305] It should be noted that according to DTI witnesses, they were not required in terms of the contracts to monitor the number of jobs created, and their main focus was on the three performance criteria, namely investment, local sales and exports. Consequently, the monitoring of jobs may not have been consistent.

[306] The term 'jobs saved or retained' is used in the case where, without the involvement of the obligor, a company or factory would have closed down and employees would have lost their jobs.

[307] Mr Zimela testified that the figure for jobs saved/retained is not an estimate but the actual figure.

[308] With regard to the number of jobs created, they obtained the figures from the obligors themselves and during the site visits at the various premises where the projects were carried out. Business plans were also used to extract the number of jobs created or retained.

[309] DTI witnesses referred to a project called the 'Package Tourism Project' that was undertaken in Port Elizabeth by one of the obligors. The project created new jobs that were never accounted for. The project caused a big number of tourists from Scandinavian countries to visit Port Elizabeth and other parts of the country.

[310] The initial number of jobs to be created was obtained from the business plans and during engagement with the obligors. It was not a requirement of the NIP Programme that obligors should indicate the number of jobs to be created.

[311] During his testimony, Mr Zimela said:

The Jobs created comes from two sources. There was never a requirement for the obligors to account for the jobs created but when we were doing the monitoring had review meetings every six months with the obligors. In some cases they would provide jobs for the projects, but in some cases they did bot provide jobs, so we then went back to the business plans to arrive at the number of jobs created, where in the review reports there was no number of jobs created.'

[312] Mr Zimela further said:

The new indirect jobs were an estimate of what is the figure of indirect jobs. We economists use different figures to calculate indirect jobs, we have used a number of 2, like if you have 700 direct jobs, then you will have 1400 indirect jobs. The sort of multiplier for indirect jobs differ depending on the different sectors, multiplier for indirect jobs differ depending on the different sectors, each sector will have a different multiplier for indirect jobs. We took a decision to use 2 to calculate indirect jobs'

[313] It is clear from the above statements that it is not possible to obtain an exact figure of direct and indirect jobs created. In the absence of exact figures, we have to work on the estimates provided to the Commission by the various witnesses.

[314] The failure to track or monitor the actual number of jobs created was occasioned partly by the fact that although job creation was regarded as an important element, it was not an evaluation element.

[315] The initial projections of number of jobs to be created were based on the projects initially submitted by the obligors. There were 38 initial projects, but not all of them were proceeded with, for a variety of reasons.

[316] The contracts allowed projects to be substituted, and when that happened, the number of jobs to be created also changed. Initially, the number of jobs to be created was estimated to be 61 629. The total number f direct and indirect jobs created, saved or retained under the NIP Programme, is approximately 51 436.

[317] Mr Lionel Victor October also testified that the initial projection of the number of jobs expected to be created was based on the projects initially submitted by the obligors. He further said that initially there were 25 projects, but not all of them were proceeded with, for a variety of reasons.

[318] He confirmed other evidence that the contracts allowed projects to be substituted and when that happened, the number of jobs to be created also changed. Initially the number of jobs to be created was estimated at about 60 000. The number of jobs created saved or retained and indirect jobs created was 51 436, a figure which is not far off the initial projected figure of 60 000.

[319] Some SDPP projects are still continuing to date. They continue to create or retain jobs. Exports and local sales are still ongoing. For example, Ms Christine Guerrier, Vice President Dispute Resolution and Litigation for Thales, testified that the Thales Group had and still has other interests in South Africa where it employs more than 300 people at present.

[320] There are other successful projects, such as the already-mentioned Package Tourism Project in Port Elizabeth that created jobs that were never accounted for, for one reason or another. This implies that the number of jobs created or retained is much higher than the number recorded.

[321] Mr Zikode also testified about the Package Tourism Project. When tourists arrived in Port Elizabeth, young people would be employed as security personnel to ensure that the tourists were safe. The jobs thus created were never accounted for. Initially the tourists were going to Port Elizabeth, but later they went all over South Africa.

[322] He further said that this project caused about 244 000 tourists from Scandinavian countries to come to South Africa. According to him, it is accepted in the tourism industry that when 10 foreign tourists come to South Africa, one job is created. In fact, Mr Zikode said the following:

[I]n terms of the number of tourists that came to South Africa, we have about 244 000 tourists if you add them up. To show that the numbers are simple, if you use a factor of 10, not 7, normally they said 7 tourists create a job; if you say 10 tourists create a job the potential for job creation for this project, which obviously I cannot prove, that is why we didn't even put here, this project created about 24 000 jobs alone, this project if you follow the logic which is out there in the market that 7 tourists create 1 job … but I'm just being modest, I say 10 tourists now, let us say 10 tourists create a job, the potential jobs that were, or let me say, the jobs that were created roughly would amount to about 24 000. If you take 7 it goes to about 34 000 jobs. But we didn't want to put all these numbers here because if a person says "prove", that it's very difficult to prove.'

[323] As Mr Zikode has said, it is difficult to prove the number of jobs created as a result of the Package Tourism Project, but we believe that it is fair to infer that a reasonable number of jobs were created by this project.

[324] The probabilities are that the total number of direct, indirect and retained or saved jobs under the NIP Programme is much higher than the 51 436 jobs mentioned earlier.

[325] Mr October testified that they commissioned a number of independent audits of the SDPP programme, including an internal audit. He further said that some of the independent audits indicated that the benefits the country achieved from this programme were much more substantial than what the Department

had indicated. The figures that the DTI gave the Commission were very conservative.

514. From this, two facts emerge clearly:

514.1. The DTI did not monitor or evaluate the number of jobs created by the NIP program.

514.2. The job estimates are taken from the business plans submitted by the SDPP obligors and from reports submitted by the SDPP obligors to the DTI.

515. The "jobs created" figure which DTI provided to the Commission were therefore not based on audited proof, or substantiated by any evidence at all.

516. The Commission simply accepted the say-so of the DTI, which had in turn simply accepted the say-so of the obligors. At paragraph 313 it states: '*It is clear from the above statements that it is not possible to obtain an exact figure of direct and indirect jobs created. In the absence of exact figures, we have to work on the estimates provided to the Commission by the various witnesses.'*

517. It is not so that the Commission had 'to work on the estimates provided to the Commission by various witnesses.' At paragraph 305 the Commission acknowledges that the estimates were derived from the DTI's monitoring, but that '*the monitoring of jobs may not have been consistent.*' The Commission was empowered, and had the resources, to conduct its own investigation into the number of jobs created. It did not so do. An independent audit, for example, would have assisted in establishing the truth or otherwise of the claims of jobs created. Instead, the Commission merely attempted

to extrapolate information from the jobs figures of DTI witnesses – which the Commission acknowledged were unreliable.

518. The failure to conduct an independent audit was compounded by the Commission's credulous approach to the evidence presented by the DTI witnesses. I mention just two examples of this.

519. First, at paragraph 325, the Commission states that *'Mr October testified that they commissioned a number of independent audits of the SDPP programme, including an internal audit. He further said that some of the independent audits indicated that the benefits the country achieved from this programme were much more substantial than what the Department had indicated. The figures that the DTI gave the Commission were very conservative.'*

520. It is not stated whether the Commission accessed all the 'independent audits' undertaken by the DTI. This will no doubt emerge from the record. Advocates Sibeko and Sello stated in their submission that the Commission had not been presented with any such audits.

521. However, the Commission was presented with at least one *internal* audit conducted by the DTI. That internal audit was conducted in October 2012 and is titled 'Final Internal Audit Report: NIPP Performance Review: Strategic Defence Packages (SDP) Phase 1.' It was Annexure E to the witness statement of Mr. Masikhela Zimela. The timing and the title suggest that the report was considered a final audit following the completion of the NIP program.

522. At page 1, it stated that 'the performance review considered 40 out of 121 NIP projects related to the SDP.' The audit thus could not be used to prove the success or otherwise of the 81 other NIP projects which were not considered.

523. The Audit's findings call into question the Commission's bald acceptance of Mr. October's statement regarding the findings of the audits, and should have led the Commission to investigate each project further. While the audit at paragraph 2.2.2.1 found that 'the NIP Credits awarded to the Defence Obligors with respect to Investments, Local Sales, Net Export Revenues were valid', this should be read against the finding at paragraph 2.2.1.1 of the audit. This paragraph addresses the use of 'package deals' by the DTI. In these deals, the SDPP obligors were granted upfront or bulk offset credits in return for investing in industries or ventures identified as a priority by the DTI. This was inconsistent with the credit award methodology in terms of the NIP Supply Terms, which required that offset credits be awarded strictly on a 1:1 basis, where $1 of investment or sale be granted a matching $1 credit. The audit states:

> *IPS and IPCC took a decision to adopt the concept of 'Package Deals' as a strategy to:*
>
> - *direct NIPP investments towards industrial areas, sectors, communities that would traditionally not be favourable to potential investors (NIPP obligated companies).*
>
> - *compensate those NIPP obligated companies that are willing to invest in industrial areas, sectors and businesses where the return on investment is not attractive, the risk of not earning NIPP credits on revenue is high, the time of generating NIPP credits is longer than the required time frames (as per paragraph 1 above).*

This resulted in Defence Obligors obtaining more NIPP Credits compared to the investments and sales created or caused by them.[238][my emphasis]

524. This finding was amplified in a more detailed discussion of the package deals in the body of the audit's findings. The report noted that:

The obligors were awarded credits which exceeded the value of investments, local sales and net export revenues actually caused by them. This indicates that the value of NIP Activities completed by the Defense Obligors was less than the total obligation value to be offset by the NIP Credits. The table below reflects additional credits awarded as a result of the negotiated package deals:

Obligor	***Actual Obligor Contribution***	***Value of Package Deal Credits***	
		Investment	***Sales***
THALES	*$80 000 000*	-	*$80 000 000*
BAES	*$14 460 000*	*$460 404 336*	-
GFC	*€15 500 000*	*€157 711 019*	*€415 729 023*
GSC	*€27 574 952*	*€538 112 500*	*€747 598 750*

525. The audit made a number of other troubling findings. One such finding was:

'for certain projects the package deals were agreed to in advance with certain conditions having to be met. However the conditions were not met and the obligor was awarded credits without meeting the conditions. The obligor had a shortfall of €15 210 000 to the agreed contributions.'

[238] Final Internal Audit Report: NIPP Performance Review: Strategic Defence Package (SDP) Phase 1, Department of Trade and Industry, October 2012, Submited as Annex E to the Witness Statement of Mr. Masizakhe Zimela, p. 11

526. The report also stated that 'it was noted that for one (1) project the NIP credits were granted "up front" with certain conditions. Further enquiries from IPS indicated that this project eventually failed. There is currently no evidence to indicate that the conditions for awarding the credits were eventually met.'[239] The project referred to was a medical waste processing facility 'Evertrade Medical Waste'. The obligor was Thales. It was granted a total of $171 213 256 in offset credits, made up of $63 623 256 in investment credits and $107 590 000 in sales credits. Thales' actual contribution to the project was a $1 100 065 non-refundable grant to Evertrade.[240]

527. The second example of a credulous approach to the evidence of DTI witnesses appears in the discussion of the Package Tourism Project. The Commission appears to agree with the evidence of Mr. Zikode of the DTI that the Package Tourism Project, while not awarded any jobs, would have actually created a substantial number of jobs. This was based, *inter alia*, on the claim that the Package Tourism Project had caused 240 000 tourists to visit South Africa, and that jobs would have been created, including by some of these tourists using the services of local people to provide security.

528. If the Commission had interrogated the evidence on this project, beyond what was stated by the DTI witnesses, it would easily have established that this Project was an example of how poorly offsets performed, and how the credits and jobs created figures awarded to the obligors was arbitrary and unfounded.

529. This becomes apparent from notes prepared by Adv Barry Skinner SC ahead of the appearance of DTI witnesses. Adv Skinner was the Evidence Leader responsible for the evidence of, *inter alia*, Mr. Zikode. At pages 4288 to 4293 of the transcript, Adv Skinner confirmed that he had compiled the notes in preparation for examining Mr.

[239] *Ibid*, p. 22
[240] *Ibid*, p. 23

Zikode. The notes were distributed to the Commissioners and to interested parties. They appear to be based on research Adv Skinner (and whoever assisted him) had undertaken based on the underlying documents emanating from the DTI regarding the NIP projects. The notes were unsigned as the DTI and DTI witnesses apparently disagreed with some of the conclusions, although the exact nature of these disagreements is left unstated.

530. The notes refer to evidence in the Commission's possession that demonstrate that the Commission could not simply accept the statements of Mr Zikode without question. The relevant sections of Adv Skinner's notes state:

> *6.*
>
> *SANIP submitted an application for package tourism approval. According to the application which is annexed "the first chosen hub in South Africa is Port Elizabeth". It was stipulated that there were three related activities to the project that were pre-requisites to launch it namely :-*
>
> *(a) a heated swimming pool system had to be established on the beach in order to compensate for relatively cold water temperatures in comparison to other global destinations competing with Port Elizabeth;*
>
> *(b) a professional PR campaign was to be initiated with the objective of improving the image of South Africa in Scandinavia;*
>
> *(c) the runway at the Port Elizabeth airport was to be extended so that it could accommodate wide-body aircraft used by tour operators for long haul charters.*
>
> *7.*
>
> *Annexed is the Investment Business Plan for the upgrade to the McArthur Baths in Port Elizabeth. This was presented to the DTI as a supplementary part of the already approved Package Tourism Project. According to the plan "the objective for the overall project is to grow the project to a level where on average (taken over 9 years) 38 000 European package tourists will visit South Africa annually".*
>
> *8.*

R15 million was required for the upgrading of the swimming pool all of which was to be funded by SANIP. The swimming pool was an added benefit to market the facilities in Port Elizabeth and not "the causal effect". Causality was on the basis of the marketing campaign by Scandinavian Tour Operators.

9.

The minutes of the IPCC meeting of 12 August 2002 reflect that "the investment for the swimming pool was presented to the committee as a separate business proposal from the package tourism".

10.

Claim A105/44/CO2 was lodged on 28 February 2003. The minutes of the IPCC meeting held on 2 October 2003 reflect that the credits were approved "on the basis of receiving a letter confirming that these are all new tourists". This was repeated in the minutes of 2 December 2003 and 1 March 2004. No such confirmation letter can be found but it is assumed it was submitted as the credits were granted.

11.

In support of the claim two letters dated 17 December 2002 were furnished, both of which are annexed. Save for the number of tourists they are identical in wording and format. They purport to confirm the total number of tourists booked on package tours to South Africa for the period up to 31 May 2003, some five months after the date of the letter.

12.

No proof was supplied by the obligor as to whether South Africa had ever been marketed in any of the Scandinavian countries by SA Tourism. Enquiries were made by DTI to SA Tourism but the results thereof are unknown.

13.

It would have been an impossible task to establish how many tourists utilised the swimming pool. It was not known whether the marketing campaign in Scandinavia had referred to the heated swimming pool.

14.

The average amount estimated to have been spent per tourist per day and utilised in the claims was based on a formula confirmed by the consultant used by BAE/SAAB.

15.

The DTI was unaware of what amount was spent on the marketing campaign because information in respect thereof was never required from BAE

16.

Claim A105/44/CO1 was for investment for the upgrading of the McArthur Baths. A letter was furnished confirming receipt of payments totalling R15 177 960 from SANIP to Grinaker-LTA. A schedule of purchases was provided reflecting purchases in the amount of USD 1 481 373.57. Investment credits in that amount were approved. This equated to approximately R15 million.

17.

Thereafter 26 claims were lodged totalling USD 627 330 031.72 in respect of "export sales" credits – these claims were not in respect of the upgrade to the McArthur Baths but related solely to the "package tourism" itself. These claims did not actually refer to "export sales" in the strict sense but to the number of tourists from Scandinavia visiting South Africa and spending money (for daily living etc.) in South Africa. The claims (other than the first one of these - Claim A105/44/CO2) are not based on the sales of package tourist trips to persons in Scandinavia by particular entities.

18.

Other than the first such claim to which reference has already been made in respect of the letters furnished by the tour operators, the remaining claims were based on a differential increase in the number of tourists from various Scandinavian countries (Denmark, Finland, Norway and Sweden) visiting South Africa

19.

The claims were made on the basis of establishing first the incremental number of tourist arrivals and then applying a percentage as to how many of those tourists were visiting for holiday purposes. This percentage varied (for example in Claim A105/44/C03 it was 70% for Denmark, 66% for Norway and 57% for Sweden). It was then accepted that such number of tourists were visiting as a result of the marketing campaign and that therefore causality had been satisfied.

20.

In this regard reference is had to an email dated 23 February 2003 from SANIP to the DTI in which it is stated :-
"From the reports given to you with the claim you can see that there has been

no effort from South Africa into marketing South Africa as a tourist destination in these regions, and Scandinavia has not been acknowledged as a market for SA. The growth as a whole therefore can only be credited to our PR activities".

21.

It was not established how many tourists actually visited Port Elizabeth or how many tourists were aware of or visited as a result of the marketing campaign.

22.

The percentages which were employed were based on extracts from the South African Tourism Index which reflected the total tourist arrivals to South Africa from various countries and the purpose of visit expressed as a percentage per country of origin. This was despite the IPCC minutes of 19 September 2005 reflecting that the project "involves promotion of tourists from Scandinavia to Eastern Cape". Such minute also reflects that R10 million had apparently been spent promoting the project. That particular claim (105/44/C09) was provisionally approved "subject to confirmation from SATOUR on the number of tourists for that period."

23.

The minutes of the IPCC meeting of 12 December 2006 reflect that Claim 105/44/C12"was approved at the previous meeting [14 November 2006] but due to the high number of tourists they were claiming for, the committee requested that the project manager does a follow up on the trend to ensure that indeed the number of tourists were high for that particular season. Through investigations the project manager did confirm that indeed the number given was correct according to the places visited by the tourists."

This is misleading as there was no direct evidence of tourists visiting Port Elizabeth.

24.

The marketing campaign was undertaken during the period 2002 to 2003. Claims were lodged reflecting tourists up to December 2011. The view of the DTI was that based on the principles of causality and sustainability the marketing campaign was still the effective cause of tourists from Scandinavia visiting South Africa some seven or eight years after the campaign.

25.

Throughout the period of claims a daily spend of USD 150 was applied.

26.

Initially it was accepted by the DTI that the average stay for tourists should be no more than 17 days per tourist. Accordingly Claim A105/44/CO7 covering the period July 2004 to September 2004 was reduced from 21 days to an average of 17 days per tourist. The minutes of the IPCC meeting held on 18 March 2005 reflect that "the committee decided to reject the claim [105/44/C08] as it was a package formula that was agreed upon at the outset of the project." This figure of 17 days was then applied in the next 14 claims until Claim A105/44/C17 where a claim for 18.7 days was accepted. The three subsequent claims were for an average of less than 17 days per tourist but thereafter the DTI allowed claims of 25.2 days (Claim A105/44/C21), 20.2 days (Claim A105/44/C22), 19.4 days (Claim A105/44/C23), 19.4 days (Claim A105/44/C24), 15.7 days (Claim A105/44/C25), 18.1 days (Claim A105/44/C26) and 14.8 days (Claim A105/44/C27). No supporting documentation was attached to various of these claims but it may well be that due to the lapse of time, any supporting documentation has become lost or misfiled.

531. I submit that this shows that the Commission did not properly investigate whether the jobs anticipated to flow from the SDPP actually did so. I highlight the following:

531.1. The Commission did not conduct, or cause to be conducted, any independent audit of the NIP program, such as would confirm the evidence submitted by the DTI.

531.2. The Commission's failure to do so was highlighted by two Evidence Leaders, Advs Sibeko and Sello, in their final submission to the Commission. They submitted that the Commission's failure to do so meant that it had no credible basis upon which it could assess whether the NIP programs delivered the anticipated benefits.

531.3. The Commission was told that the job estimates from the NIP programs submitted by the DTI to the Commission were:

531.3.1. not monitored or otherwise confirmed by the DTI, as the number of jobs created was not a criterion on which the SDPP obligors were to be evaluated under the terms of the underlying NIP agreements between the SDPP obligors and the South African government;

531.3.2. taken from the business plans of the NIP obligors or reports made by the NIP obligors to the DTI, but were not independently tested beyond a handful of site visits.

531.4. The Commission thus acknowledged that the jobs created estimates could not be relied upon. However, it was of the opinion that its only course of action was to attempt to extrapolate from the estimates of witnesses before it, despite acknowledging that '*the monitoring of jobs may not have been consistent.*' This did not amount to conducting a proper investigation of this matter.

531.5. In attempting to extrapolate a finding from the evidence of DTI witnesses, the Commission did not properly interrogate the evidence of these witnesses. The Commission accepted the DTI's version uncritically.

531.6. This is clear in the example of Mr Lionel October, who stated that audit reports commissioned by the DTI had indicated that the achievements of the NIP program exceeded expectations and performed better than the figures submitted by the DTI to the Commission. However, his statement was contradicted by the 2012 audit report of the DTI, which found, inter alia, that the offset the credits awarded to SDPP obligors was in excess of the actual economic impact of the projects.

531.7. It was also clear from the Commission's uncritical acceptance that the Package Tourism Project caused 240 000 tourists to visit South Africa, and thus would have created a substantial number of jobs. Offset credits were granted to this project up until 2011 and included all new Scandinavian tourists in 2010, the year that South Africa hosted the FIFA Football World Cup. The notes of Adv Skinner raised serious concerns as to the reliability of this claim, which the Commission appears to have entirely ignored.

GROUNDS OF REVIEW

532. The Commission was required to establish the facts and the truth with regard to the six issues identified in the Terms of Reference and to make findings in respect thereof.

533. I have set out above, under "The Duties of the Commission", the manner in which a Commission of Inquiry is required to undertake its task. I shall not repeat all of that here. At the heart of it is that a Commission must embark upon an exhaustive investigation which is transparent and open to all possible findings. The Commission must conduct the investigation in an unbiased fashion, probing all possible avenues until the truth is discovered. The investigation must be conducted with an open and inquiring mind. An investigation that is not conducted with an open and inquiring mind is no investigation at all. The Commission should not be unduly suspicious, but also not unduly believing. It asks whether the pieces that have been presented fit into place.

If at first they do not, then it asks questions and seeks out information until they do.

534. A Commission has wide-ranging investigative powers to fulfil its investigative mandate. It may inform itself of facts by hearsay evidence, newspaper reports or representations or submissions without sworn evidence. Flexibility is a central feature of Commissions, which are designed to allow an investigation which goes beyond what might be permitted in a court**.**

535. A Commission is itself responsible for the collection of evidence, for taking statements from witnesses and testing the accuracy of such evidence by inquisitorial examination.

536. I respectfully submit that the process followed by the Commission, and as a result its findings, did not meet the requirements set out immediately above and in the section of this affidavit dealing with "The Duties of the Commission".

537. As I have stated, this review is brought in terms of PAJA and the principle of legality. I submit that the Commission's mode of operation and conduct had the result that it did not perform the task which it was by law obliged to undertake.

538. The failures of the process followed by the Commission included (a) its failure to gather relevant material, call material witnesses and properly investigate the allegations and evidence that were properly before it or made available to it; (b) its failure to admit into evidence material that was highly relevant to its enquiry; (c) its failure to seek or allow information from material witnesses; and (d) its failure to test the evidence of witnesses before it. Individually and cumulatively, these failures tainted both the process it followed and its resultant findings.

539. A primary function of a public inquiry such as a commission is to make the truth known to the public. The Commission regrettably failed in that task, as a result of the manner in which it undertook its enquiry.

540. I respectfully submit that the findings of the Commission fall to be reviewed and set aside on the following grounds:

540.1. The process followed was procedurally unfair and was irregular for the reasons set out above.

540.2. As a result of the flawed process having been followed, the findings of the Commission are:

540.2.1. Underpinned and informed by irrelevant considerations having been taken into account and relevant considerations not having been considered.

540.2.2. Arbitrary and capricious.

540.2.3. Not rationally connected to: (a) the purpose for which the Commission was established; (b) the reasons given by the Commission.

540.2.4. Are so unreasonable that they could not have been taken by any reasonable person.

541. The findings of the Commission are also unconstitutional and unlawful for reasons set out above.

THE RELIEF SOUGHT

542. In the circumstances, I ask that the findings of the Commission be reviewed and set aside. The Applicants do not ask that a further Commission be set up to conduct a further investigation. It does not do so given the extensive costs and resources that were invested into this Commission; any such further investment in a new process cannot in our voiew be justified in light of the current demands on the fiscus.

543. It is however of fundamental importance that the Report of the Commission should not be allowed to stand, given that (I submit) it did not carry out its functions in accordance with the principles of legality and rationality. The Constitution requires that conduct that is inconsistent with the Consitution should be declared invalid to the extent of that inconsistency. No decisions as to what further actions, if any, should be taken, should be made in reliance on a Report that is fatally flawed. The public have the right to know that they too should not place any reliance on the Report. It is an important element of democratic process that there should be accountability, and that such a failure of accountability should not be allowed to stand.

544. I accordingly ask for an Order in accordance with the Notice of Motion.

____

LEANNE GOVINDSAMY

I certify that:

1. The deponent acknowledges to me that:

1.1 she knows and understands the contents of this declaration;

1.2 she has no objection to taking the prescribed oath;

1.3 she considers the prescribed oath to be binding on her conscience.

2 the deponent thereafter uttered the words “I swear that the contents of this declaration are true, so help me God”.

3 the deponent signed this declaration in my presence at the address set out hereunder on this ______ day of OCTOBER 2016.

____

COMMISSIONER OF OATHS

The Constitution

OF THE REPUBLIC OF SOUTH AFRICA, 1996

As adopted on 8 May 1996 and amended
on 11 October 1996 by the Constitutional Assembly

ISBN 978-0-621-39063-6

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

(Manner of reference to the Act, previously "Constitution of the Republic of South Africa, Act 108 of 1996", substituted by s. 1 (1) of the Citation of Constitutional Laws, 2005 (Act No. 5 of 2005)
[Assented to 16 December 1996]

[DATE OF PROMULGATION: 18 DECEMBER, 1996]
[DATE OF COMMENCEMENT: 4 FEBRUARY, 1997]
(unless otherwise indicated - see also s. 243[5])
(English text signed by the President)

as amended by
Constitution First Amendment Act of 1997
Constitution Second Amendment Act of 1998
Constitution Third Amendment Act of 1998
Constitution Fourth Amendment Act of 1999
Constitution Fifth Amendment Act of 1999
Constitution Sixth Amendment Act of 2001
Constitution Seventh Amendment Act of 2001
Constitution Eighth Amendment Act of 2002
Constitution Ninth Amendment Act of 2002
Constitution Tenth Amendment Act of 2003
Constitution Eleventh Amendment Act of 2003
Constitution Twelfth Amendment Act of 2005
Constitution Thirteenth Amendment Act of 2007
Constitution Fourteenth Amendment Act of 2008
Constitution Fifteen Amendment Act of 2008
Constitution Sixteenth Amendment Act of 2009
Constitution Seventeenth Amendment Act of 2012

In terms of Proclamation No. 26 of 26 April, 2001, the administration of this Act has been assigned to the Minister for Justice and Constitutional Development.

ACT

To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.

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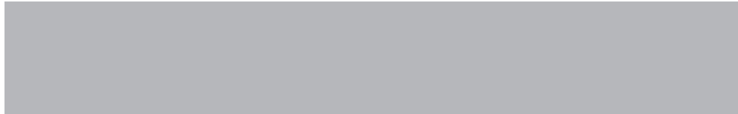
We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -

> *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*
>
> *Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*
>
> *Improve the quality of life of all citizens and free the potential of each person; and*
>
> *Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.*

May God protect our people.
Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.



CHAPTER 1

FOUNDING PROVISIONS

Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
   (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
   (b) Non-racialism and non-sexism.
   (c) Supremacy of the constitution and the rule of law.
   (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Supremacy of Constitution

2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Citizenship

3. (1) There is a common South African citizenship.
   (2) All citizens are—
   (a) equally entitled to the rights, privileges and benefits of citizenship; and
   (b) equally subject to the duties and responsibilities of citizenship.
   (3) National legislation must provide for the acquisition, loss and restoration of citizenship.

National anthem

4. The national anthem of the Republic is determined by the President by proclamation.

National flag

5. The national flag of the Republic is black, gold, green, white, red and blue, as described and sketched in Schedule 1.

Languages

6. (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

(b) Municipalities must take into account the language usage and preferences of their residents.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

(5) A Pan South African Language Board established by national legislation must—

(a) promote, and create conditions for, the development and use of—

(i) all official languages;

(ii) the Khoi, Nama and San languages; and

(iii) sign language; and

(b) promote and ensure respect for—

(i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and

(ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

CHAPTER 2

BILL OF RIGHTS

Rights

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
   (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
   (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Application

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
   (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
   (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
      (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
      (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
   (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Equality

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
   (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed

to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life

11. Everyone has the right to life.

Freedom and security of the person

12. (1) Everyone has the right to freedom and security of the person, which includes the right—
   - (a) not to be deprived of freedom arbitrarily or without just cause;
   - (b) not to be detained without trial;
   - (c) to be free from all forms of violence from either public or private sources;
   - (d) not to be tortured in any way; and
   - (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—
   - (a) to make decisions concerning reproduction;
   - (b) to security in and control over their body; and
   - (c) not to be subjected to medical or scientific experiments without their informed consent.

Slavery, servitude and forced labour

13. No one may be subjected to slavery, servitude or forced labour.

Privacy

14. Everyone has the right to privacy, which includes the right not to have—
    - (a) their person or home searched;
    - (b) their property searched;
    - (c) their possessions seized; or
    - (d) the privacy of their communications infringed.

Freedom of religion, belief and opinion

15. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
    (2) Religious observances may be conducted at state or state-aided institutions, provided that—
    - (a) those observances follow rules made by the appropriate public authorities;
    - (b) they are conducted on an equitable basis; and
    - (c) attendance at them is free and voluntary.

    (3) (a) This section does not prevent legislation recognising—
    - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
    - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

    (b) Recognition in terms of paragraph *(a)* must be consistent with this section and the other provisions of the Constitution.

Freedom of expression

16. (1) Everyone has the right to freedom of expression, which includes—
    - (a) freedom of the press and other media;
    - (b) freedom to receive or impart information or ideas;
    - (c) freedom of artistic creativity; and
    - (d) academic freedom and freedom of scientific research.

    (2) The right in subsection (1) does not extend to—

(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Assembly, demonstration, picket and petition

17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Freedom of association

18. Everyone has the right to freedom of association.

Political rights

19. (1) Every citizen is free to make political choices, which includes the right—
  (a) to form a political party;
  (b) to participate in the activities of, or recruit members for, a political party; and
  (c) to campaign for a political party or cause.
(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
(3) Every adult citizen has the right—
  (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  (b) to stand for public office and, if elected, to hold office.

Citizenship

20. No citizen may be deprived of citizenship.

Freedom of movement and residence

21. (1) Everyone has the right to freedom of movement.
(2) Everyone has the right to leave the Republic.
(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
(4) Every citizen has the right to a passport.

Freedom of trade, occupation and profession

22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Labour relations

23. (1) Everyone has the right to fair labour practices.
    (2) Every worker has the right—
        (a) to form and join a trade union;
        (b) to participate in the activities and programmes of a trade union; and
        (c) to strike.
    (3) Every employer has the right—
        (a) to form and join an employers' organisation; and
        (b) to participate in the activities and programmes of an employers' organisation.
    (4) Every trade union and every employers' organisation has the right—
        (a) to determine its own administration, programmes and activities;
        (b) to organise; and
        (c) to form and join a federation.
    (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
    (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

Environment

24. Everyone has the right—
    (a) to an environment that is not harmful to their health or wellbeing; and
    (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
        (i) prevent pollution and ecological degradation;
        (ii) promote conservation; and
        (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Property

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—
- (a) for a public purpose or in the public interest; and
- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

(4) For the purposes of this section—
- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
- (b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results

of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

Housing

26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Health care, food, water and social security

27. (1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

Children

28. (1) Every child has the right—

(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that—
 (i) are inappropriate for a person of that child's age; or
 (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
(i) kept separately from detained persons over the age of 18 years; and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

Education

29. (1) Everyone has the right—
(a) to a basic education, including adult basic education; and
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
(a) equity;
(b) practicability; and
(c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Language and culture

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Cultural, religious and linguistic communities

31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
    (a) to enjoy their culture, practise their religion and use their language; and
    (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Access to information

32. (1) Everyone has the right of access to—
    (a) any information held by the state; and
    (b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Just administrative action

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Arrested, detained and accused persons

35. (1) Everyone who is arrested for allegedly committing an offence has the right—
(a) to remain silent;
(b) to be informed promptly—
(i) of the right to remain silent; and
(ii) of the consequences of not remaining silent;
(c) not to be compelled to make any confession or admission that could be used in evidence against that person;
(d) to be brought before a court as soon as reasonably possible, but not later than—
(i) 48 hours after the arrest; or
(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right—
(a) to be informed promptly of the reason for being detained;
(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
(f) to communicate with, and be visited by, that person's—
 (i) spouse or partner;
 (ii) next of kin;
 (iii) chosen religious counsellor; and
 (iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right—
(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

States of emergency

37. (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—
(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
(b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—
(a) prospectively; and
(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time.

The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of—
- (a) a declaration of a state of emergency;
- (b) any extension of a declaration of a state of emergency; or
- (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—
- (a) the derogation is strictly required by the emergency; and
- (b) the legislation—
  - (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
  - (ii) conforms to subsection (5); and
  - (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—
- (a) indemnifying the state, or any person, in respect of any unlawful act;
- (b) any derogation from this section; or
- (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 **Section number**	2 **Section title**	3 **Extent to which the right is protected**
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)*(d)* and *(e)* and (2)*(c)*.
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: – subsection (1)*(d)* and *(e)*; – the rights in subparagraphs (i) and (ii) of subsection (1)*(g)*; and – subsection 1*(i)* in respect of children of 15 years and younger.
35	Arrested, detained and accused persons	With respect to: – subsections (1)*(a)*, *(b)* and *(c)* and (2)*(d)*; – the rights in paragraphs *(a)* to *(o)* of subsection (3), excluding paragraph *(d)* – subsection (4); and – subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

(a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

(b) A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

(e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.

(g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

(h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

Enforcement of rights

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
    - (a) anyone acting in their own interest;
    - (b) anyone acting on behalf of another person who cannot act in their own name;
    - (c) anyone acting as a member of, or in the interest of, a group or class of persons;
    - (d) anyone acting in the public interest; and
    - (e) an association acting in the interest of its members.

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—
    - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
    - (b) must consider international law; and
    - (c) may consider foreign law.

    (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

    (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

CHAPTER 3

CO-OPERATIVE GOVERNMENT

Government of the Republic

40. (1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

Principles of co-operative government and intergovernmental relations

41. (1) All spheres of government and all organs of state within each sphere must—
(a) preserve the peace, national unity and the indivisibility of the Republic;
(b) secure the well-being of the people of the Republic;
(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(d) be loyal to the Constitution, the Republic and its people;
(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred on them in terms of the Constitution;
(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(h) co-operate with one another in mutual trust and good faith by—
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must—
   (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
   (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

CHAPTER 4

PARLIAMENT

Composition of Parliament

42. (1) Parliament consists of—
    (a) the National Assembly; and
    (b) the National Council of Provinces.
  (2) The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.
  (3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.
  (4) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.
  (5) The President may summon Parliament to an extraordinary sitting at any time to conduct special business.
  (6) The seat of Parliament is Cape Town, but an Act of Parliament enacted in accordance with section 76(1) and (5) may determine that the seat of Parliament is elsewhere.

Legislative authority of the Republic

43. In the Republic, the legislative authority—
    (a) of the national sphere of government is vested in Parliament, as set out in section 44;
    (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
    (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

National legislative authority

44. (1) The national legislative authority as vested in Parliament—
  (a) confers on the National Assembly the power—
    (i) to amend the Constitution;
    (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and
    (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and
  (b) confers on the National Council of Provinces the power—
    (i) to participate in amending the Constitution in accordance with section 74;
    (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and
    (iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—
  (a) to maintain national security;
  (b) to maintain economic unity;
  (c) to maintain essential national standards;
  (d) to establish minimum standards required for the rendering of services; or
  (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

Joint rules and orders and joint committees

45. (1) The National Assembly and the National Council of Provinces must establish a joint rules committee to make rules and orders concerning the joint business of the Assembly and Council, including rules and orders—
    - (a) to determine procedures to facilitate the legislative process, including setting a time limit for completing any step in the process;
    - (b) to establish joint committees composed of representatives from both the Assembly and the Council to consider and report on Bills envisaged in sections 74 and 75 that are referred to such a committee;
    - (c) to establish a joint committee to review the Constitution at least annually; and
    - (d) to regulate the business of—
        - (i) the joint rules committee;
        - (ii) the Mediation Committee;
        - (iii) the constitutional review committee; and
        - (iv) any joint committees established in terms of paragraph (b).

    (2) Cabinet members, members of the National Assembly and delegates to the National Council of Provinces have the same privileges and immunities before a joint committee of the Assembly and the Council as they have before the Assembly or the Council.

The National Assembly

Composition and election

46. (1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that—
    (a) is prescribed by national legislation;
    (b) is based on the national common voters roll;
    (c) provides for a minimum voting age of 18 years; and
    (d) results, in general, in proportional representation.

(2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly.

[Sub-s. (1) amended by s. 1 of the Constitution Tenth Amendment Act of 2003 and by s. 1 of the Constitution Fifteenth Amendment Act of 2008.]

Membership

47. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except—
    (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than—
        (i) the President, Deputy President, Ministers and Deputy Ministers; and
        (ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;
    (b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;
    (c) unrehabilitated insolvents;
    (d) anyone declared to be of unsound mind by a court of the Republic; or
    (e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of the National Assembly in terms of subsection (1)(a) or (b) may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.

(3) A person loses membership of the National Assembly if that person—

(a) ceases to be eligible; or

(b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or

(c) ceases to be a member of the party that nominated that person as a member of the Assembly.

[Sub-s. (3) substituted by s. 2 of the Constitution Tenth Amendment Act of 2003 and by s. 2 of the Constitution Fifteenth Amendment Act of 2008.]

(4) Vacancies in the National Assembly must be filled in terms of national legislation.

Oath or affirmation

48. Before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Duration of National Assembly

49. (1) The National Assembly is elected for a term of five years.

(2) If the National Assembly is dissolved in terms of section 50, or when its term expires, the President, by proclamation must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of the National Assembly.

[Sub-s. (2) substituted by s. 1 of the Constitution Fifth Amendment Act of 1999.]

(3) If the result of an election of the National Assembly is not declared within the period established in terms of section 190, or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.

(4) The National Assembly remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next Assembly.

Dissolution of National Assembly before expiry of its term

50. (1) The President must dissolve the National Assembly if—
    (a) the Assembly has adopted a resolution to dissolve with a supporting vote of a majority of its members; and
    (b) three years have passed since the Assembly was elected.
(2) The Acting President must dissolve the National Assembly if—
    (a) there is a vacancy in the office of President; and
    (b) the Assembly fails to elect a new President within 30 days after the vacancy occurred.

Sittings and recess periods

51. (1) After an election, the first sitting of the National Assembly must take place at a time and on a date determined by the Chief Justice, but not more than 14 days after the election result has been declared. The Assembly may determine the time and duration of its other sittings and its recess periods.

[Sub-s. (1) substituted by s. 1 of the Constitution Sixth Amendment Act of 2001.]

(2) The President may summon the National Assembly to an extraordinary sitting at any time to conduct special business.
(3) Sittings of the National Assembly are permitted at places other than the seat of Parliament only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Assembly.

Speaker and Deputy Speaker

52. (1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.
(2) The Chief Justice must preside over the election of a Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.

[Sub-s. (2) substituted by s. 2 of the Constitution Sixth Amendment Act of 2001.]

(3) The procedure set out in Part A of Schedule 3 applies to the election of the Speaker and the Deputy Speaker.
(4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.

(5) In terms of its rules and orders, the National Assembly may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

Decisions

53. (1) Except where the Constitution provides otherwise—
   (a) a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;
   (b) at least one third of the members must be present before a vote may be taken on any other question before the Assembly; and
   (c) all questions before the Assembly are decided by a majority of the votes cast.

(2) The member of the National Assembly presiding at a meeting of the Assembly has no deliberative vote, but—
   (a) must cast a deciding vote when there is an equal number of votes on each side of a question; and
   (b) may cast a deliberative vote when a question must be decided with a supporting vote of at least two thirds of the members of the Assembly.

Rights of certain Cabinet members and Deputy Ministers in the National Assembly

54. The President, and any member of the Cabinet or any Deputy Minister who is not a member of the National Assembly, may, subject to the rules and orders of the Assembly, attend and speak in the Assembly, but may not vote.

[S. 54 substituted by s. 3 of the Constitution Sixth Amendment Act of 2001.]

Powers of National Assembly

55. (1) In exercising its legislative power, the National Assembly may—
   (a) consider, pass, amend or reject any legislation before the Assembly; and
   (b) initiate or prepare legislation, except money Bills.

(2) The National Assembly must provide for mechanisms—
   (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
   (b) to maintain oversight of—

(i) the exercise of national executive authority, including the implementation of legislation; and
(ii) any organ of state.

Evidence or information before National Assembly

56. The National Assembly or any of its committees may—
(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
(b) require any person or institution to report to it;
(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
(d) receive petitions, representations or submissions from any interested persons or institutions.

Internal arrangements, proceedings and procedures of National Assembly

57. (1) The National Assembly may—
(a) determine and control its internal arrangements, proceedings and procedures; and
(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of the National Assembly must provide for—
(a) the establishment, composition, powers, functions, procedures and duration of its committees;
(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;
(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and
(d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

Privilege

58. (1) Cabinet members, Deputy Ministers and members of the National Assembly—
   (a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
   (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—
      (i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or
      (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.

(2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to members of the National Assembly are a direct charge against the National Revenue Fund.

[S. 58 amended by s. 4 of the Constitution Sixth Amendment Act of 2001.]

Public access to and involvement in National Assembly

59. (1) The National Assembly must—
   (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
   (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
      (i) to regulate public access, including access of the media, to the Assembly and its committees; and
      (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

National Council of Provinces

Composition of National Council

60. (1) The National Council of Provinces is composed of a single delegation from each province consisting of ten delegates.

(2) The ten delegates are—

(a) four special delegates consisting of—

(i) the Premier of the province or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council of Provinces; and

(ii) three other special delegates; and

(b) six permanent delegates appointed in terms of section 61(2).

(3) The Premier of a province, or if the Premier is not available, a member of the province's delegation designated by the Premier, heads the delegation.

Allocation of delegates

61. (1) Parties represented in a provincial legislature are entitled to delegates in the province's delegation in accordance with the formula set out in Part B of Schedule 3.

(2) (a) A provincial legislature must, within 30 days after the result of an election of that legislature is declared—

(i) determine, in accordance with national legislation, how many of each party's delegates are to be permanent delegates and how many are to be special delegates; and

(ii) appoint the permanent delegates in accordance with the nominations of the parties.

(b) . . . .

[Para. (b) omitted by s. 1 of the Constitution Fourteenth Amendment Act of 2008.]

[Sub-s. (2) substituted by s. 1 of the Constitution Ninth Amendment Act of 2002 and by s. 1 of the Constitution Fourteenth Amendment Act of 2008.]

(3) The national legislation envisaged in subsection (2)*(a)* must ensure the participation of minority parties in both the permanent and special delegates' components of the delegation in a manner consistent with democracy.

(4) The legislature, with the concurrence of the Premier and the leaders of the parties entitled to special delegates in the province's delegation, must designate special delegates, as required from time to time, from among the members of the legislature.

Permanent delegates

62. (1) A person nominated as a permanent delegate must be eligible to be a member of the provincial legislature.

(2) If a person who is a member of a provincial legislature is appointed as a permanent delegate, that person ceases to be a member of the legislature.

(3) Permanent delegates are appointed for a term that expires—

(a) immediately before the first sitting of the provincial legislature after its next election..

(b) . . . . . .

[Para. (b) omitted by s. 2 of the Constitution Fourteenth Amendment Act of 2008.]

[Sub-s. (3) substituted by s. 2 of the Constitution Ninth Amendment Act of 2002 and substituted by s. 2 of the Constitution Fourteenth Amendment Act of 2008.]

(4) A person ceases to be a permanent delegate if that person—

(a) ceases to be eligible to be a member of the provincial legislature for any reason other than being appointed as a permanent delegate;

(b) becomes a member of the Cabinet;

(c) has lost the confidence of the provincial legislature and is recalled by the party that nominated that person;

(d) ceases to be a member of the party that nominated that person and is recalled by that party; or

(e) is absent from the National Council of Provinces without permission in circumstances for which the rules and orders of the Council prescribe loss of office as a permanent delegate.

(5) Vacancies among the permanent delegates must be filled in terms of national legislation.

(6) Before permanent delegates begin to perform their functions in the National Council of Provinces, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Sittings of National Council

63. (1) The National Council of Provinces may determine the time and duration of its sittings and its recess periods.

(2) The President may summon the National Council of Provinces to an extraordinary sitting at any time to conduct special business.

(3) Sittings of the National Council of Provinces are permitted at places other than the seat of Parliament only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Council.

Chairperson and Deputy Chairpersons

64. (1) The National Council of Provinces must elect a Chairperson and two Deputy Chairpersons from among the delegates.

(2) The Chairperson and one of the Deputy Chairpersons are elected from among the permanent delegates for five years unless their terms as delegates expire earlier.

(3) The other Deputy Chairperson is elected for a term of one year, and must be succeeded by a delegate from another province, so that every province is represented in turn.

(4) The Chief Justice must preside over the election of the Chairperson, or designate another judge to do so. The Chairperson presides over the election of the Deputy Chairpersons.

[Sub-s. (4) substituted by s. 5 of the Constitution Sixth Amendment Act of 2001.]

(5) The procedure set out in Part A of Schedule 3 applies to the election of the Chairperson and the Deputy Chairpersons.

(6) The National Council of Provinces may remove the Chairperson or a Deputy Chairperson from office.

(7) In terms of its rules and orders, the National Council of Provinces may elect from among the delegates other presiding officers to assist the Chairperson and Deputy Chairpersons.

Decisions

65. (1) Except where the Constitution provides otherwise—

(a) each province has one vote, which is cast on behalf of the province by the head of its delegation; and

(b) all questions before the National Council of Provinces are agreed when at least five provinces vote in favour of the question.

(2) An Act of Parliament, enacted in accordance with the procedure established by either subsection (1) or subsection (2) of section 76, must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf.

Participation by members of national executive

66. (1) Cabinet members and Deputy Ministers may attend, and may speak in, the National Council of Provinces, but may not vote.

(2) The National Council of Provinces may require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council.

Participation by local government representatives

67. Not more than ten part-time representatives designated by organised local government in terms of section 163, to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.

Powers of National Council

68. In exercising its legislative power, the National Council of Provinces may—

(a) consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this Chapter; and

(b) initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3), but may not initiate or prepare money Bills.

Evidence or information before National Council

69. The National Council of Provinces or any of its committees may—

(a) summon any person to appear before it to give evidence on oath or affirmation or to produce documents;

(b) require any institution or person to report to it;

(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
(d) receive petitions, representations or submissions from any interested persons or institutions.

Internal arrangements, proceedings and procedures of National Council

70. (1) The National Council of Provinces may—
(a) determine and control its internal arrangements, proceedings and procedures; and
(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
(2) The rules and orders of the National Council of Provinces must provide for—
(a) the establishment, composition, powers, functions, procedures and duration of its committees;
(b) the participation of all the provinces in its proceedings in a manner consistent with democracy; and
(c) the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy, whenever a matter is to be decided in accordance with section 75.

Privilege

71. (1) Delegates to the National Council of Provinces and the persons referred to in sections 66 and 67—
(a) have freedom of speech in the Council and in its committees, subject to its rules and orders; and
(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—
(i) anything that they have said in, produced before or submitted to the Council or any of its committees; or
(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Council or any of its committees.

(2) Other privileges and immunities of the National Council of Provinces, delegates to the Council and persons referred to in sections 66 and 67 may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to permanent members of the National Council of Provinces are a direct charge against the National Revenue Fund.

Public access to and involvement in National Council

72. (1) The National Council of Provinces must—
  - (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and
  - (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
    - (i) to regulate public access, including access of the media, to the Council and its committees; and
    - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

National Legislative Process

All Bills

73. (1) Any Bill may be introduced in the National Assembly.

(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:
  - (a) a money Bill; or
  - (b) a Bill which provides for legislation envisaged in section 214.

[Sub-s. (2) substituted by s. 1(a) of the Constitution Seventh Amendment Act of 2001.]

(3) A Bill referred to in section 76(3), except a Bill referred to in subsection (2)(a) or (b) of this section, may be introduced in the National Council of Provinces.

[Sub-s. (3) substituted by s. 1(b) of the Constitution Seventh Amendment Act of 2001.]

(4) Only a member or committee of the National Council of Provinces may introduce a Bill in the Council.

(5) A Bill passed by the National Assembly must be referred to the National Council of Provinces if it must be considered by the Council. A Bill passed by the Council must be referred to the Assembly.

Bills amending the Constitution

74. (1) Section 1 and this subsection may be amended by a Bill passed by—
   - (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and
   - (b) the National Council of Provinces, with a supporting vote of at least six provinces.

(2) Chapter 2 may be amended by a Bill passed by—
   - (a) the National Assembly, with a supporting vote of at least two thirds of its members; and
   - (b) the National Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed—
   - (a) by the National Assembly, with a supporting vote of at least two thirds of its members; and
   - (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment—
     - (i) relates to a matter that affects the Council;
     - (ii) alters provincial boundaries, powers, functions or institutions; or
     - (iii) amends a provision that deals specifically with a provincial matter.

(4) A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

(5) At least 30 days before a Bill amending the Constitution is introduced in terms of section 73(2), the person or committee intending to introduce the Bill must—
   - (a) publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;
   - (b) submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and

(c) submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures—
(a) to the Speaker for tabling in the National Assembly; and
(b) in respect of amendments referred to in subsection (1), (2) or (3)(b), to the Chairperson of the National Council of Provinces for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of—
(a) its introduction, if the Assembly is sitting when the Bill is introduced; or
(b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.

(8) If a Bill referred to in subsection (3)(b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.

(9) A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.

Ordinary Bills not affecting provinces

75. (1) When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
(a) The Council must—
(i) pass the Bill;
(ii) pass the Bill subject to amendments proposed by it; or
(iii) reject the Bill.
(b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.

(c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may—
   (i) pass the Bill again, either with or without amendments; or
   (ii) decide not to proceed with the Bill.

(d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.

(2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—
   (a) each delegate in a provincial delegation has one vote;
   (b) at least one third of the delegates must be present before a vote may be taken on the question; and
   (c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.

Ordinary Bills affecting provinces

76. (1) When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
   (a) The Council must—
      (i) pass the Bill;
      (ii) pass an amended Bill; or
      (iii) reject the Bill.
   (b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.
   (c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.
   (d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on—

- (i) the Bill as passed by the Assembly;
- (ii) the amended Bill as passed by the Council; or
- (iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.

(f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.

(i) If a Bill referred to the Council in terms of paragraph (f) or (h) is not passed by the Council, the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.

(j) If a Bill referred to the Assembly in terms of paragraph (g) or (h) is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.

(k) A Bill passed by the Assembly in terms of paragraph (e), (i) or (j) must be submitted to the President for assent.

(2) When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure:

(a) The Assembly must—

- (i) pass the Bill;
- (ii) pass an amended Bill; or
- (iii) reject the Bill.

(b) A Bill passed by the Assembly in terms of paragraph (a)(i) must be submitted to the President for assent.

(c) If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.

(d) If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill must be referred to the Mediation Committee, which may agree on—

(i) the Bill as passed by the Council;

(ii) the amended Bill as passed by the Assembly; or

(iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses.

(f) If the Mediation Committee agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.

(i) If a Bill referred to the Assembly in terms of paragraph (f) or (h) is not passed by the Assembly, the Bill lapses.

(3) A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:

(a) Section 65(2);

(b) section 163;

(c) section 182;

(d) section 195(3) and (4);

(e) section 196; and

(f) section 197.

(4) A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation—
- (a) envisaged in section 44(2) or 220(3); or
- (b) envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.

[Para. (b) substituted by s. 1 of the Constitution Eleventh Amendment Act of 2003.]

(5) A Bill envisaged in section 42(6) must be dealt with in accordance with the procedure established by subsection (1), except that—
- (a) when the National Assembly votes on the Bill, the provisions of section 53(1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and
- (b) if the Bill is referred to the Mediation Committee, the following rules apply:
  - (i) If the National Assembly considers a Bill envisaged in subsection (1)(g) or (h), that Bill may be passed only if a majority of the members of the Assembly vote in favour of it.
  - (ii) If the National Assembly considers or reconsiders a Bill envisaged in subsection (1)(e), (i) or (j), that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.

(6) This section does not apply to money Bills.

Money Bills

77. (1) A Bill is a money Bill if it—
- (a) appropriates money;
- (b) imposes national taxes, levies, duties or surcharges;
- (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
- (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except—
- (a) a subordinate matter incidental to the appropriation of money;
- (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;
- (c) the granting of exemption from national taxes, levies, duties or surcharges; or
- (d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.

[S. 77 substituted by s. 2 of the Constitution Seventh Amendment Act 2001.]

Mediation Committee

78. (1) The Mediation Committee consists of—
(a) nine members of the National Assembly elected by the Assembly in accordance with a procedure that is prescribed by the rules and orders of the Assembly and results in the representation of parties in substantially the same proportion that the parties are represented in the Assembly; and
(b) one delegate from each provincial delegation in the National Council of Provinces, designated by the delegation.

(2) The Mediation Committee has agreed on a version of a Bill, or decided a question, when that version, or one side of the question, is supported by—
(a) at least five of the representatives of the National Assembly; and
(b) at least five of the representatives of the National Council of Provinces.

Assent to Bills

79. (1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

(2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.

(3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if—
(a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or
(b) section 74(1), (2) or (3)(b) or 76 was applicable in the passing of the Bill.

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either—

(a) assent to and sign the Bill; or
(b) refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.

Application by members of National Assembly to Constitutional Court

80. (1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.

(2) An application—
(a) must be supported by at least one third of the members of the National Assembly; and
(b) must be made within 30 days of the date on which the President assented to and signed the Act.

(3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if—
(a) the interests of justice require this; and
(b) the application has a reasonable prospect of success.

(4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

Publication of Acts

81. A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.

Safekeeping of Acts of Parliament

82. The signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.

CHAPTER 5

THE PRESIDENT AND NATIONAL EXECUTIVE

The President

83. The President—
   - (a) is the Head of State and head of the national executive;
   - (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
   - (c) promotes the unity of the nation and that which will advance the Republic.

Powers and functions of President

84. (1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for—
   - (a) assenting to and signing Bills;
   - (b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;
   - (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
   - (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
   - (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
   - (f) appointing commissions of inquiry;
   - (g) calling a national referendum in terms of an Act of Parliament;
   - (h) receiving and recognising foreign diplomatic and consular representatives;
   - (i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
   - (j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and
   - (k) conferring honours.

[General Note: Honourable tributes instituted in Government Gazette 24155 of 6 December, 2002 and Government Gazette 25213 of 25 July, 2003.]

Executive authority of the Republic

85. (1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by—

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation.

Election of President

86. (1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.

(2) The Chief Justice must preside over the election of the President, or designate another judge to do so. The procedure set out in Part A of Schedule 3 applies to the election of the President.

[Sub-s. (2) substituted by s. 6 of the Constitution Sixth Amendment Act of 2001.]

(3) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the Chief Justice, but not more than 30 days after the vacancy occurs.

[Sub-s. (3) substituted by s. 6 of the Constitution Sixth Amendment Act of 2001.]

Assumption of office by President

87. When elected President, a person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Term of office of President

88. (1) The President's term of office begins on assuming office and ends upon a vacancy occurring or when the person next elected President assumes office.

(2) No person may hold office as President for more than two terms, but when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President is not regarded as a term.

Removal of President

89. (1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of—
   (a) a serious violation of the Constitution or the law;
   (b) serious misconduct; or
   (c) inability to perform the functions of office.

(2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office.

Acting President

90. (1) When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President:
   (a) The Deputy President.
   (b) A Minister designated by the President.
   (c) A Minister designated by the other members of the Cabinet.
   (d) The Speaker, until the National Assembly designates one of its other members.

(2) An Acting President has the responsibilities, powers and functions of the President.

(3) Before assuming the responsibilities, powers and functions of the President, the Acting President must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

(4) A person who as Acting President has sworn or affirmed faithfulness to the Republic need not repeat the swearing or affirming procedure for any subsequent term as Acting President during the period ending when the person next elected President assumes office.

[Sub-s. (4) added by s. 1 of the Constitution First Amendment Act of 1997]

Cabinet

91. (1) The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.

(2) The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.

(3) The President—

(a) must select the Deputy President from among the members of the National Assembly;

(b) may select any number of Ministers from among the members of the Assembly; and

(c) may select no more than two Ministers from outside the Assembly.

(4) The President must appoint a member of the Cabinet to be the leader of government business in the National Assembly.

(5) The Deputy President must assist the President in the execution of the functions of government.

Accountability and responsibilities

92. (1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.

(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

(3) Members of the Cabinet must—

(a) act in accordance with the Constitution; and

(b) provide Parliament with full and regular reports concerning matters under their control.

Deputy Ministers

93. (1) The President may appoint—

(a) any number of Deputy Ministers from among the members of the National Assembly; and

(b) no more than two Deputy Ministers from outside the Assembly, to assist the members of the Cabinet, and may dismiss them.

(2) Deputy Ministers appointed in terms of subsection (1)*(b)* are accountable to Parliament for the exercise of their powers and the performance of their functions.

[S. 93 substituted by s. 7 of the Constitution Sixth Amendment Act of 2001.]

Continuation of Cabinet after elections

94. When an election of the National Assembly is held, the Cabinet, the Deputy President, Ministers and any Deputy Ministers remain competent to function until the person elected President by the next Assembly assumes office.

Oath or affirmation

95. Before the Deputy President, Ministers and any Deputy Ministers begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Conduct of Cabinet members and Deputy Ministers

96. (1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
    (2) Members of the Cabinet and Deputy Ministers may not—
        (a) undertake any other paid work;
        (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
        (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

Transfer of functions

97. The President by proclamation may transfer to a member of the Cabinet—
        (a) the administration of any legislation entrusted to another member; or
        (b) any power or function entrusted by legislation to another member.

Temporary assignment of functions

98. The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

Assignment of functions

99. A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment—

(a) must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;
(b) must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and
(c) takes effect upon proclamation by the President.

National intervention in provincial administration

[Heading amended by s. 2(a) the Constitution Eleventh Amendment Act of 2003.]

100. (1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
(b) assuming responsibility for the relevant obligation in that province to the extent necessary to—
(i) maintain essential national standards or meet established minimum standards for the rendering of a service;
(ii) maintain economic unity;
(iii) maintain national security; or
(iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

[Sub-s. (1) amended by s. 2(b) of the Constitution Eleventh Amendment Act of 2003.]

(2) If the national executive intervenes in a province in terms of subsection (1)(b)—
(a) it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;
(b) the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.

[Sub-s. (2) substituted by s. 2(c) of the Constitution Eleventh Amendment Act of 2003.]

(3) National legislation may regulate the process established by this section.

[S. 100 amended by s. 2 of the Constitution Eleventh Amendment Act of 2003.]

Executive decisions

101. (1) A decision by the President must be in writing if it—
   (a) is taken in terms of legislation; or
   (b) has legal consequences.
(2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.
(3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.
(4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—
   (a) tabled in Parliament; and
   (b) approved by Parliament.

Motions of no confidence

102. (1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.
(2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.

CHAPTER 6

PROVINCES

Provinces

103. (1) The Republic has the following provinces:
(a) Eastern Cape;
(b) Free State;
(c) Gauteng;
(d) KwaZulu-Natal;
(e) Limpopo;
(f) Mpumalanga;
(g) Northern Cape;
(h) North West;
(i) Western Cape.

[Sub-s. (1) substituted by s. 3 of the Constitution Eleventh Amendment Act of 2003 and substituted by s. 1 of the Constitution Twelfth Amendment Act of 2005]

(2) The geographical areas of the respective provinces comprise the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A.

[Sub-s. (2) substituted by s. 1 of the Constitution Twelfth Amendment Act of 2005.]

(3) (a) Whenever the geographical area of a province is re-determined by an amendment to the Constitution, an Act of Parliament may provide for measures to regulate, within a reasonable time, the legal, practical and any other consequences of the re-determination.
(b) An Act of Parliament envisaged in paragraph (a) may be enacted and implemented before such amendment to the Constitution takes effect, but any provincial functions, assets, rights, obligations, duties or liabilities may only be transferred in terms of that Act after that amendment to the Constitution takes effect.

[S.103 substituted by s. 1 of the Constitution Twelfth Amendment Act of 2005.]

Provincial Legislatures

Legislative authority of provinces

104. (1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power—
  (a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;
  (b) to pass legislation for its province with regard to—
    (i) any matter within a functional area listed in Schedule 4;
    (ii) any matter within a functional area listed in Schedule 5;
    (iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and
    (iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and
  (c) to assign any of its legislative powers to a Municipal Council in that province.

(2) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may request Parliament to change the name of that province.

(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.

(4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.

(5) A provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law.

Composition and election of provincial legislatures

105. (1) A a provincial legislature consists of women and men elected as members in terms of an electoral system that—
  (a) is prescribed by national legislation;
  (b) is based on that province's segment of the national common voters roll;

(c) provides for a minimum voting age of 18 years; and
(d) results, in general, in proportional representation.

[Sub-s. (1) amended by s. 3 of the Constitution Tenth Amendment Act of 2003 and by s. 3 of the Constitution Fourteenth Amendment Act of 2008.]

(2) A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation.

Membership

106. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except—
(a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than—
(i) the Premier and other members of the Executive Council of a province; and
(ii) other office-bearers whose functions are compatible with the functions of a member of a provincial legislature, and have been declared compatible with those functions by national legislation;
(b) members of the National Assembly, permanent delegates to the National Council of Provinces or members of a Municipal Council;
(c) unrehabilitated insolvents;
(d) anyone declared to be of unsound mind by a court of the Republic; or
(e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of a provincial legislature in terms of subsection (1)(a) or (b) may be a candidate for the legislature, subject to any limits or conditions established by national legislation.

(3) A person loses membership of a provincial legislature if that person—
(a) ceases to be eligible;
(b) is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership; or
(c) ceases to be a member of the party that nominated that person as a member of the legislature.

[Sub-s. (3) substituted by s. 4 of the Constitution Tenth Amendment Act of 2003 and by s. 4 of the Constitution Fourteenth Amendment Act of 2008.]

(4) Vacancies in a provincial legislature must be filled in terms of national legislation.

Oath or affirmation

107. Before members of a provincial legislature begin to perform their functions in the legislature, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Duration of provincial legislatures

108. (1) A provincial legislature is elected for a term of five years.
(2) If a provincial legislature is dissolved in terms of section 109, or when its term expires, the Premier of the province, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the legislature was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of a provincial legislature.

[Sub-s. (2) substituted by s. 1 of the Constitution Fourth Amendment Act of 1999.]

(3) If the result of an election of a provincial legislature is not declared within the period referred to in section 190, or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.
(4) A provincial legislature remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next legislature.

Dissolution of provincial legislatures before expiry of term

109. (1) The Premier of a province must dissolve the provincial legislature if—
(a) the legislature has adopted a resolution to dissolve with a supporting vote of a majority of its members; and
(b) three years have passed since the legislature was elected.
(2) An Acting Premier must dissolve the provincial legislature if—
(a) there is a vacancy in the office of Premier; and
(b) the legislature fails to elect a new Premier within 30 days after the vacancy occurred.

Sittings and recess periods

110. (1) After an election, the first sitting of a provincial legislature must take place at a time and on a date determined by a judge designated by the Chief Justice, but not more than 14 days after the election result has been declared. A provincial legislature may determine the time and duration of its other sittings and its recess periods.

[Sub-s. (1) substituted by s. 8 of the Constitution Sixth Amendment Act of 2001.]

(2) The Premier of a province may summon the provincial legislature to an extraordinary sitting at any time to conduct special business.
(3) A provincial legislature may determine where it ordinarily will sit.

Speakers and Deputy Speakers

111. (1) At the first sitting after its election, or when necessary to fill a vacancy, a provincial legislature must elect a Speaker and a Deputy Speaker from among its members.
(2) A judge designated by the Chief Justice must preside over the election of a Speaker. The Speaker presides over the election of a Deputy Speaker.

[Sub-s. (2) substituted by s. 9 of the Constitution Sixth Amendment Act of 2001.]

(3) The procedure set out in Part A of Schedule 3 applies to the election of Speakers and Deputy Speakers.
(4) A provincial legislature may remove its Speaker or Deputy Speaker from office by resolution. A majority of the members of the legislature must be present when the resolution is adopted.
(5) In terms of its rules and orders, a provincial legislature may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

Decisions

112. (1) Except where the Constitution provides otherwise—
   (a) a majority of the members of a provincial legislature must be present before a vote may be taken on a Bill or an amendment to a Bill;
   (b) at least one third of the members must be present before a vote may be taken on any other question before the legislature; and
   (c) all questions before a provincial legislature are decided by a majority of the votes cast.
 (2) The member presiding at a meeting of a provincial legislature has no deliberative vote, but—
   (a) must cast a deciding vote when there is an equal number of votes on each side of a question; and
   (b) may cast a deliberative vote when a question must be decided with a supporting vote of at least two thirds of the members of the legislature.

Permanent delegates' rights in provincial legislatures

113. A province's permanent delegates to the National Council of Provinces may attend, and may speak in, their provincial legislature and its committees, but may not vote. The legislature may require a permanent delegate to attend the legislature or its committees.

Powers of provincial legislatures

114. (1) In exercising its legislative power, a provincial legislature may—
   (a) consider, pass, amend or reject any Bill before the legislature; and
   (b) initiate or prepare legislation, except money Bills.
 (2) A provincial legislature must provide for mechanisms—
   (a) to ensure that all provincial executive organs of state in the province are accountable to it; and
   (b) to maintain oversight of—
     (i) the exercise of provincial executive authority in the province, including the implementation of legislation; and
     (ii) any provincial organ of state.

Evidence or information before provincial legislatures

115. A provincial legislature or any of its committees may—
   - (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
   - (b) require any person or provincial institution to report to it;
   - (c) compel, in terms of provincial legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
   - (d) receive petitions, representations or submissions from any interested persons or institutions.

Internal arrangements, proceedings and procedures of provincial legislatures

116. (1) A provincial legislature may—
   - (a) determine and control its internal arrangements, proceedings and procedures; and
   - (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of a provincial legislature must provide for—
   - (a) the establishment, composition, powers, functions, procedures and duration of its committees;
   - (b) the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy;
   - (c) financial and administrative assistance to each party represented in the legislature, in proportion to its representation, to enable the party and its leader to perform their functions in the legislature effectively; and
   - (d) the recognition of the leader of the largest opposition party in the legislature, as the Leader of the Opposition.

Privilege

117. (1) Members of a provincial legislature and the province's permanent delegates to the National Council of Provinces—
  - (a) have freedom of speech in the legislature and in its committees, subject to its rules and orders; and
  - (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—
    - (i) anything that they have said in, produced before or submitted to the legislature or any of its committees; or
    - (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the legislature or any of its committees.

(2) Other privileges and immunities of a provincial legislature and its members may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to members of a provincial legislature are a direct charge against the Provincial Revenue Fund.

Public access to and involvement in provincial legislatures

118. (1) A provincial legislature must—
  - (a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and
  - (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
    - (i) to regulate public access, including access of the media, to the legislature and its committees; and
    - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

Introduction of Bills

119. Only members of the Executive Council of a province or a committee or member of a provincial legislature may introduce a Bill in the legislature; but only the member of the Executive Council who is responsible for financial matters in the province may introduce a money Bill in the legislature.

Money Bills

120. (1) A Bill is a money Bill if it—
(a) appropriates money;
(b) imposes provincial taxes, levies, duties or surcharges;
(c) abolishes or reduces, or grants exemptions from, any provincial taxes, levies, duties or surcharges; or
(d) authorises direct charges against a Provincial Revenue Fund.

(2) A money Bill may not deal with any other matter except—
(a) a subordinate matter incidental to the appropriation of money;
(b) the imposition, abolition or reduction of provincial taxes, levies, duties or surcharges;
(c) the granting of exemption from provincial taxes, levies, duties or surcharges; or
(d) the authorisation of direct charges against a Provincial Revenue Fund.

(3) A provincial Act must provide for a procedure by which the province's legislature may amend a money Bill.

[S. 120 substituted by s. 3 of the Constitution Seventh Amendment Act of 2001.]

Assent to Bills

121. (1) The Premier of a province must either assent to and sign a Bill passed by the provincial legislature in terms of this Chapter or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.

(2) If, after reconsideration, a Bill fully accommodates the Premier's reservations, the Premier must assent to and sign the Bill; if not, the Premier must either—
(a) assent to and sign the Bill; or
(b) refer it to the Constitutional Court for a decision on its constitutionality.

(3) If the Constitutional Court decides that the Bill is constitutional, the Premier must assent to and sign it.

Application by members to Constitutional Court

122. (1) Members of a provincial legislature may apply to the Constitutional Court for an order declaring that all or part of a provincial Act is unconstitutional.

(2) An application—
  (a) must be supported by at least 20 per cent of the members of the legislature; and
  (b) must be made within 30 days of the date on which the Premier assented to and signed the Act.

(3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if—
  (a) the interests of justice require this; and
  (b) the application has a reasonable prospect of success.

(4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

Publication of provincial Acts

123. A Bill assented to and signed by the Premier of a province becomes a provincial Act, must be published promptly and takes effect when published or on a date determined in terms of the Act.

Safekeeping of provincial Acts

124. The signed copy of a provincial Act is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.

Provincial Executives

Executive authority of provinces

125. (1) The executive authority of a province is vested in the Premier of that province.

(2) The Premier exercises the executive authority, together with the other members of the Executive Council, by—
  (a) implementing provincial legislation in the province;
  (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;

(c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
(d) developing and implementing provincial policy;
(e) co-ordinating the functions of the provincial administration and its departments;
(f) preparing and initiating provincial legislation; and
(g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

(3) A province has executive authority in terms of subsection (2)(b) only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2).

(4) Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.

(5) Subject to section 100, the implementation of provincial legislation in a province is an exclusive provincial executive power.

(6) The provincial executive must act in accordance with—
(a) the Constitution; and
(b) the provincial constitution, if a constitution has been passed for the province.

Assignment of functions

126. A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council. An assignment—
(a) must be in terms of an agreement between the relevant Executive Council member and the Municipal Council;
(b) must be consistent with the Act in terms of which the relevant power or function is exercised or performed; and
(c) takes effect upon proclamation by the Premier.

Powers and functions of Premiers

127. (1) The Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation.

(2) The Premier of a province is responsible for—

(a) assenting to and signing Bills;
(b) referring a Bill back to the provincial legislature for reconsideration of the Bill's constitutionality;
(c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
(d) summoning the legislature to an extraordinary sitting to conduct special business;
(e) appointing commissions of inquiry; and
(f) calling a referendum in the province in accordance with national legislation.

Election of Premiers

128. (1) At its first sitting after its election, and whenever necessary to fill a vacancy, a provincial legislature must elect a woman or a man from among its members to be the Premier of the province.

(2) A judge designated by the Chief Justice must preside over the election of the Premier. The procedure set out in Part A of Schedule 3 applies to the election of the Premier.

[Sub-s. (2) substituted by s. 10 of the Constitution Sixth Amendment Act of 2001.]

(3) An election to fill a vacancy in the office of Premier must be held at a time and on a date determined by the Chief Justice, but not later than 30 days after the vacancy occurs.

[Sub-s. (3) substituted by s. 10 of the Constitution Sixth Amendment Act of 2001.]

Assumption of office by Premiers

129. A Premier-elect must assume office within five days of being elected, by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Term of office and removal of Premiers

130. (1) A Premier's term of office begins when the Premier assumes office and ends upon a vacancy occurring or when the person next elected Premier assumes office.

(2) No person may hold office as Premier for more than two terms, but when a person is elected to fill a vacancy in the office of Premier, the period between that election and the next election of a Premier is not regarded as a term.

(3) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the Premier from office only on the grounds of—

(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office.

(4) Anyone who has been removed from the office of Premier in terms of subsection (3) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.

Acting Premiers

131. (1) When the Premier is absent or otherwise unable to fulfil the duties of the office of Premier, or during a vacancy in the office of Premier, an office-bearer in the order below acts as the Premier:

(a) A member of the Executive Council designated by the Premier.

(b) A member of the Executive Council designated by the other members of the Council.

(c) The Speaker, until the legislature designates one of its other members.

(2) An Acting Premier has the responsibilities, powers and functions of the Premier.

(3) Before assuming the responsibilities, powers and functions of the Premier, the Acting Premier must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Executive Councils

132. (1) The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.

(2) The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them.

Accountability and responsibilities

133. (1) The members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.

(2) Members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.

(3) Members of the Executive Council of a province must—

(a) act in accordance with the Constitution and, if a provincial constitution has been passed for the province, also that constitution; and

(b) provide the legislature with full and regular reports concerning matters under their control.

Continuation of Executive Councils after elections

134. When an election of a provincial legislature is held, the Executive Council and its members remain competent to function until the person elected Premier by the next legislature assumes office.

Oath or affirmation

135. Before members of the Executive Council of a province begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Conduct of members of Executive Councils

136. (1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Executive Council of a province may not—

(a) undertake any other paid work;

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

Transfer of functions

137. The Premier by proclamation may transfer to a member of the Executive Council—
   (a) the administration of any legislation entrusted to another member; or
   (b) any power or function entrusted by legislation to another member.

Temporary assignment of functions

138. The Premier of a province may assign to a member of the Executive Council any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

Provincial intervention in local government

139. (1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
   (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
   (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to —
      (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
      (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
      (iii) maintain economic unity; or
   (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

(2) If a provincial executive intervenes in a municipality in terms of subsection (1)(b)—
   (a) it must submit a written notice of the intervention to—
      (i) the Cabinet member responsible for local government affairs; and
      (ii) the relevant provincial legislature and the National Council of Provinces, within 14 days after the intervention began;

(b) the intervention must end if—
 (i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or
 (ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.

(3) If a Municipal Council is dissolved in terms of subsection (1)(c)—
(a) the provincial executive must immediately submit a written notice of the dissolution to—
 (i) the Cabinet member responsible for local government affairs; and
 (ii) the relevant provincial legislature and the National Council of Provinces; and
(b) the dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.

(4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and—
(a) appointing an administrator until a newly elected Municipal Council has been declared elected; and
(b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.

(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must—
(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which—
 (i) is to be prepared in accordance with national legislation; and

(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and—

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

(6) If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to—

(a) the Cabinet member responsible for local government affairs; and

(b) the relevant provincial legislature and the National Council of Provinces, within seven days after the intervention began.

(7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.

(8) National legislation may regulate the implementation of this section, including the processes established by this section.

[S. 139 substituted by s. 4 of the Constitution Eleventh Amendment Act of 2003.]

Executive decisions

140. (1) A decision by the Premier of a province must be in writing if it—

(a) is taken in terms of legislation; or

(b) has legal consequences.

(2) A written decision by the Premier must be countersigned by another Executive Council member if that decision concerns a function assigned to that other member.

(3) Proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public.

(4) Provincial legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—
- (a) tabled in the provincial legislature; and
- (b) approved by the provincial legislature.

Motions of no confidence

141. (1) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the province's Executive Council excluding the Premier, the Premier must reconstitute the Council.

(2) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the Premier, the Premier and the other members of the Executive Council must resign.

Provincial Constitutions

Adoption of provincial constitutions

142. A provincial legislature may pass a constitution for the province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill.

Contents of provincial constitutions

143. (1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for—
- (a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or
- (b) the institution, role, authority and status of a traditional monarch, where applicable.

(2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraphs (a) or (b) of subsection (1)—
- (a) must comply with the values in section 1 and with Chapter 3; and
- (b) may not confer on the province any power or function that falls—
  - (i) outside the area of provincial competence in terms of Schedules 4 and 5; or

(ii) outside the powers and functions conferred on the province by other sections of the Constitution.

Certification of provincial constitutions

144. (1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the constitution or constitutional amendment to the Constitutional Court for certification.

(2) No text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court has certified—

(a) that the text has been passed in accordance with section 142; and

(b) that the whole text complies with section 143.

Signing, publication and safekeeping of provincial constitutions

145. (1) The Premier of a province must assent to and sign the text of a provincial constitution or constitutional amendment that has been certified by the Constitutional Court.

(2) The text assented to and signed by the Premier must be published in the national Government Gazette and takes effect on publication or on a later date determined in terms of that constitution or amendment.

(3) The signed text of a provincial constitution or constitutional amendment is conclusive evidence of its provisions and, after publication, must be entrusted to the Constitutional Court for safekeeping.

Conflicting Laws

Conflicts between national and provincial legislation

146. (1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—
  (i) norms and standards;
  (ii) frameworks; or
  (iii) national policies.
(c) The national legislation is necessary for—
  (i) the maintenance of national security;
  (ii) the maintenance of economic unity;
  (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
  (iv) the promotion of economic activities across provincial boundaries;
  (v) the promotion of equal opportunity or equal access to government services; or
  (vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—
  (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
  (b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.

(7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.

(8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

Other conflicts

147. (1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to—
(a) a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution;
(b) national legislative intervention in terms of section 44 (2), the national legislation prevails over the provision of the provincial constitution; or
(c) a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.
(2) National legislation referred to in section 44(2) prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.

Conflicts that cannot be resolved

148. If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.

Status of legislation that does not prevail

149. A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.

Interpretation of conflicts

150. When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.

CHAPTER 7

LOCAL GOVERNMENT

Status of municipalities

151. (1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
(2) The executive and legislative authority of a municipality is vested in its Municipal Council.
(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

Objects of local government

152. (1) The objects of local government are—
(a) to provide democratic and accountable government for local communities;
(b) to ensure the provision of services to communities in a sustainable manner;
(c) to promote social and economic development;
(d) to promote a safe and healthy environment; and
(e) to encourage the involvement of communities and community organisations in the matters of local government.
(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

Developmental duties of municipalities

153. A municipality must—
(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
(b) participate in national and provincial development programmes.

Municipalities in co-operative government

154. (1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

(2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

Establishment of municipalities

155. (1) There are the following categories of municipality:

(a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.

(b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.

(c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.

(2) National legislation must define the different types of municipality that may be established within each category.

(3) National legislation must—

(a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;

(b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and

(c) subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.

(4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.

(5) Provincial legislation must determine the different types of municipality to be established in the province.

(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—
- (a) provide for the monitoring and support of local government in the province; and
- (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

(6A) ......

[Sub-s. (6A) inserted by s. 1 of the Constitution Third Amendment Act of 1998 and deleted by s. 2 of the Constitution Twelfth Amendment Act of 2005.]

(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

Powers and functions of municipalities

156. (1) A municipality has executive authority in respect of, and has the right to administer—
- (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
- (b) any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

(3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a bylaw and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if—

(a) that matter would most effectively be administered locally; and

(b) the municipality has the capacity to administer it.

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

Composition and election of Municipal Councils

157. (1) A Municipal Council consists of—

(a) members elected in accordance with subsections (2) and (3); or

(b) if provided for by national legislation—

(i) members appointed by other Municipal Councils to represent those other Councils; or

(ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.

[Sub-s. (1) substituted by s. 1 (a) of the Constitution Eighth Amendment Act of 2002 and by s. 3 of the Constitution Fifteenth Amendment Act of 2008.]

(2) The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system—

(a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or

(b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll.

(3) An electoral system in terms of subsection (2) must result, in general, in proportional representation.

[Sub-s. (3) substituted by s. 1(b) of the Constitution Eighth Amendment Act of 2002.]

(4) (a) If the electoral system includes ward representation, the delimitation of wards must be done by an independent authority appointed in terms of, and operating according to, procedures and criteria prescribed by national legislation.

(b) . . . . . .

[Para. (b) deleted by s. 3 of the Constitution Twelfth Amendment Act of 2005.]

[Sub-s. (4) substituted by s. 2 of the Constitution Third Amendment Act of 1998.]

(5) A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll.

(6) The national legislation referred to in subsection (1)(b) must establish a system that allows for parties and interests reflected within the Municipal Council making the appointment, to be fairly represented in the Municipal Council to which the appointment is made.

Membership of Municipal Councils

158. (1) Every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except—

(a) anyone who is appointed by, or is in the service of, the municipality and receives remuneration for that appointment or service, and who has not been exempted from this disqualification in terms of national legislation;

(b) anyone who is appointed by, or is in the service of, the state in another sphere, and receives remuneration for that appointment or service, and who has been disqualified from membership of a Municipal Council in terms of national legislation;

(c) anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1)(c), (d) or (e) from being a member of the Assembly;

(d) a member of the National Assembly, a delegate to the National Council of Provinces or a member of a provincial legislature; but this disqualification does not apply to a member of a Municipal Council representing local government in the National Council; or

(e) a member of another Municipal Council; but this disqualification does not apply to a member of a Municipal Council representing that Council in another Municipal Council of a different category.

(2) A person who is not eligible to be a member of a Municipal Council in terms of subsection (1)(a), (b), (d) or (e) may be a candidate for the Council, subject to any limits or conditions established by national legislation.

(3) Vacancies in a Municipal Council must be filled in terms of national legislation.

[Sub-s. (3) added by s. 4 of the Constitution Fifteenth Amendment Act of 2008.]

Terms of Municipal Councils

159. (1) The term of a Municipal Council may be no more than five years, as determined by national legislation.

(2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.

(3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.

[S. 159 substituted by s. 1 of the Constitution Second Amendment Act of 1998.]

Internal procedures

160. (1) A Municipal Council—

(a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;

(b) must elect its chairperson;

(c) may elect an executive committee and other committees, subject to national legislation; and

(d) may employ personnel that are necessary for the effective performance of its functions.

(2) The following functions may not be delegated by a Municipal Council:

(a) The passing of by-laws;

(b) the approval of budgets;

(c) the imposition of rates and other taxes, levies and duties; and

(d) the raising of loans.

(3) (a) A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.

(b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.

(c) All other questions before a Municipal Council are decided by a majority of the votes cast.

(4) No by-law may be passed by a Municipal Council unless—
  (a) all the members of the Council have been given reasonable notice; and
  (b) the proposed by-law has been published for public comment.

(5) National legislation may provide criteria for determining—
  (a) the size of a Municipal Council;
  (b) whether Municipal Councils may elect an executive committee or any other committee; or
  (c) the size of the executive committee or any other committee of a Municipal Council.

(6) A Municipal Council may make by-laws which prescribe rules and orders for—
  (a) its internal arrangements;
  (b) its business and proceedings; and
  (c) the establishment, composition, procedures, powers and functions of its committees.

(7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.

(8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that—
  (a) allows parties and interests reflected within the Council to be fairly represented;
  (b) is consistent with democracy; and
  (c) may be regulated by national legislation.

Privilege

161. Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members.

Publication of municipal by-laws

162. (1) A municipal by-law may be enforced only after it has been published in the official gazette of the relevant province.

(2) A provincial official gazette must publish a municipal by-law upon request by the municipality.

(3) Municipal by-laws must be accessible to the public.

Organised local government

163. An Act of Parliament enacted in accordance with the procedure established by section 76 must—
   (a) provide for the recognition of national and provincial organisations representing municipalities; and
   (b) determine procedures by which local government may—
      (i) consult with the national or a provincial government;
      (ii) designate representatives to participate in the National Council of Provinces; and
      (iii) participate in the process prescribed in the national legislation envisaged in section 221(1)(c).

[S. 163(b) substituted by s. 4 of the Constitution Seventh Amendment Act of 2001.]

Other matters

164. Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

CHAPTER 8

COURTS AND ADMINISTRATION OF JUSTICE

Judicial authority

165. (1) The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

[Sub-s (6) added by s. 1 of the Constitution Seventeenth Amendment Act of 2012.]

Judicial system

166. The courts are—
(a) the Constitutional Court;
(b) the Supreme Court of Appeal;
(c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;
(d) the Magistrates' Courts; and
(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

[Sub-s (c) and (e) substituted by s. 2 of the Constitution Seventeenth Amendment Act of 2012.]

Constitutional Court

167. (1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.

[Sub-s. (1) substituted by s. 11 of the Constitution Sixth Amendment Act of 2001.]

(2) A matter before the Constitutional Court must be heard by at least eight judges.

(3) The Constitutional Court—
- (a) is the highest court of the Republic; and
- (b) may decide—
  - (i) constitutional matters; and
  - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and
- (c) makes the final decision whether a matter is within its jurisdiction.

[Sub-s (3) substituted by s. 3 of the Constitution Seventeenth Amendment Act of 2012.]

(4) Only the Constitutional Court may—
- (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
- (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
- (c) decide applications envisaged in section 80 or 122;
- (d) decide on the constitutionality of any amendment to the Constitution;
- (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
- (f) certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.

[Sub-s (5) substituted by s. 3 of the Constitution Seventeenth Amendment Act of 2012.]

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

(a) to bring a matter directly to the Constitutional Court; or
(b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

Supreme Court of Appeal

168. (1) The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms of an Act of Parliament.

[Sub-s. (1) substituted by s. 12 of the Constitution Sixth Amendment Act of 2001.]

(2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.

[Sub-s. (2) substituted by s. 12 of the Constitution Sixth Amendment Act of 2001.]

(3) (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such an extent as may be determined by an Act of Parliament.

(b) The Supreme Court of Appeal may decide only—
(i) appeals;
(ii) issues connected with appeals; and
(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

[Sub-s (3) substituted by s. 4 of the Constitution Seventeenth Amendment Act of 2012.]

High Court of South Africa

169. (1) The High Court of South Africa may decide—
(a) any constitutional matter except a matter that—
(i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or
(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
(b) any other matter not assigned to another court by an Act of Parliament.

(2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for—
  (a) the establishing of Divisions, with one or two more seats in a Division; and
  (b) the assigning of jurisdiction to a Division or a seat with a Division.

(3) Each Division of the High Court of South Africa—
  (a) has a Judge President;
  (b) may have one or more Deputy Judges President; and
  (c) has the number of other judges determined in terms of national legislation.

[S. 169 substituted by s. 5 of the Constitution Seventeenth Amendment Act of 2012.]

Other courts

170. All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

[S. 170 substituted by s. 6 of the Constitution Seventeenth Amendment Act of 2012.]

Court procedures

171. All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

Powers of courts in constitutional matters

172. (1) When deciding a constitutional matter within its power, a court—
  (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  (b) may make any order that is just and equitable, including—
    (i) an order limiting the retrospective effect of the declaration of invalidity; and
    (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an

order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[Par (a) substituted by s. 7 of the Constitution Seventeenth Amendment Act of 2012.]

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

Inherent power

173. The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

[S. 173 substituted by s. 8 of the Constitution Seventeenth Amendment Act of 2012.]

Appointment of judicial officers

174. (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

(3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.

[Sub-s. (3) substituted by s. 13 of the Constitution Sixth Amendment Act of 2001.]

(4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
  (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
  (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
  (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

[Sub-s. (4) substituted by s. 13 of the Constitution Sixth Amendment Act of 2001.]

(5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.

(6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.

(7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

(8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.

Appointment of acting judges

175. (1) The President may appoint a woman or a man to serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices , or if the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges who had been appointed to the Constitutional Court in terms of section 174(4).

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.

[S. 175 substituted by s. 9 of the Constitution Seventeenth Amendment Act of 2012.]

Terms of office and remuneration

176. (1) A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.

[Sub-s. (1) substituted by s. 15 of the Constitution Sixth Amendment Act of 2001.]

(2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.

(3) The salaries, allowances and benefits of judges may not be reduced.

Removal

177. (1) A judge may be removed from office only if—
- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
- (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

Judicial Service Commission

178. (1) There is a Judicial Service Commission consisting of—
- (a) the Chief Justice, who presides at meetings of the Commission;
- (b) the President of the Supreme Court of Appeal;

[Para. (b) substituted by s. 16(a) of the Constitution Sixth Amendment Act of 2001.]

- (c) one Judge President designated by the Judges President;
- (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;

(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
(g) one teacher of law designated by teachers of law at South African universities;
(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them.

[Para. (k) substituted by s. 2(a) of the Constitution Second Amendment Act of 1998, by s. 16(b) of the Constitution Sixth Amendment Act of 2001 and by s. 10 of the Constitution Seventeenth Amendment Act of 2012.]

(2) If the number of persons nominated from within the advocates' or attorneys' profession in terms of subsection (1)(e) or (f) equals the number of vacancies to be filled, the President must appoint them. If the number of persons nominated exceeds the number of vacancies to be filled, the President, after consulting the relevant profession, must appoint sufficient of the nominees to fill the vacancies, taking into account the need to ensure that those appointed represent the profession as a whole.

(3) Members of the Commission designated by the National Council of Provinces serve until they are replaced together, or until any vacancy occurs in their number. Other members who were designated or nominated to the Commission serve until they are replaced by those who designated or nominated them.

(4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.

(5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers

any matter except the appointment of a judge, it must sit without the members designated in terms of subsection (1)(h) and (i).

(6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.

(7) If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.

[Sub-s. (7) added by s. 2(b) of the Constitution Second Amendment Act of 1998 and substituted by s. 16 (c) of Constitution Sixth Amendment Act of 2001.]

(8) The President and the persons who appoint, nominate or designate the members of the Commission in terms of subsection (1)(c), (e), (f) and (g), may, in the same manner appoint, nominate or designate an alternate for each of those members, to serve on the Commission whenever the member concerned is temporarily unable to do so by reason of his or her incapacity or absence from the Republic or for any other sufficient reason.

[Sub-s. (8) added by s. 2(b) of the Constitution Second Amendment Act of 1998.]

Prosecuting authority

179. (1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions—

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions—
- (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
- (b) must issue policy directives which must be observed in the prosecution process;
- (c) may intervene in the prosecution process when policy directives are not complied with; and
- (d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
  - (i) The accused person.
  - (ii) The complainant.
  - (iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

Other matters concerning administration of justice

180. National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including—
- (a) training programmes for judicial officers;
- (b) procedures for dealing with complaints about judicial officers; and
- (c) the participation of people other than judicial officers in court decisions.

CHAPTER 9

STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

Establishment and governing principles

181. (1) The following state institutions strengthen constitutional democracy in the Republic:
  (a) The Public Protector.
  (b) The South African Human Rights Commission.
  (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
  (d) The Commission for Gender Equality.
  (e) The Auditor-General.
  (f) The Electoral Commission.
(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
(4) No person or organ of state may interfere with the functioning of these institutions.
(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

Public Protector

Functions of Public Protector

182. (1) The Public Protector has the power, as regulated by national legislation—
  (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and
(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

Tenure

183. The Public Protector is appointed for a non-renewable period of seven years.

South African Human Rights Commission

Functions of South African Human Rights Commission

184. (1) The South African Human Rights Commission must—
(a) promote respect for human rights and a culture of human rights;
(b) promote the protection, development and attainment of human rights; and
(c) monitor and assess the observance of human rights in the Republic.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power—
(a) to investigate and to report on the observance of human rights;
(b) to take steps to secure appropriate redress where human rights have been violated;
(c) to carry out research; and
(d) to educate.

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

(4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

Functions of Commission

185. (1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are—
(a) to promote respect for the rights of cultural, religious and linguistic communities;
(b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
(c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

(2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.

(3) The Commission may report any matter which falls within its powers and functions to the South African Human Rights Commission for investigation.

(4) The Commission has the additional powers and functions prescribed by national legislation.

Composition of Commission

186. (1) The number of members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and their appointment and terms of office must be prescribed by national legislation.

(2) The composition of the Commission must—
(a) be broadly representative of the main cultural, religious and linguistic communities in South Africa; and
(b) broadly reflect the gender composition of South Africa.

Commission for Gender Equality

Functions of Commission for Gender Equality

187. (1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.

(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

(3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

Auditor-General

Functions of Auditor-General

188. (1) The Auditor-General must audit and report on the accounts, financial statements and financial management of—

(a) all national and provincial state departments and administrations;

(b) all municipalities; and

(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of—

(a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or

(b) any institution that is authorised in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.

Tenure

189. The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.

Electoral Commission

Functions of Electoral Commission

190. (1) The Electoral Commission must—
  - (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
  - (b) ensure that those elections are free and fair; and
  - (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

 (2) The Electoral Commission has the additional powers and functions prescribed by national legislation.

Composition of Electoral Commission

191. The Electoral Commission must be composed of at least three persons. The number of members and their terms of office must be prescribed by national legislation.

Independent Authority to Regulate Broadcasting

Broadcasting Authority

192. National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

General Provisions

Appointments

193. (1) The Public Protector and the members of any Commission established by this Chapter must be women or men who—

(a) are South African citizens;
(b) are fit and proper persons to hold the particular office; and
(c) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of—
(a) the South African Human Rights Commission;
(b) the Commission for Gender Equality; and
(c) the Electoral Commission.

(5) The National Assembly must recommend persons—
(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and
(b) approved by the Assembly by a resolution adopted with a supporting vote—
(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or
(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a).

Removal from office

194. (1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—
(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of—
  (a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
  (b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President—
  (a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
  (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

CHAPTER 10

PUBLIC ADMINISTRATION

Basic values and principles governing public administration

195. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to—
(a) administration in every sphere of government;
(b) organs of state; and
(c) public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.

Public Service Commission

196. (1) There is a single Public Service Commission for the Republic.

(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.

(3) Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.

(4) The powers and functions of the Commission are—

(a) to promote the values and principles set out in section 195, throughout the public service;

(b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;

(c) to propose measures to ensure effective and efficient performance within the public service;

(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;

(e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and

(f) either of its own accord or on receipt of any complaint—

(i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;

(ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;

(iii) to monitor and investigate adherence to applicable procedures in the public service; and

(iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service; and

(g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament.

[Para. (g) added by s. 3 of the Constitution Second Amendment Act of 1998.]

(5) The Commission is accountable to the National Assembly.

(6) The Commission must report at least once a year in terms of subsection (4)(e)—

(a) to the National Assembly; and

(b) in respect of its activities in a province, to the legislature of that province.

(7) The Commission has the following 14 commissioners appointed by the President:

(a) Five commissioners approved by the National Assembly in accordance with subsection (8)(a); and

(b) one commissioner for each province nominated by the Premier of the province in accordance with subsection (8)(b).

(8) (a) A commissioner appointed in terms of subsection (7)(a) must be—

(i) recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and

(ii) approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members.

(b) A commissioner nominated by the Premier of a province must be—

(i) recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the legislature; and

(ii) approved by the legislature by a resolution adopted with a supporting vote of a majority of its members.

(9) An Act of Parliament must regulate the procedure for the appointment of commissioners.

(10) A commissioner is appointed for a term of five years, which is renewable for one additional term only, and must be a woman or a man who is—

(a) a South African citizen; and
(b) a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services.

(11) A commissioner may be removed from office only on—
(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and
(c) the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office.

(12) The President must remove the relevant commissioner from office upon—
(a) the adoption by the Assembly of a resolution calling for that commissioner's removal; or
(b) written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner's removal.

(13) Commissioners referred to in subsection (7)(b) may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation.

Public Service

197. (1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

(4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.

CHAPTER 11

SECURITY SERVICES

Governing principles

198. The following principles govern national security in the Republic:

(a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.

(b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

(c) National security must be pursued in compliance with the law, including international law.

(d) National security is subject to the authority of Parliament and the national executive.

Establishment, structuring and conduct of security services

199. (1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

(2) The defence force is the only lawful military force in the Republic.

(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

(4) The security services must be structured and regulated by national legislation.

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

(6) No member of any security service may obey a manifestly illegal order.

(7) Neither the security services, nor any of their members, may, in the performance of their functions—

(a) prejudice a political party interest that is legitimate in terms of the Constitution; or

(b) further, in a partisan manner, any interest of a political party.

(8) To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

Defence

Defence force

200. (1) The defence force must be structured and managed as a disciplined military force.

(2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

Political responsibility

201. (1) A member of the Cabinet must be responsible for defence.

(2) Only the President, as head of the national executive, may authorise the employment of the defence force—

(a) in co-operation with the police service;
(b) in defence of the Republic; or
(c) in fulfilment of an international obligation.

(3) When the defence force is employed for any purpose mentioned in subsection (2), the President must inform Parliament, promptly and in appropriate detail, of—

(a) the reasons for the employment of the defence force;
(b) any place where the force is being employed;
(c) the number of people involved; and
(d) the period for which the force is expected to be employed.

(4) If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the information required in subsection (3) to the appropriate oversight committee.

Command of defence force

202. (1) The President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Command of the defence force.

(2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.

State of national defence

203. (1) The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of—
   (a) the reasons for the declaration;
   (b) any place where the defence force is being employed; and
   (c) the number of people involved.

(2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration.

(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.

Defence civilian secretariat

204. A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence.

Police

Police service

205. (1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.

(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

Political responsibility

206. (1) A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.

(2) The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.

(3) Each province is entitled—
- (a) to monitor police conduct;
- (b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;
- (c) to promote good relations between the police and the community;
- (d) to assess the effectiveness of visible policing; and
- (e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.

(4) A provincial executive is responsible for policing functions—
- (a) vested in it by this Chapter;
- (b) assigned to it in terms of national legislation; and
- (c) allocated to it in the national policing policy.

(5) In order to perform the functions set out in subsection (3), a province—
- (a) may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and
- (b) must make recommendations to the Cabinet member responsible for policing.

(6) On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

(7) National legislation must provide a framework for the establishment, powers, functions and control of municipal police services.

(8) A committee composed of the Cabinet member and the members of the Executive Councils responsible for policing must be established to ensure effective co-ordination of the police service and effective co-operation among the spheres of government.

(9) A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions.

Control of police service

207. (1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

(3) The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.

(4) The provincial commissioners are responsible for policing in their respective provinces—

(a) as prescribed by national legislation; and

(b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).

(5) The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.

(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation.

Police civilian secretariat

208. A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing.

Intelligence

Establishment and control of intelligence services

209. (1) Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation.

(2) The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility.

Powers, functions and monitoring

210. National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for—

(a) the co-ordination of all intelligence services; and

(b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.

CHAPTER 12

TRADITIONAL LEADERS

Recognition

211. (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Role of traditional leaders

212. (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.

CHAPTER 13

FINANCE

General Financial Matters

National Revenue Fund

213. (1) There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from the National Revenue Fund only—

(a) in terms of an appropriation by an Act of Parliament; or

(b) as a direct charge against the National Revenue Fund, when it is provided for in the Constitution or an Act of Parliament.

(3) A province's equitable share of revenue raised nationally is a direct charge against the National Revenue Fund.

[Date of commencement of s. 213: 1 January 1998]

Equitable shares and allocations of revenue

214. (1) An Act of Parliament must provide for—

(a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

(b) the determination of each province's equitable share of the provincial share of that revenue; and

(c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

(2) The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account—

(a) the national interest;

(b) any provision that must be made in respect of the national debt and other national obligations;

(c) the needs and interests of the national government, determined by objective criteria;
(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
(e) the fiscal capacity and efficiency of the provinces and municipalities;
(f) developmental and other needs of provinces, local government and municipalities;
(g) economic disparities within and among the provinces;
(h) obligations of the provinces and municipalities in terms of national legislation;
(i) the desirability of stable and predictable allocations of revenue shares; and
(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

[Date of commencement of s. 214: 1 January 1998]

National, provincial and municipal budgets

215. (1) National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.

(2) National legislation must prescribe—
(a) the form of national, provincial and municipal budgets;
(b) when national and provincial budgets must be tabled; and
(c) that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.

(3) Budgets in each sphere of government must contain—
(a) estimates of revenue and expenditure, differentiating between capital and current expenditure;
(b) proposals for financing any anticipated deficit for the period to which they apply; and
(c) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year.

[Date of commencement of s. 215: 1 January 1998.]

Treasury control

216. (1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing—
   (a) generally recognised accounting practice;
   (b) uniform expenditure classifications; and
   (c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

[Sub-s. (2) substituted by s. 5 (a) of the Constitution Seventh Amendment Act of 2001.]

(3) A decision to stop the transfer of funds due to a province in terms of section 214(1)(b) may be taken only in the circumstances mentioned in subsection (2) and—
   (a) may not stop the transfer of funds for more than 120 days; and
   (b) may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 76(1) and prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the national treasury.

[Sub-s. (3) amended by s. 5 (b) of the Constitution Seventh Amendment Act of 2001.]

(4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection (3).

(5) Before Parliament may approve or renew a decision to stop the transfer of funds to a province—
   (a) the Auditor-General must report to Parliament; and
   (b) the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee.

Procurement

217. (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

[Sub-s. (3) substituted by s. 6 of the Constitution Seventh Amendment Act of 2001.]

Government guarantees

218. (1) The national government, a provincial government or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

(3) Each year, every government must publish a report on the guarantees it has granted.

[Date of commencement of S. 218: 1 January 1998.]

Remuneration of persons holding public office

219. (1) An Act of Parliament must establish a framework for determining—
(a) the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders; and
(b) the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories.

(2) National legislation must establish an independent commission to make recommendations concerning the salaries, allowances and benefits referred to in subsection (1).

(3) Parliament may pass the legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(4) The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(5) National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192.

Financial and Fiscal Commission

Establishment and functions

220. (1) There is a Financial and Fiscal Commission for the Republic which makes recommendations envisaged in this Chapter, or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.

(2) The Commission is independent and subject only to the Constitution and the law, and must be impartial.

(3) The Commission must function in terms of an Act of Parliament and, in performing its functions, must consider all relevant factors, including those listed in section 214(2).

Appointment and tenure of members

221. (1) The Commission consists of the following women and men appointed by the President, as head of the national executive:

(a) A chairperson and a deputy chairperson;

(b) three persons selected, after consulting the Premiers, from a list compiled in accordance with a process prescribed by national legislation;

(c) two persons selected, after consulting organised local government, from a list compiled in accordance with a process prescribed by national legislation; and

(d) two other persons.

[Sub-s (1) substituted by s. 2 of the Constitution Fifth Amendment Act of 1999] and substituted by s. 7(a) of the Constitution Seventh Amendment Act of 2001.]

(1A) National legislation referred to in subsection (1) must provide for the participation of—
  (a) the Premiers in the compilation of a list envisaged in subsection (1) (b); and
  (b) organised local government in the compilation of a list envisaged in subsection (1) (c).

[Sub-s. (1A) inserted by s. 7(b) of the Constitution Seventh Amendment Act of 2001.]

(2) Members of the Commission must have appropriate expertise.

(3) Members serve for a term established in terms of national legislation. The President may remove a member from office on the ground of misconduct, incapacity or incompetence.

Reports

222. The Commission must report regularly both to Parliament and to the provincial legislatures.

Central Bank

Establishment

223. The South African Reserve Bank is the central bank of the Republic and is regulated in terms of an Act of Parliament.

Primary object

224. (1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

Powers and functions

225. The powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, which powers and functions must be determined by an Act of Parliament and must be exercised or performed subject to the conditions prescribed in terms of that Act.

Provincial and Local Financial Matters

Provincial Revenue Funds

226. (1) There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.
(2) Money may be withdrawn from a Provincial Revenue Fund only—
(a) in terms of an appropriation by a provincial Act; or
(b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.
(3) Revenue allocated through a province to local government in that province in terms of section 214(1), is a direct charge against that province's Revenue Fund.
(4) National legislation may determine a framework within which—
(a) a provincial Act may in terms of subsection (2)(b) authorise the withdrawal of money as a direct charge against a Provincial Revenue Fund; and
(b) revenue allocated through a province to local government in that province in terms of subsection (3) must be paid to municipalities in the province.

[Sub-s. (4) added by s. 8 of the Constitution Seventh Amendment Act of 2001.]
[Date of commencement of s. 226: 1 January 1998]

National sources of provincial and local government funding

227. (1) Local government and each province—
(a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and
(b) may receive other allocations from national government revenue, either conditionally or unconditionally.
(2) Additional revenue raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them

out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.

(3) A province's equitable share of revenue raised nationally must be transferred to the province promptly and without deduction, except when the transfer has been stopped in terms of section 216.

(4) A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution.

[Date of commencement of s. 227: 1 January 1998]

Provincial taxes

228. (1) A provincial legislature may impose—

(a) taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and

(b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.

[Para. (b) substituted by s. 9 of the Constitution Seventh Amendment Act of 2001.]

(2) The power of a provincial legislature to impose taxes, levies, duties and surcharges—

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and

(b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

[Date of commencement of s. 228: 1 January 1998]

Municipal fiscal powers and functions

229. (1) Subject to subsections (2), (3) and (4), a municipality may impose—

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

(b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.

(2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties—

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and

(b) may be regulated by national legislation.

(3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:

(a) The need to comply with sound principles of taxation.

(b) The powers and functions performed by each municipality.

(c) The fiscal capacity of each municipality.

(d) The effectiveness and efficiency of raising taxes, levies and duties.

(e) Equity.

(4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.

(5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

[Date of commencement of s. 229: 1 January 1998]

Provincial loans

230. (1) A province may raise loans for capital or current expenditure in accordance with national legislation, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

[S. 230 substituted by s. 10 of the Constitution Seventh Amendment Act of 2001.]

Municipal loans

230A. (1) A Municipal Council may, in accordance with national legislation—

(a) raise loans for capital or current expenditure for the municipality, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year; and

(b) bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

[S. 230A inserted by s. 17 of the Constitution Sixth Amendment Act of 2001.]

CHAPTER 14

GENERAL PROVISIONS

International Law

International agreements

231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Customary international law

232. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Application of international law

233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Other Matters

Charters of Rights

234. In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

Self-determination

235. The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

Funding for political parties

236. To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.

Diligent performance of obligations

237. All constitutional obligations must be performed diligently and without delay.

Agency and delegation

238. An executive organ of state in any sphere of government may—
    (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
    (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

Definitions

239. In the Constitution, unless the context indicates otherwise—
“national legislation” includes—
(a) subordinate legislation made in terms of an Act of Parliament; and
(b) legislation that was in force when the Constitution took effect and that is administered by the national government;
“organ of state” means—
(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution—
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;
“provincial legislation” includes—
(a) subordinate legislation made in terms of a provincial Act; and
(b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.

Inconsistencies between different texts

240. In the event of an inconsistency between different texts of the Constitution, the English text prevails.

Transitional arrangements

241. Schedule 6 applies to the transition to the new constitutional order established by this Constitution, and any matter incidental to that transition.

Repeal of laws

242. The laws mentioned in Schedule 7 are repealed, subject to section 243 and Schedule 6.

Short title and commencement

243. (1) This Act is called the Constitution of the Republic of South Africa, 1996, and comes into effect as soon as possible on a date set by the President by proclamation, which may not be a date later than 1 July 1997.

(2) The President may set different dates before the date mentioned in subsection (1) in respect of different provisions of the Constitution.

(3) Unless the context otherwise indicates, a reference in a provision of the Constitution to a time when the Constitution took effect must be construed as a reference to the time when that provision took effect.

(4) If a different date is set for any particular provision of the Constitution in terms of subsection (2), any corresponding provision of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), mentioned in the proclamation, is repealed with effect from the same date.

(5) Sections 213, 214, 215, 216, 218, 226, 227, 228, 229 and 230 come into effect on 1 January 1998, but this does not preclude the enactment in terms of this Constitution of legislation envisaged in any of these provisions before that date. Until that date any corresponding and incidental provisions of the Constitution of the Republic of South Africa, 1993, remain in force.

SCHEDULE 1

National Flag

(1) The national flag is rectangular; it is one and a half times longer than it is wide.

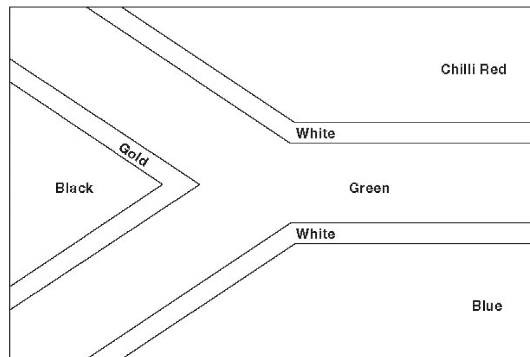
(2) It is black, gold, green, white, chilli red and blue.

(3) It has a green Y-shaped band that is one fifth as wide as the flag. The centre lines of the band start in the top and bottom corners next to the flag post, converge in the centre of the flag, and continue horizontally to the middle of the free edge.

(4) The green band is edged, above and below in white, and towards the flag post end, in gold. Each edging is one fifteenth as wide as the flag.

(5) The triangle next to the flag post is black.

(6) The upper horizontal band is chilli red and the lower horizontal band is blue. These bands are each one third as wide as the flag.



SCHEDULE 1A

Geographical Areas of Provinces

[Schedule 1A inserted by s. 4 of the Constitution Twelfth Amendment Act of 2005 and amended by s. 1 of the Constitution Thirteenth Amendment Act of 2007 and by the Constitution Sixteenth Amendment Act of 2009.]

The Province of the Eastern Cape

[Demarcation of the Province of the Eastern Cape substituted by the Constitution Thirteenth Amendment Act of 2007.]

Map No. 3 of Schedule 1 to Notice 1998 of 2005
Map No. 6 of Schedule 2 to Notice 1998 of 2005
Map No. 7 of Schedule 2 to Notice 1998 of 2005
Map No. 8 of Schedule 2 to Notice 1998 of 2005
Map No. 9 of Schedule 2 to Notice 1998 of 2005
Map No. 10 of Schedule 2 to Notice 1998 of 2005
Map No. 11 of Schedule 2 to Notice 1998 of 2005

The Province of the Free State

Map No. 12 of Schedule 2 to Notice 1998 of 2005
Map No. 13 of Schedule 2 to Notice 1998 of 2005
Map No. 14 of Schedule 2 to Notice 1998 of 2005
Map No. 15 of Schedule 2 to Notice 1998 of 2005
Map No. 16 of Schedule 2 to Notice 1998 of 2005

The Province of Gauteng

[Demarcation of the Province of Gauteng amended by the Constitution Sixteenth Amendment Act of 2009.]

Map No. 4 in Notice 1490 of 2008

[Reference to Map No. 4 substituted by s. 1(a) of the Constitution Sixteenth Amendment Act of 2009.]

Map No. 17 of Schedule 2 to Notice 1998 of 2005
Map No. 18 of Schedule 2 to Notice 1998 of 2005

Map No. 19 of Schedule 2 to Notice 1998 of 2005
Map No. 20 of Schedule 2 to Notice 1998 of 2005
Map No. 21 of Schedule 2 to Notice 1998 of 2005

The Province of KwaZulu-Natal

[Demarcation of the Province of KwaZulu-Natal substituted by the Constitution Thirteenth Amendment Act of 2007.]

Map No. 22 of Schedule 2 to Notice 1998 of 2005
Map No. 23 of Schedule 2 to Notice 1998 of 2005
Map No. 24 of Schedule 2 to Notice 1998 of 2005
Map No. 25 of Schedule 2 to Notice 1998 of 2005
Map No. 26 of Schedule 2 to Notice 1998 of 2005
Map No. 27 of Schedule 2 to Notice 1998 of 2005
Map No. 28 of Schedule 2 to Notice 1998 of 2005
Map No. 29 of Schedule 2 to Notice 1998 of 2005
Map No. 30 of Schedule 2 to Notice 1998 of 2005
Map No. 31 of Schedule 2 to Notice 1998 of 2005
Map No. 32 of Schedule 2 to Notice 1998 of 2005

The Province of Limpopo

Map No. 33 of Schedule 2 to Notice 1998 of 2005
Map No. 34 of Schedule 2 to Notice 1998 of 2005
Map No. 35 of Schedule 2 to Notice 1998 of 2005
Map No. 36 of Schedule 2 to Notice 1998 of 2005
Map No. 37 of Schedule 2 to Notice 1998 of 2005

The Province of Mpumalanga

Map No. 38 of Schedule 2 to Notice 1998 of 2005
Map No. 39 of Schedule 2 to Notice 1998 of 2005
Map No. 40 of Schedule 2 to Notice 1998 of 2005

The Province of the Northern Cape

Map No. 41 of Schedule 2 to Notice 1998 of 2005
Map No. 42 of Schedule 2 to Notice 1998 of 2005
Map No. 43 of Schedule 2 to Notice 1998 of 2005
Map No. 44 of Schedule 2 to Notice 1998 of 2005
Map No. 45 of Schedule 2 to Notice 1998 of 2005

The Province of North West

[Demarcation of the Province of North West amended by the Constitution Sixteenth Amendment Act of 2009.]

Map No. 5 in Notice 1490 of 2008

[Reference to Map No. 5 substituted by s. 1(b) of the Constitution Sixteenth Amendment Act of 2009.]

Map No. 46 of Schedule 2 to Notice 1998 of 2005
Map No. 47 of Schedule 2 to Notice 1998 of 2005
Map No. 48 of Schedule 2 to Notice 1998 of 2005

The Province of the Western Cape

Map No. 49 of Schedule 2 to Notice 1998 of 2005
Map No. 50 of Schedule 2 to Notice 1998 of 2005
Map No. 51 of Schedule 2 to Notice 1998 of 2005
Map No. 52 of Schedule 2 to Notice 1998 of 2005
Map No. 53 of Schedule 2 to Notice 1998 of 2005
Map No. 54 of Schedule 2 to Notice 1998 of 2005

SCHEDULE 2

Oaths and Solemn Affirmations

[Schedule 2 amended by s. 2 of Constitution First Amendment Act of 1997 (Eng text only) and substituted by s. 18 of Constitution Sixth Amendment Act of 2001.]

Oath or solemn affirmation of President and Acting President

1. The President or Acting President, before the Chief Justice, or another judge designated by the Chief Justice, must swear/affirm as follows:

In the presence of everyone assembled here, and in full realisation of the high calling I assume as President/Acting President of the Republic of South Africa, I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

- promote all that will advance the Republic, and oppose all that may harm it;
- protect and promote the rights of all South Africans;
- discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;
- do justice to all; and
- devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

Oath or solemn affirmation of Deputy President

2. The Deputy President, before the Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows:

In the presence of everyone assembled here, and in full realisation of the high calling I assume as Deputy President of the Republic of South Africa, I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

- promote all that will advance the Republic, and oppose all that may harm it;
- be a true and faithful counsellor;
- discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;
- do justice to all; and
- devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

Oath or solemn affirmation of Ministers and Deputy Ministers

3. Each Minister and Deputy Minister, before the Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Minister/Deputy Minister with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.
(In the case of an oath: So help me God.)

Oath or solemn affirmation of members of the National Assembly, permanent delegates to the National Council of Provinces and members of the provincial legislatures

4. (1) Members of the National Assembly, permanent delegates to the National Council of Provinces and members of provincial legislatures, before the Chief Justice or a judge designated by the Chief Justice, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the: Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I solemnly promise to perform my functions as a member of the National Assembly/permanent delegate to the National Council of Provinces/member of the legislature of the province of C.D. to the best of my ability.
(In the case of an oath: So help me God.)

(2) Persons filling a vacancy in the National Assembly, a permanent delegation to the National Council of Provinces or a provincial legislature may swear or affirm in terms of subitem (1) before the presiding officer of the Assembly, Council or legislature, as the case may be.

Oath or solemn affirmation of Premiers, Acting Premiers and members of provincial Executive Councils

5. The Premier or Acting Premier of a province, and each member of the Executive Council of a province, before the Chief Justice or a judge designated by the Chief Justice, must swear/affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Premier/Acting Premier/member of the Executive Council of the province of C.D. with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.
(In the case of an oath: So help me God.)

Oath or solemn affirmation of Judicial Officers

6. (1) Each judge or acting judge, before the Chief Justice or another judge designated by the Chief Justice, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/ E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.
(In the case of an oath: So help me God.)

(2) A person appointed to the office of Chief Justice who is not already a judge at the time of that appointment must swear or affirm before the Deputy Chief Justice, or failing that judge, the next most senior available judge of the Constitutional Court.

(3) Judicial officers, and acting judicial officers, other than judges, must swear/affirm in terms of national legislation.

SCHEDULE 3

Election Procedures

[Schedule 3 amended by s. 2 of the Constitution Fourth Amendment Act of 1999, by s. 19 of the Constitution Sixth Amendment Act of 2001, by s. 3 of the Constitution Ninth Amendment Act of 2002 and by s. 5 of the Constitution Fourteenth Amendment Act of 2008.]

Part A
Election Procedures for Constitutional Office-Bearers

Application

1. The procedure set out in this Schedule applies whenever—
   (a) the National Assembly meets to elect the President, or the Speaker or Deputy Speaker of the Assembly;
   (b) the National Council of Provinces meets to elect its Chairperson or a Deputy Chairperson; or
   (c) a provincial legislature meets to elect the Premier of the province or the Speaker or Deputy Speaker of the legislature.

Nominations

2. The person presiding at a meeting to which this Schedule applies must call for the nomination of candidates at the meeting.

Formal requirements

3. (1) A nomination must be made on the form prescribed by the rules mentioned in item 9.
   (2) The form on which a nomination is made must be signed—
   (a) by two members of the National Assembly, if the President or the Speaker or Deputy Speaker of the Assembly is to be elected;
   (b) on behalf of two provincial delegations, if the Chairperson or a Deputy Chairperson of the National Council of Provinces is to be elected; or
   (c) by two members of the relevant provincial legislature, if the Premier of the province or the Speaker or Deputy Speaker of the legislature is to be elected.

(3) A person who is nominated must indicate acceptance of the nomination by signing either the nomination form or any other form of written confirmation.

Announcement of names of candidates

4. At a meeting to which this Schedule applies, the person presiding must announce the names of the persons who have been nominated as candidates, but may not permit any debate.

Single candidate

5. If only one candidate is nominated, the person presiding must declare that candidate elected.

Election procedure

6. If more than one candidate is nominated—
   (a) a vote must be taken at the meeting by secret ballot;
   (b) each member present, or if it is a meeting of the National Council of Provinces, each province represented, at the meeting may cast one vote; and
   (c) the person presiding must declare elected the candidate who receives a majority of the votes.

Elimination procedure

7. (1) If no candidate receives a majority of the votes, the candidate who receives the lowest number of votes must be eliminated and a further vote taken on the remaining candidates in accordance with item 6. This procedure must be repeated until a candidate receives a majority of the votes.

   (2) When applying subitem (1), if two or more candidates each have the lowest number of votes, a separate vote must be taken on those candidates, and repeated as often as may be necessary to determine which candidate is to be eliminated.

Further meetings

8. (1) If only two candidates are nominated, or if only two candidates remain after an elimination procedure has been applied, and those two candidates receive the same number of votes, a further meeting must be held within seven days, at a time determined by the person presiding.

(2) If a further meeting is held in terms of subitem (1), the procedure prescribed in this Schedule must be applied at that meeting as if it were the first meeting for the election in question.

Rules

9. (1) The Chief Justice must make rules prescribing—
   (a) the procedure for meetings to which this Schedule applies;
   (b) the duties of any person presiding at a meeting, and of any person assisting the person presiding;
   (c) the form on which nominations must be submitted; and
   (d) the manner in which voting is to be conducted.

   (2) These rules must be made known in the way that the Chief Justice determines.

Part B
Formula to Determine Party Participation in Provincial
Delegations to the National Council of Provinces

1. The number of delegates in a provincial delegation to the National Council of Provinces to which a party is entitled, must be determined by multiplying the number of seats the party holds in the provincial legislature by ten and dividing the result by the number of seats in the legislature plus one.
2. If a calculation in terms of item 1 yields a surplus not absorbed by the delegates allocated to a party in terms of that item, the surplus must compete with similar surpluses accruing to any other party or parties, and any undistributed delegates in the delegation must be allocated to the party or parties in the sequence of the highest surplus.
3. If the competing surpluses envisaged in item 2 are equal, the undistributed delegates in the delegation must be allocated to the party or parties with the same surplus in the sequence from the highest to the lowest number of votes that have been recorded for those parties during the last election for the provincial legislature concerned.

   [Item 3 added by s. 2 of the Constitution Fourth Amendment Act of 1999 and substituted by s. 3 of the Constitution Ninth Amendment Act of 2002 and by s. 5(a) of the Constitution Fourteenth Amendment Act of 2008.]

4. If more than one party with the same surplus recorded the same number of votes during the last election for the provincial legislature concerned, the legislature concerned must allocate the undistributed delegates in the delegation to the party with the same surplus in a manner which is consistent with democracy.

[Item 4 added by s. 5(b) of the Constitution Fourteenth Amendment Act of 2008.]

SCHEDULE 4

Functional Areas of Concurrent National and Provincial Legislative Competence

Part A

- Administration of indigenous forests
- Agriculture
- Airports other than international and national airports
- Animal control and diseases
- Casinos, racing, gambling and wagering, excluding lotteries and sports pools
- Consumer protection
- Cultural matters
- Disaster management
- Education at all levels, excluding tertiary education
- Environment
- Health services
- Housing
- Indigenous law and customary law, subject to Chapter 12 of the Constitution
- Industrial promotion
- Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
- Media services directly controlled or provided by the provincial government, subject to section 192
- Nature conservation, excluding national parks, national botanical gardens and marine resources
- Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
- Pollution control
- Population development
- Property transfer fees

- Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
- Public transport
- Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
- Regional planning and development
- Road traffic regulation
- Soil conservation
- Tourism
- Trade
- Traditional leadership, subject to Chapter 12 of the Constitution
- Urban and rural development
- Vehicle licensing
- Welfare services

Part B

The following local government matters to the extent set out in section 155(6)*(a)* and (7):

- Air pollution
- Building regulations
- Child care facilities
- Electricity and gas reticulation
- Firefighting services
- Local tourism
- Municipal airports
- Municipal planning
- Municipal health services
- Municipal public transport
- Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
- Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

- Stormwater management systems in built-up areas
- Trading regulations
- Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

SCHEDULE 5

Functional Areas of Exclusive Provincial Legislative Competence

Part A

- Abattoirs
- Ambulance services
- Archives other than national archives
- Libraries other than national libraries
- Liquor licences
- Museums other than national museums
- Provincial planning
- Provincial cultural matters
- Provincial recreation and amenities
- Provincial sport
- Provincial roads and traffic
- Veterinary services, excluding regulation of the profession

Part B

The following local government matters to the extent set out for provinces in section 155(6)*(a)* and (7):

- Beaches and amusement facilities
- Billboards and the display of advertisements in public places
- Cemeteries, funeral parlours and crematoria
- Cleansing
- Control of public nuisances
- Control of undertakings that sell liquor to the public
- Facilities for the accommodation, care and burial of animals
- Fencing and fences
- Licensing of dogs
- Licensing and control of undertakings that sell food to the public

- Local amenities
- Local sport facilities
- Markets
- Municipal abattoirs
- Municipal parks and recreation
- Municipal roads
- Noise pollution
- Pounds
- Public places
- Refuse removal, refuse dumps and solid waste disposal
- Street trading
- Street lighting
- Traffic and parking

SCHEDULE 6

Transitional Arrangements

[Schedule 6 amended by s. 3 of Constitution First Amendment Act of 1997, by s. 5 of Constitution Second Amendment Act of 1998 and by s. 20 of Constitution Sixth Amendment Act of 2001.]

Definitions

1. In this Schedule, unless inconsistent with the context—

   "homeland" means a part of the Republic which, before the previous Constitution took effect, was dealt with in South African legislation as an independent or a self-governing territory;

   "new Constitution" means the Constitution of the Republic of South Africa, 1996;

   "old order legislation" means legislation enacted before the previous Constitution took effect;

   "previous Constitution" means the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

Continuation of existing law

2. (1) All law that was in force when the new Constitution took effect, continues in force, subject to—
   (a) any amendment or repeal; and
   (b) consistency with the new Constitution.

   (2) Old order legislation that continues in force in terms of subitem (1)—
   (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
   (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.

Interpretation of existing legislation

3. (1) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation that existed when the new Constitution took effect—
   (a) to the Republic of South Africa or a homeland (except when it refers to a territorial area), must be construed as a reference to the Republic of South Africa under the new Constitution;
   (b) to Parliament, the National Assembly or the Senate, must be construed as a reference to Parliament, the National Assembly or the National Council of Provinces under the new Constitution;
   (c) to the President, an Executive Deputy President, a Minister, a Deputy Minister or the Cabinet, must be construed as a reference to the President, the Deputy President, a Minister, a Deputy Minister or the Cabinet under the new Constitution, subject to item 9 of this Schedule;
   (d) to the President of the Senate, must be construed as a reference to the Chairperson of the National Council of Provinces;
   (e) to a provincial legislature, Premier, Executive Council or member of an Executive Council of a province, must be construed as a reference to a provincial legislature, Premier, Executive Council or member of an Executive Council under the new Constitution, subject to item 12 of this Schedule; or
   (f) to an official language or languages, must be construed as a reference to any of the official languages under the new Constitution.

(2) Unless inconsistent with the context or clearly inappropriate, a reference in any remaining old order legislation—
   (a) to a Parliament, a House of a Parliament or a legislative assembly or body of the Republic or of a homeland, must be construed as a reference to—
      (i) Parliament under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or
      (ii) the provincial legislature of a province, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive; or
   (b) to a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers' Council or executive council of the Republic or of a homeland, must be construed as a reference to—

(i) the President under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or

(ii) the Premier of a province under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive.

National Assembly

4. (1) Anyone who was a member or office-bearer of the National Assembly when the new Constitution took effect, becomes a member or office-bearer of the National Assembly under the new Constitution, and holds office as a member or office-bearer in terms of the new Constitution.

(2) The National Assembly as constituted in terms of subitem (1) must be regarded as having been elected under the new Constitution for a term that expires on 30 April 1999.

(3) The National Assembly consists of 400 members for the duration of its term that expires on 30 April 1999, subject to section 49(4) of the new Constitution.

(4) The rules and orders of the National Assembly in force when the new Constitution took effect, continue in force, subject to any amendment or repeal.

Unfinished business before Parliament

5. (1) Any unfinished business before the National Assembly when the new Constitution takes effect must be proceeded with in terms of the new Constitution.

(2) Any unfinished business before the Senate when the new Constitution takes effect must be referred to the National Council of Provinces, and the Council must proceed with that business in terms of the new Constitution.

Elections of National Assembly

6. (1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved in terms of section 50(2) after a motion of no confidence in the President in terms of section 102(2) of the new Constitution.

(2) Section 50(1) of the new Constitution is suspended until 30 April 1999.

(3) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies—
(a) to the first election of the National Assembly under the new Constitution;
(b) to the loss of membership of the Assembly in circumstances other than those provided for in section 47(3) of the new Constitution; and
(c) to the filling of vacancies in the Assembly, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the Assembly under the new Constitution.

(4) Section 47(4) of the new Constitution is suspended until the second election of the National Assembly under the new Constitution.

National Council of Provinces

7. (1) For the period which ends immediately before the first sitting of a provincial legislature held after its first election under the new Constitution—
(a) the proportion of party representation in the province's delegation to the National Council of Provinces must be the same as the proportion in which the province's 10 senators were nominated in terms of section 48 of the previous Constitution; and
(b) the allocation of permanent delegates and special delegates to the parties represented in the provincial legislature, is as follows:

PROVINCE	PERMANENT DELEGATES	SPECIAL DELEGATES
1. Eastern Cape	ANC 5 NP 1	ANC 4
2. Free State	ANC 4 FF 1 NP 1	ANC 4
3. Gauteng	ANC 3 DP 1 FF 1 NP 1	ANC 3 NP 1

PROVINCE	PERMANENT DELEGATES	SPECIAL DELEGATES
4. KwaZulu-Natal	ANC 1 DP 1 IFP 3 NP 1	ANC 2 IFP 2
5. Mpumalanga	ANC 4 FF 1 NP 1	ANC 4
6. Northern Cape	ANC 3 FF 1 NP 2	ANC 2 NP 2
7. Northern Province	ANC 6	ANC 4
8. North West	ANC 4 FF 1 NP 1	ANC 4
9. Western Cape	ANC 2 DP 1 NP 3	ANC 1 NP 3

(2) A party represented in a provincial legislature—
   (a) must nominate its permanent delegates from among the persons who were senators when the new Constitution took effect and are available to serve as permanent delegates; and
   (b) may nominate other persons as permanent delegates only if none or an insufficient number of its former senators are available.

(3) A provincial legislature must appoint its permanent delegates in accordance with the nominations of the parties.

(4) Subitems (2) and (3) apply only to the first appointment of permanent delegates to the National Council of Provinces.

(5) Section 62(1) of the new Constitution does not apply to the nomination and appointment of former senators as permanent delegates in terms of this item.

(6) The rules and orders of the Senate in force when the new Constitution took effect, must be applied in respect of the business of the National Council to the extent that they can be applied, subject to any amendment or repeal.

Former senators

8. (1) A former senator who is not appointed as a permanent delegate to the National Council of Provinces is entitled to become a full voting member of the legislature of the province from which that person was nominated as a senator in terms of section 48 of the previous Constitution.

(2) If a former senator elects not to become a member of a provincial legislature that person is regarded as having resigned as a senator the day before the new Constitution took effect.

(3) The salary, allowances and benefits of a former senator appointed as a permanent delegate or as a member of a provincial legislature may not be reduced by reason only of that appointment.

National executive

9. (1) Anyone who was the President, an Executive Deputy President, a Minister or a Deputy Minister under the previous Constitution when the new Constitution took effect, continues in and holds that office in terms of the new Constitution, but subject to subitem (2).

(2) Until 30 April 1999, sections 84, 89, 90, 91, 93 and 96 of the new Constitution must be regarded to read as set out in Annexure B to this Schedule.

(3) Subitem (2) does not prevent a Minister who was a senator when the new Constitution took effect, from continuing as a Minister referred to in section 91(1)(a) of the new Constitution, as that section reads in Annexure B.

Provincial legislatures

10. (1) Anyone who was a member or office-bearer of a province's legislature when the new Constitution took effect, becomes a member or office-bearer of the legislature for that province under the new Constitution, and holds office as a member or office-bearer in terms of the new Constitution and any provincial constitution that may be enacted.

(2) A provincial legislature as constituted in terms of subitem (1) must be regarded as having been elected under the new Constitution for a term that expires on 30 April 1999.

(3) For the duration of its term that expires on 30 April 1999, and subject to section 108(4), a provincial legislature consists of the number of members determined for that legislature under the previous Constitution plus the number of former senators who became members of the legislature in terms of item 8 of this Schedule.

(4) The rules and orders of a provincial legislature in force when the new Constitution took effect, continue in force, subject to any amendment or repeal.

Elections of provincial legislatures

11. (1) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies—
   (a) to the first election of a provincial legislature under the new Constitution;
   (b) to the loss of membership of a legislature in circumstances other than those provided for in section 106(3) of the new Constitution; and
   (c) to the filling of vacancies in a legislature, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the legislature under the new Constitution.

(2) Section 106(4) of the new Constitution is suspended in respect of a provincial legislature until the second election of the legislature under the new Constitution.

Provincial executives

12. (1) Anyone who was the Premier or a member of the Executive Council of a province when the new Constitution took effect, continues in and holds that office in terms of the new Constitution and any provincial constitution that may be enacted, but subject to subitem (2).

(2) Until the Premier elected after the first election of a province's legislature under the new Constitution assumes office, or the province enacts its constitution, whichever occurs first, sections 132 and 136 of the new Constitution must be regarded to read as set out in Annexure C to this Schedule.

Provincial constitutions

13. A provincial constitution passed before the new Constitution took effect must comply with section 143 of the new Constitution.

Assignment of legislation to provinces

14. (1) Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation, to an authority within a provincial executive designated by the Executive Council of the province.

(2) To the extent that it is necessary for an assignment of legislation under subitem (1) to be effectively carried out, the President, by proclamation, may—

(a) amend or adapt the legislation to regulate its interpretation or application;

(b) where the assignment does not apply to the whole of any piece of legislation, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph (a), those provisions to which the assignment applies or to the extent that the assignment applies to them; or

(c) regulate any other matter necessary as a result of the assignment, including the transfer or secondment of staff, or the transfer of assets, liabilities, rights and obligations, to or from the national or a provincial executive or any department of state, administration, security service or other institution.

(3) (a) A copy of each proclamation issued in terms of subitem (1) or (2) must be submitted to the National Assembly and the National Council of Provinces within 10 days of the publication of the proclamation.

(b) If both the National Assembly and the National Council by resolution disapprove the proclamation or any provision of it, the proclamation or provision lapses, but without affecting—

(i) the validity of anything done in terms of the proclamation or provision before it lapsed; or

(ii) a right or privilege acquired or an obligation or liability incurred before it lapsed.

(4) When legislation is assigned under subitem (1), any reference in the legislation to an authority administering it, must be construed as a reference to the authority to which it has been assigned.

(5) Any assignment of legislation under section 235(8) of the previous Constitution, including any amendment, adaptation or repeal and re-enactment of any legislation and any other action taken under that section, is regarded as having been done under this item.

Existing legislation outside Parliament's legislative power

15. (1) An authority within the national executive that administers any legislation falling outside Parliament's legislative power when the new Constitution takes effect, remains competent to administer that legislation until it is assigned to an authority within a provincial executive in terms of item 14 of this Schedule.

(2) Subitem (1) lapses two years after the new Constitution took effect.

Courts

16. (1) Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to—

(a) any amendment or repeal of that legislation; and

(b) consistency with the new Constitution.

(2) (a) The Constitutional Court established by the previous Constitution becomes the Constitutional Court under the new Constitution.

(b) . . . . . .

[Subitem (b) deleted by s. 20(a) of the Constitution Sixth Amendment Act of 2001.]

(3) (a) The Appellate Division of the Supreme Court of South Africa becomes the Supreme Court of Appeal under the new Constitution.

(b) . . . . . .

[Subitem (b) deleted by s. 20(a) of the Constitution Sixth Amendment Act of 2001.]

(4) (a) A provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or a general division of such a court, becomes a High Court under the new Constitution without any alteration in its area of jurisdiction, subject to any rationalisation contemplated in subitem (6).

(b) Anyone holding office or deemed to hold office as the Judge President, the Deputy Judge President or a judge of a court referred to in paragraph *(a)* when the new Constitution takes effect, becomes the Judge President, the Deputy Judge President or a judge of such a court under the new Constitution, subject to any rationalisation contemplated in subitem (6).

(5) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation or process to—
(a) the Constitutional Court under the previous Constitution, must be construed as a reference to the Constitutional Court under the new Constitution;
(b) the Appellate Division of the Supreme Court of South Africa, must be construed as a reference to the Supreme Court of Appeal; and
(c) a provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or general division of that court, must be construed as a reference to a High Court.

(6) (a) As soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.
(b) The Cabinet member responsible for the administration of justice, acting after consultation with the Judicial Service Commission, must manage the rationalisation envisaged in paragraph (a).

(7) (a) Anyone holding office, when the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, as—
(i) the President of the Constitutional Court, becomes the Chief Justice as contemplated in section 167(1) of the new Constitution;
(ii) the Deputy President of the Constitutional Court, becomes the Deputy Chief Justice as contemplated in section 167(1) of the new Constitution;
(iii) the Chief Justice, becomes the President of the Supreme Court of Appeal as contemplated in section 168(1) of the new Constitution; and
(iv) the Deputy Chief Justice, becomes the Deputy President of the Supreme Court of Appeal as contemplated in section 168(1) of the new Constitution.

(b) All rules, regulations or directions made by the President of the Constitutional Court or the Chief Justice in force immediately before the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, continue in force until repealed or amended.

(c) Unless inconsistent with the context or clearly inappropriate, a reference in any law or process to the Chief Justice or to the President of the Constitutional Court, must be construed as a reference to the Chief Justice as contemplated in section 167(1) of the new Constitution.

[Subitem (7) added by s. 20(b) of the Constitution Sixth Amendment Act of 2001.]

Cases pending before courts

17. All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise.

Prosecuting authority

18. (1) Section 108 of the previous Constitution continues in force until the Act of Parliament envisaged in section 179 of the new Constitution takes effect. This subitem does not affect the appointment of the National Director of Public Prosecutions in terms of section 179.

(2) An attorney-general holding office when the new Constitution takes effect, continues to function in terms of the legislation applicable to that office, subject to subitem (1).

Oaths and affirmations

19. A person who continues in office in terms of this Schedule and who has taken the oath of office or has made a solemn affirmation under the previous Constitution, is not obliged to repeat the oath of office or solemn affirmation under the new Constitution.

Other constitutional institutions

20. (1) In this section "constitutional institution" means—

(a) the Public Protector;

(b) the South African Human Rights Commission;

[Para (b) amended by s. 4 of the Constitution Second Amendment Act of 1998.]

(c) the Commission on Gender Equality;
(d) the Auditor-General;
(e) the South African Reserve Bank;
(f) the Financial and Fiscal Commission;
(g) the Judicial Service Commission; or
(h) the Pan South African Language Board.

(2) A constitutional institution established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a commission member, a member of the board of the Reserve Bank or the Pan South African Language Board, the Public Protector or the Auditor-General when the new Constitution takes effect, continues to hold office in terms of the legislation applicable to that office, subject to—
(a) any amendment or repeal of that legislation; and
(b) consistency with the new Constitution.

(3) Sections 199(1), 200(1), (3) and (5) to (11) and 201 to 206 of the previous Constitution continue in force until repealed by an Act of Parliament passed in terms of section 75 of the new Constitution.

(4) The members of the Judicial Service Commission referred to in section 105(1)(h) of the previous Constitution cease to be members of the Commission when the members referred to in section 178(1)(i) of the new Constitution are appointed.

(5) (a) The Volkstaat Council established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a member of the Council when the new Constitution takes effect, continues to hold office in terms of the legislation applicable to that office, subject to—
(i) any amendment or repeal of that legislation; and
(ii) consistency with the new Constitution.
(b) Sections 184A and 184B (1)*(a)*, *(b)* and *(d)* of the previous Constitution continue in force until repealed by an Act of Parliament passed in terms of section 75 of the new Constitution.

Enactment of legislation required by new Constitution

21. (1) Where the new Constitution requires the enactment of national or provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date the new Constitution took effect.

(2) Section 198(b) of the new Constitution may not be enforced until the legislation envisaged in that section has been enacted.

(3) Section 199(3)(a) of the new Constitution may not be enforced before the expiry of three months after the legislation envisaged in that section has been enacted.

(4) National legislation envisaged in section 217(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect, but the absence of this legislation during this period does not prevent the implementation of the policy referred to in section 217(2).

(5) Until the Act of Parliament referred to in section 65(2) of the new Constitution is enacted each provincial legislature may determine its own procedure in terms of which authority is conferred on its delegation to cast votes on its behalf in the National Council of Provinces.

(6) Until the legislation envisaged in section 229(1)(b) of the new Constitution is enacted, a municipality remains competent to impose any tax, levy or duty which it was authorised to impose when the Constitution took effect.

National unity and reconciliation

22. (1) Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.

(2) For the purposes of subitem (1), the date "6 December 1993", where it appears in the provisions of the previous Constitution under the heading "National Unity and Reconciliation", must be read as "11 May 1994".

[Subitem (2) added by s. 3 of the Constitution First Amendment Act of 1997.]

Bill of Rights

23. (1) National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

(2) Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted—

(a) section 32 (1) must be regarded to read as follows:
"(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."; and

(b) section 33(1) and (2) must be regarded to read as follows:
"Every person has the right to—

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.".

(3) Sections 32(2) and 33(3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.

Public administration and security services

24. (1) Sections 82(4)(b), 215, 218(1), 219(1), 224 to 228, 236(1), (2), (3), (6), (7)(b) and (8), 237(1) and (2)*(a)* and 239(4) and (5) of the previous Constitution continue in force as if the previous Constitution had not been repealed, subject to—

(a) the amendments to those sections as set out in Annexure D;

(b) any further amendment or any repeal of those sections by an Act of Parliament passed in terms of section 75 of the new Constitution; and

(c) consistency with the new Constitution.

(2) The Public Service Commission and the provincial service commissions referred to in Chapter 13 of the previous Constitution continue to function in terms of that Chapter and the legislation applicable to it as if that Chapter had not been repealed, until the Commission and the provincial service commissions are abolished by an Act of Parliament passed in terms of section 75 of the new Constitution.

(3) The repeal of the previous Constitution does not affect any proclamation issued under section 237(3) of the previous Constitution, and any such proclamation continues in force, subject to—

(a) any amendment or repeal; and

(b) consistency with the new Constitution.

Additional disqualification for legislatures

25. (1) Anyone who, when the new Constitution took effect, was serving a sentence in the Republic of more than 12 months' imprisonment without the option of a fine, is not eligible to be a member of the National Assembly or a provincial legislature.

(2) The disqualification of a person in terms of subitem (1)—

(a) lapses if the conviction is set aside on appeal, or the sentence is reduced on appeal to a sentence that does not disqualify that person; and

(b) ends five years after the sentence has been completed.

Local government

26. (1) Notwithstanding the provisions of sections 151, 155, 156 and 157 of the new Constitution—

(a) the provisions of the Local Government Transition Act, 1993 (Act 209 of 1993), as may be amended from time to time by national legislation consistent with the new Constitution, remain in force in respect of a Municipal Council until a Municipal Council replacing that Council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution; and

[Subitem (a) substituted by s. 5(a) of the Constitution Second Amendment Act of 1998.]

(b) a traditional leader of a community observing a system of indigenous law and residing on land within the area of a transitional local council, transitional rural council or transitional representative council, referred to in the Local Government Transition Act, 1993, and who has been identified as set out in

section 182 of the previous Constitution, is ex officio entitled to be a member of that council until a Municipal Council replacing that council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution.

[Subitem (b) substituted by s. 5(a) of the Constitution Second Amendment Act of 1998.]

(2) Section 245(4) of the previous Constitution continues in force until the application of that section lapses. Section 16(5) and (6) of the Local Government Transition Act, 1993, may not be repealed before 30 April 2000.

[Sub item (2) amended by s. 5 (b) of Constitution Second Amendment Act of 1998.]

Safekeeping of Acts of Parliament and Provincial Acts

27. Sections 82 and 124 of the new Constitution do not affect the safekeeping of Acts of Parliament or provincial Acts passed before the new Constitution took effect.

Registration of immovable property owned by the state

28. (1) On the production of a certificate by a competent authority that immovable property owned by the state is vested in a particular government in terms of section 239 of the previous Constitution, a registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or other document to register that immovable property in the name of that government.

(2) No duty, fee or other charge is payable in respect of a registration in terms of subitem (1).

ANNEXURE A

Amendments to Schedule 2 to the previous Constitution

1. The replacement of item 1 with the following item:

"1. Parties registered in terms of national legislation and contesting an election of the National Assembly, shall nominate candidates for such election on lists of candidates prepared in accordance with this Schedule and national legislation.".

2. The replacement of item 2 with the following item:

"2. The seats in the National Assembly as determined in terms of section 46 of the new Constitution, shall be filled as follows:

(a) One half of the seats from regional lists submitted by the respective parties, with a fixed number of seats reserved for each region as determined by the Commission for the next election of the Assembly, taking into account available scientifically based data in respect of voters, and representations by interested parties.

(b) The other half of the seats from national lists submitted by the respective parties, or from regional lists where national lists were not submitted.".

3. The replacement of item 3 with the following item:

"3. The lists of candidates submitted by a party, shall in total contain the names of not more than a number of candidates equal to the number of seats in the National Assembly, and each such list shall denote such names in such fixed order of preference as the party may determine.".

4. The amendment of item 5 by replacing the words preceding paragraph (a) with the following words:

"5. The seats referred to in item 2(a) shall be allocated per region to the parties contesting an election, as follows:".

5. The amendment of item 6—

(a) by replacing the words preceding paragraph (a) with the following words:

"6. The seats referred to in item 2(b) shall be allocated to the parties contesting an election, as follows:"; and

(b) by replacing paragraph (a) with the following paragraph:

"(a) A quota of votes per seat shall be determined by dividing the total number of votes cast nationally by the number of seats in the National

Assembly, plus one, and the result plus one, disregarding fractions, shall be the quota of votes per seat.".

6. The amendment of item 7(3) by replacing paragraph (b) with the following paragraph:

"(b) An amended quota of votes per seat shall be determined by dividing the total number of votes cast nationally, minus the number of votes cast nationally in favour of the party referred to in paragraph (a), by the number of seats in the Assembly, plus one, minus the number of seats finally allocated to the said party in terms of paragraph (a).".

7. The replacement of item 10 with the following item:

"10. The number of seats in each provincial legislature shall be as determined in terms of section 105 of the new Constitution.".

8. The replacement of item 11 with the following item:

"11. Parties registered in terms of national legislation and contesting an election of a provincial legislature, shall nominate candidates for election to such provincial legislature on provincial lists prepared in accordance with this Schedule and national legislation.".

9. The replacement of item 16 with the following item:

"Designation of representatives

16. (1) After the counting of votes has been concluded, the number of representatives of each party has been determined and the election result has been declared in terms of section 190 of the new Constitution, the Commission shall, within two days after such declaration, designate from each list of candidates, published in terms of national legislation, the representatives of each party in the legislature.

(2) Following the designation in terms of subitem (1), if a candidate's name appears on more than one list for the National Assembly or on lists for both the National Assembly and a provincial legislature (if an election of the Assembly and a provincial legislature is held at the same time), and such candidate is due for designation as a representative in more than one case, the party which submitted such lists shall, within two days after the said declaration, indicate to the Commission from which list such candidate will be designated or in which legislature the candidate will serve, as the case may be, in which event the candidate's name shall be deleted from the other lists.

(3) The Commission shall forthwith publish the list of names of representatives in the legislature or legislatures.”.

10. The amendment of item 18 by replacing paragraph (b) with the following paragraph:

“(b) a representative is appointed as a permanent delegate to the National Council of Provinces;”.

11. The replacement of item 19 with the following item:

“19. Lists of candidates of a party referred to in item 16 (1) may be supplemented on one occasion only at any time during the first 12 months following the date on which the designation of representatives in terms of item 16 has been concluded, in order to fill casual vacancies: Provided that any such supplementation shall be made at the end of the list.”.

12. The replacement of item 23 with the following item:

“Vacancies

23. (1) In the event of a vacancy in a legislature to which this Schedule applies, the party which nominated the vacating member shall fill the vacancy by nominating a person—

(a) whose name appears on the list of candidates from which the vacating member was originally nominated; and

(b) who is the next qualified and available person on the list.

(2) A nomination to fill a vacancy shall be submitted to the Speaker in writing.

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of item 23A(1), the seats in question shall be allocated to the remaining parties mutatis mutandis as if such seats were forfeited seats in terms of item 7 or 14, as the case may be.”.

13. The insertion of the following item after item 23:

“Additional ground for loss of membership of legislatures

23A. (1) A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

(2) Despite subitem (1) any existing political party may at any time change its name.

(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76(1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

(4) An Act of Parliament referred to in subitem (3) may also provide for—

(a) any existing party to merge with another party; or

(b) any party to subdivide into more than one party.".

14. The deletion of item 24.

15. The amendment of item 25—

(a) by replacing the definition of "Commission" with the following definition:
"'Commission' means the Electoral Commission referred to in section 190 of the new Constitution;"; and

(b) by inserting the following definition after the definition of "national list":
"'new Constitution' means the Constitution of the Republic of South Africa, 1996;".

16. The deletion of item 26.

ANNEXURE B

Government of National Unity: National Sphere

1. Section 84 of the new Constitution is deemed to contain the following additional subsection:

"(3) The President must consult the Executive Deputy Presidents—

(a) in the development and execution of the policies of the national government;

(b) in all matters relating to the management of the Cabinet and the performance of Cabinet business;

(c) in the assignment of functions to the Executive Deputy Presidents;

(d) before making any appointment under the Constitution or any legislation, including the appointment of ambassadors or other diplomatic representatives;

(e) before appointing commissions of inquiry;

(f) before calling a referendum; and

(g) before pardoning or reprieving offenders.".

2. Section 89 of the new Constitution is deemed to contain the following additional subsection:

"(3) Subsections (1) and (2) apply also to an Executive Deputy President.".

3. Paragraph (a) of section 90(1) of the new Constitution is deemed to read as follows:

"(a) an Executive Deputy President designated by the President;".

4. Section 91 of the new Constitution is deemed to read as follows:

"Cabinet

91. (1) The Cabinet consists of the President, the Executive Deputy Presidents and—

(a) not more than 27 Ministers who are members of the National Assembly and appointed in terms of subsections (8) to (12); and

(b) not more than one Minister who is not a member of the 175 National Assembly and appointed in terms of subsection (13), provided the President, acting in consultation with the Executive Deputy Presidents and the leaders of the participating parties, deems the appointment of such a Minister expedient.

(2) Each party holding at least 80 seats in the National Assembly is entitled to designate an Executive Deputy President from among the members of the Assembly.

(3) If no party or only one party holds 80 or more seats in the Assembly, the party holding the largest number of seats and the party holding the second largest number of seats are each entitled to designate one Executive Deputy President from among the members of the Assembly.

(4) On being designated, an Executive Deputy President may elect to remain or cease to be a member of the Assembly.

(5) An Executive Deputy President may exercise the powers and must perform the functions vested in the office of Executive Deputy President by the Constitution or assigned to that office by the President.

(6) An Executive Deputy President holds office—

- (a) until 30 April 1999 unless replaced or recalled by the party entitled to make the designation in terms of subsections (2) and (3); or
- (b) until the person elected President after any election of the National Assembly held before 30 April 1999, assumes office.

(7) A vacancy in the office of an Executive Deputy President may be filled by the party which designated that Deputy President.

(8) A party holding at least 20 seats in the National Assembly and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Cabinet portfolios in respect of which Ministers referred to in subsection (1)(a) are to be appointed, in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other participating parties.

(9) Cabinet portfolios must be allocated to the respective participating parties in accordance with the following formula:

- (a) A quota of seats per portfolio must be determined by dividing the total number of seats in the National Assembly held jointly by the participating parties by the number of portfolios in respect of which Ministers referred to in subsection (1)(a) are to be appointed, plus one.
- (b) The result, disregarding third and subsequent decimals, if any, is the quota of seats per portfolio.

(c) The number of portfolios to be allocated to a participating party is determined by dividing the total number of seats held by that party in the National Assembly by the quota referred to in paragraph (b).

(d) The result, subject to paragraph (e), indicates the number of portfolios to be allocated to that party.

(e) Where the application of the above formula yields a surplus not absorbed by the number of portfolios allocated to a party, the surplus competes with other similar surpluses accruing to another party or parties, and any portfolio or portfolios which remain unallocated must be allocated to the party or parties concerned in sequence of the highest surplus.

(10) The President after consultation with the Executive Deputy Presidents and the leaders of the participating parties must—

(a) determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (9);

(b) appoint in respect of each such portfolio a member of the National Assembly who is a member of the party to which that portfolio was allocated under paragraph (a), as the Minister responsible for that portfolio;

(c) if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph (a), subject to subsection (9);

(d) terminate any appointment under paragraph (b)—

(i) if the President is requested to do so by the leader of the party of which the Minister in question is a member; or

(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government; or

(e) fill, when necessary, subject to paragraph (b), a vacancy in the office of Minister.

(11) Subsection (10) must be implemented in the spirit embodied in the concept of a government of national unity, and the President and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on—

(a) the exercise of a power referred to in paragraph (a), (c) or (d)(ii) of that subsection, the President's decision prevails;

- (b) the exercise of a power referred to in paragraph (b), (d)(i) or (e) of that subsection affecting a person who is not a member of the President's party, the decision of the leader of the party of which that person is a member prevails; and
- (c) the exercise of a power referred to in paragraph (b) or (e) of that subsection affecting a person who is a member of the President's party, the President's decision prevails.

(12) If any determination of portfolio allocations is varied under subsection (10)(c), the affected Ministers must vacate their portfolios but are eligible, where applicable, for reappointment to other portfolios allocated to their respective parties in terms of the varied determination.

(13) The President—
- (a) in consultation with the Executive Deputy Presidents and the leaders of the participating parties, must—
- (i) determine a specific portfolio for a Minister referred to in subsection (1)(b) should it become necessary pursuant to a decision of the President under that subsection;
- (ii) appoint in respect of that portfolio a person who is not a member of the National Assembly, as the Minister responsible for that portfolio; and
- (iii) fill, if necessary, a vacancy in respect of that portfolio; or
- (b) after consultation with the Executive Deputy Presidents and the leaders of the participating parties, must terminate any appointment under paragraph (a) if it becomes necessary for the purposes of the Constitution or in the interest of good government.

(14) Meetings of the Cabinet must be presided over by the President, or, if the President so instructs, by an Executive Deputy President: Provided that the Executive Deputy Presidents preside over meetings of the Cabinet in turn unless the exigencies of government and the spirit embodied in the concept of a government of national unity otherwise demand.

(15) The Cabinet must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity as well as the need for effective government.".

5. Section 93 of the new Constitution is deemed to read as follows:

"Appointment of Deputy Ministers

93. (1) The President may, after consultation with the Executive Deputy Presidents and the leaders of the parties participating in the Cabinet, establish deputy ministerial posts.

(2) A party is entitled to be allocated one or more of the deputy ministerial posts in the same proportion and according to the same formula that portfolios in the Cabinet are allocated.

(3) The provisions of section 91(10) to (12) apply, with the necessary changes, in respect of Deputy Ministers, and in such application a reference in that section to a Minister or a portfolio must be read as a reference to a Deputy Minister or a deputy ministerial post, respectively.

(4) If a person is appointed as the Deputy Minister of any portfolio entrusted to a Minister—

(a) that Deputy Minister must exercise and perform on behalf of the relevant Minister any of the powers and functions assigned to that Minister in terms of any legislation or otherwise which may, subject to the directions of the President, be assigned to that Deputy Minister by that Minister; and

(b) any reference in any legislation to that Minister must be construed as including a reference to the Deputy Minister acting in terms of an assignment under paragraph (a) by the Minister for whom that Deputy Minister acts.

(5) Whenever a Deputy Minister is absent or for any reason unable to exercise or perform any of the powers or functions of office, the President may appoint any other Deputy Minister or any other person to act in the said Deputy Minister's stead, either generally or in the exercise or performance of any specific power or function.".

6. Section 96 of the new Constitution is deemed to contain the following additional subsections:

"(3) Ministers are accountable individually to the President and to the National Assembly for the administration of their portfolios, and all members of the Cabinet are correspondingly accountable collectively for the performance of the functions of the national government and for its policies.

(4) Ministers must administer their portfolios in accordance with the policy determined by the Cabinet.
(5) If a Minister fails to administer the portfolio in accordance with the policy of the Cabinet, the President may require the Minister concerned to bring the administration of the portfolio into conformity with that policy.
(6) If the Minister concerned fails to comply with a requirement of the President under subsection (5), the President may remove the Minister from office—
   (a) if it is a Minister referred to in section 91(1)(a), after consultation with the Minister and, if the Minister is not a member of the President's party or is not the leader of a participating party, also after consultation with the leader of that Minister's party; or
   (b) if it is a Minister referred to in section 91(1)(b), after consultation with the Executive Deputy Presidents and the leaders of the participating parties.".

ANNEXURE C

Government of National Unity: Provincial Sphere

1. Section 132 of the new Constitution is deemed to read as follows:

"Executive Councils

132. (1) The Executive Council of a province consists of the Premier and not more than 10 members appointed by the Premier in accordance with this section.

(2) A party holding at least 10 per cent of the seats in a provincial legislature and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Executive Council portfolios in proportion to the number of seats held by it in the legislature relative to the number of seats held by the other participating parties.

(3) Executive Council portfolios must be allocated to the respective participating parties according to the same formula set out in section 91(9), and in applying that formula a reference in that section to—

(a) the Cabinet, must be read as a reference to an Executive Council;

(b) a Minister, must be read as a reference to a member of an Executive Council; and

(c) the National Assembly, must be read as a reference to the provincial legislature.

(4) The Premier of a province after consultation with the leaders of the participating parties must—

(a) determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (3);

(b) appoint in respect of each such portfolio a member of the provincial legislature who is a member of the party to which that portfolio was allocated under paragraph (a), as the member of the Executive Council responsible for that portfolio;

(c) if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph (a), subject to subsection (3);

(d) terminate any appointment under paragraph (b)—

(i) if the Premier is requested to do so by the leader of the party of which the Executive Council member in question is a member; or

(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government; or

(e) fill, when necessary, subject to paragraph (b), a vacancy in the office of a member of the Executive Council.

(5) Subsection (4) must be implemented in the spirit embodied in the concept of a government of national unity, and the Premier and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on—

(a) the exercise of a power referred to in paragraph (a), (c) or (d)(ii) of that subsection, the Premier's decision prevails;

(b) the exercise of a power referred to in paragraph (b), (d)(i) or (e) of that subsection affecting a person who is not a member of the Premier's party, the decision of the leader of the party of which such person is a member prevails; and

(c) the exercise of a power referred to in paragraph (b) or (e) of that subsection affecting a person who is a member of the Premier's party, the Premier's decision prevails.

(6) If any determination of portfolio allocations is varied under subsection (4)(c), the affected members must vacate their portfolios but are eligible, where applicable, for reappointment to other portfolios allocated to their respective parties in terms of the varied determination.

(7) Meetings of an Executive Council must be presided over by the Premier of the province.

(8) An Executive Council must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity, as well as the need f or effective government.".

2. Section 136 of the new Constitution is deemed to contain the following additional subsections:

"(3) Members of Executive Councils are accountable individually to the Premier and to the provincial legislature for the administration of their portfolios, and all members of the Executive Council are correspondingly accountable collectively for the performance of the functions of the provincial government and for its policies.

(4) Members of Executive Councils must administer their portfolios in accordance with the policy determined by the Council.

(5) If a member of an Executive Council fails to administer the portfolio in accordance with the policy of the Council, the Premier may require the member concerned to bring the administration of the portfolio into conformity with that policy.

(6) If the member concerned fails to comply with a requirement of the Premier under subsection (5), the Premier may remove the member from office after consultation with the member, and if the member is not a member of the Premier's party or is not the leader of a participating party, also after consultation with the leader of that member's party.".

ANNEXURE D

Public Administration and Security Services: Amendments to Sections of the Previous Constitution

1. **The amendment of section 218 of the previous Constitution—**
   (a) by replacing in subsection (1) the words preceding paragraph (a) with the following words:
   "(1) Subject to the directions of the Minister of Safety and Security, the National Commissioner shall be responsible for—";
   (b) by replacing paragraph (b) of subsection (1) with the following paragraph:
   "(b) the appointment of provincial commissioners;";
   (c) by replacing paragraph (d) of subsection (1) with the following paragraph:
   "(d) the investigation and prevention of organised crime or crime which requires national investigation and prevention or specialised skills;"; and
   (d) by replacing paragraph (k) of subsection (1) with the following paragraph:
   "(k) the establishment and maintenance of a national public order policing unit to be deployed in support of and at the request of the Provincial Commissioner;".
2. **The amendment of section 219 of the previous Constitution by replacing in subsection (1) the words preceding paragraph (a) with the following words:**
   "(1) Subject to section 218(1), a Provincial Commissioner shall be responsible for—".
3. **The amendment of section 224 of the previous Constitution by replacing the proviso to subsection (2) with the following proviso:**
   "Provided that this subsection shall also apply to members of any armed force which submitted its personnel list after the commencement of the Constitution of the Republic of South Africa, 993 (Act 200 of 1993), but before the adoption of the new constitutional text as envisaged in section 73 of that Constitution, if the political organisation under whose authority and control it stands or with which it is associated and whose objectives it promotes did participate in the Transitional Executive Council or did take part in the first election of the National Assembly and the provincial legislatures under the said Constitution.".

4. The amendment of section 227 of the previous Constitution by replacing subsection (2) with the following subsection:

"(2) The National Defence Force shall exercise its powers and perform its functions solely in the national interest in terms of Chapter 11 of the Constitution of the Republic of South Africa, 1996.".

5. The amendment of section 236 of the previous Constitution—

(a) by replacing subsection (1) with the following subsection—

"(1) A public service, department of state, administration or security service which immediately before the commencement of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the new Constitution"), performed governmental functions, continues to function in terms of the legislation applicable to it until it is abolished or incorporated or integrated into any appropriate institution or is rationalised or consolidated with any other institution.";

(b) by replacing subsection (6) with the following subsection:

"(6) (a) The President may appoint a commission to review the conclusion or amendment of a contract, the appointment or promotion, or the award of a term or condition of service or other benefit, which occurred between 27 April 1993 and 30 September 1994 in respect of any person referred to in subsection (2) or any class of such persons.

(b) The commission may reverse or alter a contract, appointment, promotion or award if not proper or justifiable in the circumstances of the case."; and

(c) by replacing "this Constitution", wherever this occurs in section 236, with "the new Constitution".

6. The amendment of section 237 of the previous Constitution—

(a) by replacing paragraph (a) of subsection (1) with the following paragraph:

"(a) The rationalisation of all institutions referred to in section 236(1), excluding military forces referred to in section 224(2), shall after the commencement of the Constitution of the Republic of South Africa, 1996, continue, with a view to establishing—

(i) an effective administration in the national sphere of government to deal with matters within the jurisdiction of the national sphere; and

(ii) an effective administration for each province to deal with matters within the jurisdiction of each provincial government."; and

(b) by replacing subparagraph (i) of subsection (2)(a) with the following subparagraph:

"(i) institutions referred to in section 236(1), excluding military forces, shall rest with the national government, which shall exercise such responsibility in co-operation with the provincial governments;".

7. The amendment of section 239 of the previous Constitution by replacing subsection (4) with the following subsection:

"(4) Subject to and in accordance with any applicable law, the assets, rights, duties and liabilities of all forces referred to in section 224(2) shall devolve upon the National Defence Force in accordance with the directions of the Minister of Defence.".

SCHEDULE 6A

[Schedule 6A inserted by s. 6 of Constitution Tenth Amendment Act of 2003 and repealed by s. 6 of the Constitution Fourteenth Amendment Act of 2008.]

SCHEDULE 6B

[Schedule 6B, previously Schedule 6A, inserted by s. 2 of the Constitution Eighth Amendment Act of 2002, amended by s. 5 of the Constitution Tenth Amendment Act of 2003, renumbered by s. 6 of the Constitution Tenth Amendment Act of 2003 and repealed by s. 5 of the Constitution Fifteenth Amendment Act of 2008.]

SCHEDULE 7

LAWS REPEALED

NUMBER AND YEAR OF LAW	TITLE
Act No. 200 of 1993	Constitution of the Republic of South Africa, 1993
Act No. 2 of 1994	Constitution of the Republic of South Africa Amendment Act, 1994
Act No. 3 of 1994	Constitution of the Republic of South Africa Second Amendment Act, 1994
Act No. 13 of 1994	Constitution of the Republic of South Africa Third Amendment Act, 1994
Act No. 14 of 1994	Constitution of the Republic of South Africa Fourth Amendment Act, 1994
Act No. 24 of 1994	Constitution of the Republic of South Africa Sixth Amendment Act, 1994
Act No. 29 of 1994	Constitution of the Republic of South Africa Fifth Amendment Act, 1994
Act No. 20 of 1995	Constitution of the Republic of South Africa Amendment Act, 1995
Act No. 44 of 1995	Constitution of the Republic of South Africa Second Amendment Act, 1995
Act No. 7 of 1996	Constitution of the Republic of South Africa Amendment Act, 1996
Act No. 26 of 1996	Constitution of the Republic of South Africa Third Amendment Act, 1996

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The Inspector General of Intelligence (IGI) has launched an extraordinary court application seeking protection from the director general of the State Security Agency (SSA) Arthur Fraser.

The IGI, Setlhomamaru Dintwe, has revealed that Fraser has purported to withdraw the IGI's security clearance and access to the IGI's own office in what Dintwe describes as an unconstitutional attempt to frustrate an investigation of Fraser himself.

The IGI exercises constitutional oversight over the activities of the intelligence services.

In an urgent application to the high court in Pretoria, Dintwe alleges that Fraser's actions flowed from the IGI's attempt to investigate a complaint by the Democratic Alliance (DA) based on revelations in Jacques Pauw's best-selling exposé, *The President's Keepers*.

Dintwe states:

> “Mr Fraser is alleged to have established an illegal rogue intelligence programme, known as the Principle Agent Network, by allegedly copying the signature of the then-minister Ronnie Kasrils; Mr Fraser is alleged to have improperly influenced the awarding of contracts to his family members and other individuals through the Principle Agent network; and Mr Fraser is alleged to have created an alternative intelligence capacity, which constitutes a criminal offence.”
> (See *“What was the Principle Agent Network”* below, for more on the allegations against Fraser.)

Dintwe confirms that his office began an investigation of Fraser in May last year, but alleges he faced a rising tide of obstruction and resistance from Fraser and the SSA, culminating in a letter from Fraser on 28 March 2018, revoking the IGI's security clearance.

Dintwe has asked the court for urgent relief by overturning Fraser's actions and preventing Fraser from acting “unconstitutionally, unlawfully and motivated by bad faith”.

In his affidavit, Dintwe states:

> “The extraordinary nature of the decision taken by the Director General — to prevent me from gaining access to my office and executing my constitutional and statutory responsibilities – requires the immediate intervention by this court. The decision by the Director General has implications not only for me as an individual, but for the proper functioning of the Office of the Inspector General of Intelligence [OIGI] and the broader public interest.”

He adds:

> “On what I know, there is at least a *prima facie* case for Mr Fraser to answer. If, by his conduct, he is preventing the ventilation of that case through a statutorily created body, it is of extreme importance for a court to step in... My ability to fulfil my mandate and ensure a functional and independent OIGI and to investigate and report on complaints (most notably against Mr. Fraser himself) has been prohibited with immediate effect based on an unlawful decision

> taken by a Director General in an untenably conflicted position.”

The IGI also claims the SSA dragged its feet on upgrading the security at his official residence and attempted to remove his current security detail “who I have come to know and trust” and to replace them with protectors “who I can only imagine will serve the interests of the Director General”.

Dintwe states:

> “This threatened action coupled with the dilapidated security measures at my residence and the anonymous threats I have received in my line of work serves to intimidate me in the prosecution of my constitutional mandate and presents a very real threat to my personal safety...
>
> “It is my sincere belief that the intimidation I have been facing from the Director General is occasioned by the investigations I am undertaking into the complaints laid against him.
>
> “To the extent that these allegations are in the public domain, they are recorded by investigative journalist Jacques Pauw in his book *The President's Keepers*... These allegations include forgery, fraud and various offences in terms of the Prevention and Combating of Corrupt Activities Act.”

Dintwe describes a range of troubling incidents of alleged obstruction from Fraser, including in relation to another DA complaint about the SSA being used to spy on political parties and the IGI's attempts to get funding to fill vacancies in his office.

He asks the court to declare unconstitutional the legal framework whereby Fraser can purportedly revoke the security clearance of the IGI and control or veto the IGI's budget.

Dintwe describes how matters came to a head after Fraser wrote to him on 8 November 2017 claiming that Fraser was aware “that I had received classified information from political parties in Parliament which information relates to the State Security Agency and its activities”.

- **Read the “confidential” and “secret” letters here (https://www.dropbox.com/sh/aoqafgj9mxua7ny/AABCokxCqto6ZGH0I0O3MeV0a?dl=0).**

In the letter Fraser told the IGI that he believed members or former members of the SSA unlawfully disclosed information to these political representatives of Parliament and the IGI had an obligation to report and disclose receipt of classified information to the SSA director general.

“Later, on 13 November 2017, the Director General addressed a threatening letter to me in which he claimed that he was aware that I was in possession of certain 'classified' information submitted to my office by the Democratic Alliance. This is illustrative of the extent of the abuse... By labelling the information as 'classified', Mr Fraser sought to prevent me from making use of the information in the very investigation against him.”

Then on 15 November Fraser wrote again, claiming the SSA had received “disturbing information” impacting upon the IGI's security competence and demanding that he submit himself for re-vetting. “No clarity or detail was provided except for insinuations and prevarications.”

In a subsequent letter dated 3 December 2017, the director general advised the IGI of an impending investigation by the SSA “regarding the leakage of a classified OIGI report”.

This was a report by the previous IGI into the claims against Fraser, some details of which were published by Pauw (https://www.dropbox.com/s/ltg6wyowde42h8j/171203_ST.pdf?dl=0) in the *Sunday Times* earlier on the same day.

Fraser claimed the IGI had been "uncooperative" with the re-vetting efforts and informed Dintwe to cooperate with the SSA in the process of re-vetting and the imminent investigation.

Dintwe resisted and notes in his affidavit:

> “The attempt by the Director General to conduct a re-vetting of me owing to the fact that I did not report the receipt of classified information to him is nothing more than an attempt to interfere with the discharge of my mandated constitutional oversight responsibilities and reflects a gross misunderstanding on the part of the Director General of my powers and duties. The conduct of the Director General is illegal, unconstitutional and violates the provisions of the [Intelligence Services] Oversight Act, and the Constitution.”

Then came the decision in March to revoke his security clearance completely.

Dintwe states:

> “The substantive justification for the revocation of my security clearance is utterly irrational and unreasonable. The Director General claims that my security clearance is being revoked because I am a threat to security. The reason why it is alleged that I am a threat to security is because I am supposedly in possession of classified information. By definition, my role is to be in possession of classified information. It is impossible for me to exercise my responsibilities unless I have access to all types of information, classified or not. The Director General cannot control the manner in which I exercise my functions by determining the classified nature of the information accessible to me.
>
> “The facts illustrate gross abuse of public office in order to achieve improper ends. I have shown above that, to his knowledge, the Director General is the subject of investigation. He obviously knows that if he can revoke my security clearance, I will have no entitlement to access the necessary information. Therefore, the Director General is in effect attempting to block an investigation into himself.”

What was the Principal Agent Network (PAN)?

It was an intelligence network established by Arthur Fraser and then-director general of the National Intelligence Agency (NIA) Manala Manzini. It allegedly operated as a parallel intelligence network without oversight of how it acted or how it spent up to R1.5-billion of public money.

PAN was established in the early 2000’s during Fraser’s first stint in the intelligences services and ran until 2009. Both Manzini and Fraser left the intelligences services shortly thereafter.

According to Jacques Pauw’s book *The President’s Keepers* and reports in *Daily Maverick*, PAN agents conducted illegal surveillance, blew R48-million leasing properties and R24-million buying 293 cars and employed a wide network of highly suspect undercover agents.

Most damning though are the allegations that Fraser’s family members benefitted from the project, a charge they deny.

Two secret reports, produced by former IGI, advocate Faith Radebe, found that “financial controls were non-existent”, with millions in cash repeatedly being siphoned off to PAN.

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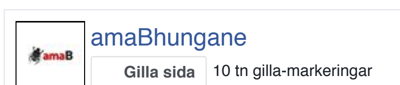

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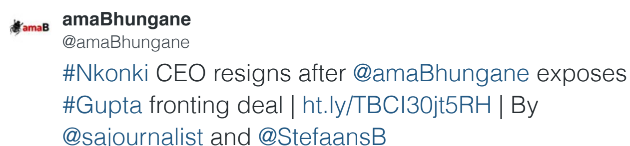

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Svenska Hamnarbetarförbundet Avd. 4 Göteborg

Göteborg 2017-01-19

Svar på hemställan

Till av Medlingsinstitutet utsedda medlare Anders Lindström och Jan Sjölin

Av Medlingsinstitutet utsedda medlare har 2017-01-17 hemställt om att Hamn4an ska teckna s.k. hängavtal. Medlarbudet är identiskt med det förslag arbetsgivarparten APM Terminals lade fram under medlingssamtalen i december.

Såsom upprepade gånger framgått under medlingssamtal och direktförhandlingar med Bolaget sedan dess, är Hamn4an berett att teckna kollektivavtal med APM Terminals. Såsom också framgår av medlarnas hemställan innebär detta i sig ingen lösning på rådande missförhållanden på arbetsplatsen, men ger fackföreningen nya verktyg att, under fredsplikt, verka för en lösning av utestående personalfrågor.
Avdelningen har vid upprepade tillfällen klargjort att en sådan överenskommelse förutsätter att Hamn4an, som organiserar en kvalificerad majoritet av de anställda inom avtalsområdet, reellt blir en jämbördig facklig part i avtalsförhållandet.
Avdelningen accepterar inte att de facto direkt eller indirekt bli en underorganisation till Svenska Transportarbetareförbundet.

Hamn4ans motförslag till Bolagets bud i december var därför att parterna skulle teckna hängavtal med följande tillägg:
* APM Terminals förband sig att följa svensk arbetsrättslig lagstiftning.
* APM Terminals accepterade att Hamn4an utser skyddsombud inom de skyddsområden där medlemmar i Hamnarbetarförbundet är i majoritet samt att avdelningen garanteras att utse ett huvudskyddsombud med representation och fullständiga rättigheter som huvudskyddsombud i skyddskommittén.
* Att det mellan parterna tecknas en förhandlingsordning.

APM Terminals avvisade Hamn4ans motförslag.

Hamn4an har alltjämt samma uppfattning som tidigare och avvisar därför även medlarna Anders Lindström och Jan Sjölins upprepning av APM Terminals förslag.

Däremot välkomnar avdelningen varje annat konstruktivt förslag till lösning, och medverkar gärna i sådana diskussioner under opartisk och konstruktiv medling.

Peter Annerback,
Ordförande Sv. Hamnarbetarförbundet Avd. 4

Svenska Hamnarbetarförbundet avd. 4 Tel 031-515451
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418 34 GÖTEBORG
e-mail: info@hamn4an.se

Evidens rörande konflikten APM/Sveriges Hamnar och Unionbusting riktat mot Hamnarbetarförbundet 2017

Arbetsgivaren APM Terminals konfliktåtgärder stod ensamt för 87,2% av de förlorade arbetsdagarna i Sverige förra året.

APM Terminals, som driver containerterminalen i Göteborgs hamn, genomförde under sommaren en lockout (utestängning av de egna arbetstagarna utan lön) som innebar sammanlagt 2 241 förlorade arbetsdagar enligt MI:s beräkningar.

Totalt genomförde arbetstagare tre lovliga strejker och en potentiellt olovlig strejk (sopkonflikten i Stockholm) i Sverige under fjolåret. Arbetstagarnas arbetsnedläggelser innebar totalt 329 förlorade arbetsdagar.

Sören Öman AB

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	Omsättning	Res.e.fin
2015	1906	3902
2014	1552	1478
2013	2115	1996
2012	1773	1695
2012	1881	1813

Obs! boksluten har olika längd.
Siffrorna som visas i grafen normaliseras till 12 månader.

Bokslutet 2012 är 4 månader och har därför blivit justerat uppåt.

Visa flera år

Information

Bolagsform: Aktiebolag

F-Skatt: Registrerad **Läs mer**

Moms: Registrerad i Momsregistret

Registreringsår: 2006

Visa styrelsen

Nyckeltal 2015-12 (tkr)

Omsättning: 1 906

Res. e. fin:	3 902
Årets resultat:	3 396
Summa tillgångar:	12 189

Fler bokslut & nyckeltal

VINSTMARGINAL	KASSALIKVIDITET	SOLIDITET	BRUTTOVINSTMARGINAL
204,93%	**1 566,71%**	**93,62%**	**100,00%**
95,43% (2014)	1 418,55% (2014)	92,95% (2014)	100,00% (2014)

Bokslut & nyckeltal	2015-12	2014-12	2013-12	2012-12	2012-08
Antal anställda	0	-	0	0	0
Omsättning (tkr)	1 906	1 552	2 115	591	1 881
Res. e. finansnetto (tkr)	3 902	1 478	1 996	565	1 813
Årets resultat (tkr)	3 396	1 146	2 017	312	1 000
Summa tillgångar (tkr)	12 189	8 795	8 797	6 814	6 676
Löner till styrelse & VD (tkr)	0	-	0	0	0
Löner till övriga anställda (tkr)	0	-	0	0	0
Vinstmarginal	204,93%	95,43%	94,42%	95,60%	96,38%
Kassalikviditet	1 566,71%	1 418,55%	791,10%	1 156,88%	952,35%
Soliditet	93,62%	92,95%	81,61%	84,47%	82,08%

Miljonsmäll för Handelshögskolan

Realtid 1 dec 2010 14:01 Visa originalet

Handelshögskolan i Stockholm åker på en miljonstämning sedan Högsta domstolen rivit upp en felaktig skiljedom. Det är en arbetstvist med tidigare högskoledirektören Håkan Hederstierna som fortsätter att spöka för Handelshögskolan i Stockholm.

En färsk dom i Högsta domstolen ger Hederstierna rätt att driva ett ersättningskrav mot Handelshögskolan, tvisten ska avgöras genom skiljeförfarande.

- Jag kommer att inleda den processen inom kort, säger Håkan Hederstierna till Realtid.se. Han vill inte ytterligare kommentera detaljerna i sina krav på skolan.

Redan 2006 slog en skiljenämnd fast att Handels skulle betala ut pensionspremier till SEB Trygg Liv som Hederstierna hade rätt till enligt sitt tidigare anställningsavtal.

Enligt obekräftade uppgifter i Svenska Dagbladet kostade domen Handels cirka 15 miljoner kronor.

Håkan Hederstierna ansåg dock att domen enbart reglerade delar av hans krav på Handelshögskolan. I slutet av 2006 påkallade han därför ett nytt skiljeförfarande.

Handel motsatte sig denna process med motiveringen att skiljeklausulen i anställningsavtalet upphört att gälla i och med den första domen. Enligt Handels hade de nya kraven varit uppe även under den första prövningen men då dragits tillbaka.

Enligt Handels, som har Vinge som juridiska rådgivare, gjorde omständigheterna i målet att skolan med fog kunde anta att saken var utagerad. Ett så kallat konkludent avtal hade uppstått mellan parterna.

I september 2007 beslöt skiljenämnden att gå på Handelshögskolans linje och avvisa Håkan Hederstiernas krav. Han dömdes även att stå för kostnaderna i målet.

Skiljenämnden bestod av Arbetsdomstolens ordförande Michaël Koch, vice ordförande **Sören Öman** samt advokaten Lars Viklund.

Domen fördes dock vidare för prövning i Svea hovrätt. Detta är enligt lagen om skiljeförfarande möjligt om nämnden inte behandlar de aktuella frågorna i tvisten.

I juni 2009 kom Svea hovrätt fram till att skiljedomen var felaktig och att skiljeavtalet mellan parterna fortfarande gällde. Dessutom ansågs Handelshögskolan vara skyldig att stå för kostnaderna i målet.

Hovrätten riktade bland annat in sig på att Handels borde ha begärt ett avgörande rörande tilläggskraven när denna möjlighet gavs under den första processen.

Något sådant krav framfördes dock aldrig och därför är det fritt fram för Håkan Hederstierna att driva tvisten vidare, enligt hovrätten.

ARBETSDOMSTOLEN

Dom nr 6/17
Mål nr A 123/15

Ett hamnbolag bundet av ett kollektivavtal mellan Sveriges Hamnar och Svenska Transportarbetareförbundet har i sina hamnar förlagt arbetstid och betalat ersättning för vissa arbetstagare inte enligt kollektivavtalet utan enligt lokala överenskommelser med Svenska Hamnarbetarförbundet. Fråga om bolaget brutit mot kollektivavtalet eller om Sveriges Hamnar och Svenska Transportarbetareförbundet känt till och accepterat avvikelserna. Även fråga om bolaget har brutit mot sin förhandlingsskyldighet enligt medbestämmandelagen i samband med att bolaget vid ett tillfälle hyrt in arbetskraft samt storleken på allmänt skadestånd för brott mot kollektivavtal och medbestämmandelagen.

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www.arbetsdomstolen.se

Expeditionstid
måndag–fredag
09.00–12.00
13.00–15.00

ARBETSDOMSTOLEN	DOM 2017-01-25 Stockholm	Dom nr 6/17 Mål nr A 123/15

KÄRANDE
Svenska Transportarbetareförbundet, Box 714, 101 33 Stockholm
Ombud: förbundsjuristen Annett Olofsson, LO-TCO Rättsskydd AB, Box 1155, 111 81 Stockholm

SVARANDE
1. Sveriges Hamnar (för ej talan)
2. ShoreLink AB, 556053-7168, Box 716, 941 28 Piteå
Ombud för ShoreLink AB: advokaten Lars Hartzell och jur.kand. Petter Wenehult, Elmzell Advokatbyrå AB, Gamla Brogatan 32, 111 20 Stockholm

SAKEN
Kollektivavtalsbrott m.m.

Bakgrund

Mellan Sveriges Hamnar och Svenska Transportarbetareförbundet (Transport) gäller Hamn- och Stuveriavtalet (kollektivavtalet). ShoreLink AB (bolaget) är medlem i Sveriges Hamnar och därmed bundet av kollektivavtalet. Bolaget bedriver verksamhet i hamnarna i Skellefteå, Piteå, Luleå och Kalix med arbetstagare som företrädesvis är medlemmar i Svenska Hamnarbetarförbundet (Hamnarbetarförbundet).

Parterna tvistar i huvudsak om bolagets förläggning av arbetstiden för vissa arbetstagare strider mot kollektivavtalet och om bolaget har brutit mot förhandlingsskyldigheten enligt 11 och 38 §§ medbestämmandelagen i samband med att bolaget vid ett tillfälle hyrt in arbetskraft. Tvisten har inte kunnat lösas vid förhandlingar mellan parterna.

Bolaget har inte förlagt den ordinarie dagarbetstiden mellan kl. 7.00 och kl. 16.30 som anges i § 4 A Mom 1 i kollektivavtalet. I stället har bolaget tillämpat andra arbetstider för berörda arbetstagare. Schemaläggningen av arbetstiden har inte föregåtts av överläggning eller överenskommelse mellan Sveriges Hamnar eller bolaget och Transport eller dess berörda avdelning (jämför § 4 B Mom 1, C Mom 1, D Mom 1 och § 7 i arbetstidsavtalet i bilaga 3 till kollektivavtalet). Däremot har bolaget, enligt egen uppgift, träffat kollektivavtal eller andra överenskommelser om arbetstiderna med Hamnarbetarförbundet eller dess berörda avdelning. Bolaget har inte betalat övertidsersättning enligt § 5

Mom 7 i kollektivavtalet för arbete som utförts utanför den ordinarie dagarbetstiden enligt § 4 A Mom 1 i kollektivavtalet.

Kollektivavtalet

I kollektivavtalet finns följande bestämmelser.

> **§ 1 Avtalets omfattning**
>
> Kollektivavtalet omfattar alla arbeten som utförs i stuveriföretagens regi. Exempel på sådana arbeten är lastning och lossning av fartyg, terminal-arbeten, godsräkning, av- och påluckningsarbeten, surrnings- och förtöj-ningsarbeten. Så länge detta avtal gäller ska vid arbetsgivarens arbets-platser tillämpas här nedan upptagna allmänna bestämmelser, löner och ordningsregler samt i förhandlingsprotokoll och protokollsanteckningar angivna beslut rörande detta avtals tolkning och tillämpning.
>
> [...]
>
> **§ 4 Arbetstid/Ersättningar**
>
> Ordinarie arbetstid utgör i genomsnitt 40 timmar per helgfri vecka.
>
> A Dagarbetstid
>
> Mom 1 Arbetstidens förläggning
>
> Den ordinarie dagarbetstiden förläggs (såvida inte annat överenskommes lokalt):
>
> | | |
> |---|---|
> | Måndag–fredag | Kl. 7.00–16.30 |
> | Måltidsraster | Kl. 9.00–9.30 |
> | | Kl. 12.00–13.00 |
>
> Arbetsgivaren kan senarelägga måltidsrast, dock endast med måltids-rastens längd.
>
> En kafferast om 15 minuter får tas ut under dagen. Rastens förläggning ska anpassas till arbetet. Om ytterligare kafferast tas ut, förlängs den ordinarie arbetstiden med den extra kafferastens längd.
>
> På midsommar-, jul- och nyårsafton kan arbete endast bedrivas som frivilligt övertidsarbete.
>
> B Schemalagt arbete
>
> Mom 1 Särskild förläggning av arbetstiden
>
> Föreligger behov av fast förläggning av ordinarie arbetstid till annan tid än som föreskrivs under punkt A eller annan utjämning av arbetstiden, exempelvis för färjetrafik, upprättas efter överläggningar mellan de avtalsslutande parterna ett särskilt lokalt arbetstidsschema för berörda arbetstagare.

För uppgörande av ändamålsenliga pass/skiftscheman kan avsteg i erforderlig omfattning göras från bestämmelsen angående veckovila. Vid schemaläggning ska dock iakttas att veckovilan utgör minst 24 timmar per sjudygnsperiod.

Mom 2 OB-tillägg

Till arbetstagare som utför arbete på schemalagd arbetstid enligt ovan utgår följande OB-tillägg:

	fr.o.m. 2013-09-01:	fr.o.m. 2014-04-01:	fr.o.m. 2015-04-01
måndag–fredag kl. 16.00–24.00	41:44 kr/tim	42:27 kr/tim	43:12 kr/tim
måndag–fredag kl. 0.00–7.00	73:66 kr/tim	75:13 kr/tim	76:63 kr/tim
lördag kl. 0.00 – söndag kl. 24.00	116:82 kr/tim	119:16 kr/tim	121:54 kr/tim
Från kl. 0.00 trettondagen, 1 maj, Kristi himmelsfärdsdag, nationaldagen och alla helgons dag till kl. 0.00 första vardagen efter resp. helger	131:32 kr/tim	133:95 kr/tim	136:63 kr/tim
Från kl. 7.00 på skärtorsdagen, nyårsafton, pingstafton, midsommarafton och julafton till kl. 0.00 första vardagen efter resp. helger:	165:60 kr/tim	168:91 kr/tim	172:29 kr/tim

Anm
OB-tillägg utgår även under håltid.

C Skiftarbete

Mom 1 Förläggning av skiftarbete

Vid behov av olika former av skiftarbete förläggs, efter överenskommelse mellan de avtalsslutande parterna, arbetstiden enligt lokalt upprättat arbetstidsschema, vilket ska ange arbetstidens början och slut samt raster.

För uppgörande av ändamålsenliga pass/skiftscheman kan avsteg i erforderlig omfattning göras från bestämmelsen angående veckovila. Vid schemaläggning ska dock iakttas att veckovilan utgör minst 24 timmar per sjudygnsperiod.

[...]

Mom 13 Betalningsregler för skiftarbete

Till arbetstagare, som utför skiftarbete, utgår följande skifttillägg:

[…]

D Förskjutning av ordinarie arbetstid (s.k. FA-tid)

Mom 1 Förläggning av FA-tid

Vid behov av förskjutning av ordinarie arbetstid kan, efter överenskommelse mellan de avtalsslutande parterna, arbetstiden förläggas enligt lokalt upprättat arbetstidsschema.

Vid arbete på FA-tid ska de särskilda tillämpningsregler gälla varom de avtalsslutande parterna i samråd med de lokala parterna kan enas.

Mom 2 FA-tillägg

Till arbetstagare, som utför arbete på förskjuten ordinarie arbetstid, utgår följande FA-tillägg:

a) Per åttatimmarspass som påbörjas vardagar mellan kl. 14.00 och 17.00:
fr.o.m. den 1 september 2013: 612:50 kr.
fr.o.m. den 1 april 2014: 624:75 kr.
fr.o.m. den 1 april 2015: 637:25 kr.

b) Per åttatimmarspass som påbörjas vardagar mellan kl. 22.00 och 1.00:
fr.o.m. den 1 september 2013: 771:42 kr.
fr.o.m. den 1 april 2014: 786:85 kr.
fr.o.m. den 1 april 2015: 802:59 kr.

c) För förskjuten arbetstid från kl. 14.00–24.00 lördagar, söndagar från kl. 0.00-06.00 måndag morgon samt från kl. 6.00 långfredag, pingstafton, midsommarafton, julafton, nyårsafton till första vardagen efter resp. helger utgår gällande övertidstillägg för motsvarande tider.

§ 5 Övertid

Mom 1 Uttagning till övertidsarbete

Till övertidsarbete uttas i första hand frivillig arbetskraft. Erhålls därvid inte tillräckligt antal frivilliga arbetstagare, får arbetsgivaren beordra övertidsarbete.

De lokala parterna överenskommer om tillämpningsregler för anmälan och uttagning till övertidsarbete.

I de fall de lokala parterna inte enas om annat gäller följande vid uttagning till övertidsarbete i anslutning till ordinarie arbetstid måndag-fredag:

- Övertidsarbete varslas i samband med lunchrasten.
- Beställning av övertidsarbete sker senast en och en halv timme före ordinarie arbetstidens slut.

- Betalning utgår för beställd tid. De lokala parterna kan mot ekonomisk kompensation överenskomma om att denna regel inte ska gälla. Uppgörelse ska innehålla uppgift om hur tillskapat löneutrymme fördelats.

[...]

Mom 7 Betalningsregler

För övertidsarbete utgår övertidstillägg

$\frac{\text{månadslönen}}{173}$ + procentuellt tillägg enligt följande:

1. Arbete på övertid betalas med 50 % förhöjning. Som övertid räknas arbete på måltidsraster och den arbetstid om två timmar, som infaller direkt efter den ordinarie arbetstidens slut eller är skild därifrån endast av måltidsrast.

2. Arbete på kvalificerad övertid, varmed avses all tid som inte är ordinarie tid eller övertid, betalas med följande förhöjningar:

   100 % på vardagar, 150 % på söndagar och 200 % på nyårsdagen, trettondagen, långfredagen, påskdagen, annandag påsk, 1 maj, Kristi himmelsfärdsdag, pingstdagen, nationaldagen, midsommardagen, alla helgons dag, juldagen och annandag jul.

3. För övertidsarbete efter EM-skift betalas kvalificerad övertidsersättning.

I månadslönen enligt ovanstående formel inkluderas inte skift-, OB- och FA-tillägg.

I bilaga 3, med rubriken ”Arbetstidsavtal”, till kollektivavtalet finns följande bestämmelser.

I § 4 Hamn- och Stuveriavtalet finns viktiga regler om arbetstidens förläggning.

Genom detta avtal har parterna gjort undantag från arbetstidslagen (SFS 1982:673) i dess helhet.

§ 1 Ordinarie arbetstid

Den ordinarie arbetstiden utgör i genomsnitt 40 timmar per helgfri vecka. Raster är inte inräknade.

Vecka räknas från och med måndag eller annan dag enligt vad som tillämpas på arbetsstället.

[…]

3 § Övertid

1. Vad är övertid?

Övertid är den tid som överstiger ordinarie arbetstid (40 timmar per helgfri vecka) och jourtid.

Vid beräkning av övertid skall ledighet som förläggs till arbetstagarens ordinarie arbetstid likställas med fullgjord arbetstid.

2. Övertidens omfattning

[…]

§ 7 Vila

1. Dygnsvila

Arbetstagare skall beredas minst 11 timmars sammanhängande vila per 24-timmarsperiod. Avvikelse får göras tillfälligtvis, om det föranleds av något särskilt förhållande som inte har kunnat förutses av arbetsgivaren, under förutsättning att arbetstagaren ges motsvarande kompensations-ledighet. Avvikelse får även göras genom lokal överenskommelse, under förutsättning att arbetstagaren ges motsvarande kompensationsledighet eller bereds lämpligt skydd.

I den dygnsvila som alla arbetstagare har rätt till skall tiden kl. 0.00–5.00 ingå. Avvikelse får göras om det är nödvändigt med hänsyn till arbetets art, allmänhetens behov eller andra särskilda omständigheter. Avvikelse får även göras genom lokal överenskommelse.

Yrkanden

Transport har yrkat att Arbetsdomstolen förpliktar bolaget att till Transport betala allmänt skadestånd med

1. 100 000 kr för brott mot § 4 B Mom 1 i kollektivavtalet,
2. 1 000 000 kr för brott mot § 5 Mom 7 i kollektivavtalet,
3. 100 000 kr för brott mot § 4 D Mom l i kollektivavtalet,
4. 500 000 kr för brott mot § 5 Mom 7 i kollektivavtalet,
5. 100 000 kr för brott mot § 4 C Mom 1 i kollektivavtalet,
6. 100 000 kr för brott mot § 4 A Mom 1 i kollektivavtalet,
7. 100 000 kr för brott mot 7 § i arbetstidsavtalet i bilaga 3 till kollektiv-avtalet, och
8. 200 000 kr för brott mot 11 och 38 §§ medbestämmandelagen.

På de allmänna skadestånden har ränta enligt 6 § räntelagen yrkats från den 15 oktober 2015 (dagen för delgivning av stämning) till dess betalning sker.

Bolaget har bestritt yrkandena och inte vitsordat något belopp för allmänt skadestånd, men däremot vitsordat ränteyrkandena som skäliga i och för sig.

Om Arbetsdomstolen skulle komma fram till att bolaget har begått skadeståndsgrundande handlingar, har bolaget yrkat att skadeståndet ska jämkas, i första hand till noll och i andra hand kraftigt.

Transport har bestritt att det finns skäl för att jämka skadeståndet.

Transport och bolaget har yrkat ersättning för rättegångskostnader.

Sveriges Hamnar har förklarat att föreningen inte för talan i målet.

Till utveckling av talan har parterna anfört i huvudsak följande.

Transport

Sammanfattning av grunderna för talan

Kollektivavtalet ska tillämpas på alla arbeten som utförs i bolagets regi oberoende av om arbetet utförts av en arbetstagare som är medlem i Transport eller en arbetstagare som inte är det. Kollektivavtal eller andra överenskommelser med Hamnarbetarförbundet eller dess avdelningar ger inte rätt att avvika från kollektivavtalet.

Arbetstidsavtalet i bilaga 3 till kollektivavtalet har ingen betydelse för vilken ersättning som ska betalas för arbete i enlighet med §§ 4 och 5 i själva kollektivavtalet.

Transport har inte kännedom om vilka arbetstagare påtalade kollektivavtalsbrott avser, eftersom bolaget konsekvent har nekat Transport att få ta del av personuppgifter om arbetstagarna.

Yrkandena under punkt 1 och 2 (§ 4 B Mom 1 – särskild förläggning av arbetstiden – och § 5 Mom 7 – övertidstillägg)

I § 4 A Mom 1 i kollektivavtalet finns det regler om förläggning av ordinarie dagarbetstid (måndag–fredag kl. 7.00–16.30). Om det behövs fast förläggning av ordinarie arbetstid till annan tid än som framgår av § 4 A i kollektivavtalet, eller annan utjämning av arbetstiden, kan ett särskilt lokalt arbetstidsschema upprättas enligt § 4 B Mom 1 i kollektivavtalet. Som framgår av nämnda bestämmelse är en förutsättning för att upprätta ett särskilt lokalt arbetstidsschema att överläggningar dessförinnan har hållits mellan de avtalsslutande parterna, dvs. mellan Sveriges Hamnar och Transport.

Några överläggningar har inte hållits mellan Sveriges Hamnar och Transport om att upprätta ett särskilt lokalt arbetstidsschema hos bolaget. Den ordinarie arbetstiden hos bolaget ska därmed förläggas enligt bestämmelsen i § 4 A Mom 1 i kollektivavtalet. Arbetstid förlagd utanför ordinarie arbetstid enligt § 4 A Mom 1 i kollektivavtalet är då övertid som ska betalas enligt § 5 Mom 7 i kollektivavtalet.

Bolaget har vid arbete i hamnarna i Piteå och Skellefteå under tiden den 1 december 2013–den 30 november 2014 betalat viss ersättning, benämnd ”OB-tillägg EM”, men inte ersättning för övertid och kvalificerad övertid enligt § 5 Mom 7 punkt 1 och 2 i kollektivavtalet till ett antal arbetstagare – tillsvidareanställda och s.k. blixtar, som är tidsbegränsat anställda för arbetstoppar. Bolaget har förlagt arbete enligt schema för tillsvidareanställda utanför den ordinarie arbetstiden enligt § 4 A Mom 1 i kollektivavtalet på det sätt som avses med bestämmelsen om särskild förläggning av arbetstiden i § 4 B i kollektivavtalet. Bolaget har därmed brutit mot § 4 B Mom 1 i kollektivavtalet genom att schemaläggningen inte föregåtts av överläggningar mellan Sveriges Hamnar och Transport.

Bolaget har betalat ”OB-tillägg EM” även till blixtar. Sveriges Hamnar och Transport är överens om att blixtar enligt kollektivavtalet ska avlönas med timlön för arbete måndag–fredag kl. 7.00–16.30 (ordinarie arbetstid enligt § 4 A Mom 1 i kollektivavtalet) och att blixtar för arbete under övrig tid ska få ersättning för övertid enligt § 5 Mom 7 i kollektivavtalet.

Det arbete som tillsvidareanställda och blixtar utfört under den angivna tiden i de angivna hamnarna har delvis varit förlagt utanför ordinarie arbetstid enligt § 4 A Mom 1 i kollektivavtalet. Genom att inte för det arbetet betala övertidsersättning och kvalificerad övertidsersättning enligt § 5 Mom 7 punkt 1 och 2 i kollektivavtalet har bolaget brutit mot nämnda bestämmelser.

Det lönetillägg bolaget betalat, ”OB-tillägg EM”, kan inte jämställas med skifttillägg enligt kollektivavtalet. Det är inte fråga om skiftarbete vare sig för tillsvidareanställda eller blixtar, inte ens enligt bolagets egen beskrivning av hur arbetet har varit organiserat.

Yrkandena vidhålls även för det fall Arbetsdomstolen skulle godta bolagets invändning om att en överenskommelse mellan bolaget och Hamnarbetarförbundet är ett lokalt arbetstidsschema enligt kollektivavtalets bestämmelser. Särskild förläggning av arbetstiden enligt § 4 B Mom 1 i kollektivavtalet kräver överläggning mellan de avtalsslutande parterna innan särskilt lokalt arbetstidsschema upprättas. Någon sådan överläggning har inte hållits. Bolaget har även i den situationen brutit mot kollektivavtalet genom att inte betala blixtarna övertidsersättning.

<u>Yrkandena under punkt 3 och 4 (§ 4 D Mom 1 – FA-tid – och § 5 Mom 7 – övertidstillägg)</u>

FA står för ”förskjuten ordinarie arbetstid”. Enligt § 4 D Mom 1 i kollektivavtalet kan de avtalsslutande parterna, dvs. Sveriges Hamnar och Transport, vid behov av förskjutning av ordinarie arbetstid, komma överens om att förlägga arbetstiden enligt lokalt upprättat arbetstidsschema på ett sätt som avviker från den ordinarie arbetstidens förläggning enligt § 4 A Mom 1 i kollektivavtalet.

Det finns inte någon överenskommelse mellan Sveriges Hamnar och Transport om förskjutning av ordinarie arbetstid enligt § 4 D Mom 1 i kollektivavtalet hos bolaget. Bolaget har därmed inte fått förskjuta ordinarie arbetstid enligt lokalt upprättat arbetstidsschema. Den ordinarie arbetstiden hos bolaget ska således förläggas enligt bestämmelsen i § 4 A Mom 1 i kollektivavtalet. Arbetstid förlagd utanför ordinarie arbetstid enligt § 4 A Mom 1 i kollektivavtalet är då övertid som ska betalas enligt § 5 Mom 7 i kollektivavtalet.

Bolaget har vid arbete i hamnarna i Kalix, Luleå, Piteå och Skellefteå under tiden den 1 december 2013–den 30 november 2014 förskjutit ordinarie arbetstid för tillsvidareanställda utan att Sveriges Hamnar och Transport har kommit överens om att förlägga arbetstiden enligt lokalt upprättat arbetstidsschema som avviker från den ordinarie arbetstidens förläggning enligt § 4 A Mom 1 i kollektivavtalet. Bolaget har därigenom brutit mot § 4 D Mom 1 i kollektivavtalet.

Bolaget har vidare för arbete under den angivna tiden i de angivna hamnarna betalat FA-tillägg till blixtar. Blixtar har ingen ordinarie arbetstid som kan förskjutas enligt § 4 D Mom 1 i kollektivavtalet. Sveriges Hamnar och Transport är som nämnts överens om att blixtar enligt kollektivavtalet ska avlönas med timlön för arbete måndag–fredag kl. 7.00–16.30 (ordinarie arbetstid enligt § 4 A Mom 1 i kollektivavtalet) och att blixtar för arbete under övrig tid ska få ersättning för övertid enligt § 5 Mom 7 i kollektivavtalet. Genom att inte för arbete annan tid än måndag–fredag kl. 7.00–16.30 betala ersättning för övertid och kvalificerad övertid till blixtarna har bolaget brutit mot § 5 Mom 7 punkt 1 och 2 i kollektivavtalet.

Yrkandena vidhålls även för det fall Arbetsdomstolen skulle godta bolagets invändning om att en överenskommelse mellan bolaget och Hamnarbetarförbundet är ett lokalt arbetstidsschema enligt kollektivavtalets bestämmelser. Förskjutning av ordinarie arbetstid enligt § 4 D Mom 1 i kollektivavtalet kräver överenskommelse mellan de avtalsslutande parterna för att den ordinarie arbetstiden ska kunna förläggas enligt lokalt upprättat arbetstidsschema. Någon sådan överenskommelse har inte träffats. Bolaget har även i den situationen brutit mot kollektivavtalet genom att inte betala blixtarna övertidsersättning för arbete annan tid än måndag–fredag kl. 7.00–16.30.

Yrkandet under punkten 5 (§ 4 C Mom 1 – skiftarbete)

Enligt § 4 C Mom 1 i kollektivavtalet kan, vid behov av olika former av skiftarbete, de avtalsslutande parterna – Sveriges Hamnar och Transport – komma överens om att förlägga arbetstiden enligt lokalt upprättat arbetstidsschema, vilket ska ange arbetstidens början och slut samt raster.

Det finns inte någon överenskommelse mellan Sveriges Hamnar och Transport om att hos bolaget införa skiftarbete enligt § 4 C Mom 1 i kollektivavtalet genom att förlägga arbetstiden enligt lokalt upprättat

arbetstidsschema. Bolaget har därmed inte fått förlägga arbetet som skift-arbete. Den ordinarie arbetstiden hos bolaget ska således förläggas till måndag–fredag kl. 7.00–16.30 enligt bestämmelsen i § 4 A Mom 1 i kollektivavtalet.

En mindre grupp tillsvidareanställda arbetstagare har enligt schema arbetat skift med s.k. inlagring i hamnen i Piteå. Skiftarbetet har pågått dygnet runt i vart fall under hela 2014.

Bolaget har därmed brutit mot § 4 C Mom 1 i kollektivavtalet genom att schemaläggningen under 2014, som innebar skiftarbete, inte tillkommit efter överenskommelse mellan Sveriges Hamnar och Transport.

Yrkandet vidhålls även för det fall Arbetsdomstolen skulle godta bolagets invändning om att en överenskommelse mellan bolaget och Hamnarbetar-förbundet är ett lokalt arbetstidsschema enligt kollektivavtalets bestämmelser. Skiftarbete enligt § 4 C Mom 1 i kollektivavtalet kräver överenskommelse mellan de avtalsslutande parterna. Någon sådan överenskommelse har inte träffats.

Yrkandet under punkten 6 (§ 4 A Mom 1 – ordinarie dagarbetstid)

Enligt § 4 A Mom 1 i kollektivavtalet ska ordinarie dagarbetstid förläggas på visst angivet sätt ”såvida inte annat överenskommes lokalt”. Med detta avses ett lokalt avtal mellan bolaget och Transports berörda avdelning.

Bolaget har brutit mot kollektivavtalet genom att, utan att lokalt avtal träffats mellan bolaget och Transports berörda avdelning, förlägga ordinarie arbetstid på annat sätt än enligt § 4 A Mom 1 i kollektivavtalet, dvs. till måndag–fredag kl. 7.00–16.30.

Bolaget har förlagt den ordinarie arbetstiden så att ingen hamnarbetare längre hade sin arbetstid förlagd till kl. 7.00–16.30. Arbetstiden var i Luleå hamn förlagd till kl. 6.00–14.00, i Skellefteå hamn till kl. 6.30–15.00 samt i Piteå och Kalix hamnar till kl. 6.00–14.30.

Yrkandet avser tillsvidareanställda arbetstagare vid bolagets samtliga hamnar som under perioden december 2013–november 2014 haft sin ordinarie dagarbetstid förlagd på annat sätt än enligt § 4 A Mom 1 i kollektivavtalet.

Om Arbetsdomstolen skulle anse att det finns en lokal överenskommelse, i den mening som avses i kollektivavtalet, om annan förläggning av ordinarie arbetstid än som anges i § 4 A Mom 1 i kollektivavtalet, har bolaget inte brutit mot § 4 A Mom 1 i kollektivavtalet.

Yrkandet under punkten 7 (arbetstidsavtalet i bilaga 3 till kollektivavtalet – dygnsvila)

Enligt 7 § i arbetstidsavtalet i bilaga 3 till kollektivavtalet ska arbetstagare beredas minst elva timmars sammanhängande vila per 24-timmarsperiod. Avvikelse från detta kan göras genom lokal överenskommelse, under förutsättning att arbetstagaren ges motsvarande kompensationsledighet eller bereds lämpligt skydd.

Det har inte träffats någon överenskommelse mellan bolaget och Transports berörda avdelning om avvikelse från 7 § i Arbetstidsavtalet.

Bolaget har under 2014 inte gett ett antal arbetstagare minst elva timmars sammanhängande vila per 24-timmarsperiod. Bolaget har därmed brutit mot 7 § i Arbetstidsavtalet.

Yrkandet vidhålls även om Arbetsdomstolen skulle anse att det finns en lokal överenskommelse, i den mening som avses i 7 § i Arbetstidsavtalet, som innebär avvikelse från dygnsviloregeln i 7 § i Arbetstidsavtalet. Berörda arbetstagare har inte getts motsvarande kompensationsledighet eller beretts lämpligt skydd.

Yrkandet under punkten 8 (11 och 38 §§ medbestämmandelagen)

Den 27 april 2015 hyrde bolaget in arbetskraft från företaget ISAB i Skellefteå för att utföra arbete med lastning och lossning av fartyget Asia Zircon i hamnen i Skellefteå.

Beslut om att hyra in personal i stället för att låta egna arbetstagare utföra arbetet är en sådan fråga som en arbetstagarorganisation typiskt sett vill förhandla om. Därmed fanns det förhandlingsskyldighet enligt 11 § medbestämmandelagen.

Transport hade under 2015 åtminstone en medlem som var arbetstagare hos bolaget. Transport har inte avstått från förhandling när det som i detta fall gäller inhyrning från ett företag som inte är bundet av kollektivavtalet.

Genom att bolaget inte före inhyrningen förhandlat med Transport enligt 11 och 38 §§ medbestämmandelagen har bolaget brutit mot de nämnda bestämmelserna och är skadeståndsskyldigt i förhållande till Transport.

Talan är inte preskriberad

Transports talan om allmänt skadestånd för kollektivavtalsbrott är inte preskriberad. Transport fick kännedom om kollektivavtalsbrotten först i samband med en avtalskontroll hos bolaget i maj 2015 och påkallade tvisteförhandlingar i direkt anslutning till att kollektivavtalsbrotten uppdagades. Lokala tvisteförhandlingar hölls i juni 2015.

Bakgrund

Sedan början av 1900-talet har det träffats centrala kollektivavtal mellan Sveriges Stuvareförbund (numera Sveriges Hamnar) och Transport. De äldre centrala kollektivavtalen förutsatte att det lokalt i varje hamn träffades kollektivavtal om anställningsvillkoren. Norra Västerbottens Stuveriaktiebolag, avseende Skellefteå hamn, Bottenvikens Stuveri Aktiebolag (numera ShoreLink AB), avseende Piteå och Luleå hamnar, samt Kalix Stuveriaktiebolag, avseende Kalix hamn, träffade för 1969–1970 kollektivavtal med Transports respektive avdelning. En förutsättning för dessa lokala kollektivavtals giltighet var att de godkändes av de centrala parterna. Dessutom kunde kollektivavtalen sägas upp av de centrala parterna.

Sveriges Stuvareförbund och Transport träffade 1974 för första gången ett centralt kollektivavtal med en utförlig reglering av anställningsvillkor i form av minimivillkor som skulle gälla i samtliga hamnar i Sverige.

När 1974 års centrala kollektivavtal träffades omfattade Bottenvikens Stuveri Aktiebolags verksamhet hamnarna i Luleå, Piteå och Skellefteå hamnar. Kalix Stuveri AB drev verksamheten i Kalix hamn. Bolaget har därefter övertagit även verksamheten i Kalix hamn.

Bolaget var bundet av kollektivavtal med Transport redan innan det eventuellt på 1970-talet blev bundet av kollektivavtal med Hamnarbetarförbundet eller dess berörda avdelning.

Majoriteten av arbetstagarna hos bolaget är medlemmar i Hamnarbetarförbundet. Av bolagets arbetstagare är sju medlemmar i Transport. Åtminstone en av dessa sju medlemmar är tillsvidareanställd och arbetar i en verkstad.

Enligt § 1 i kollektivavtalet omfattar avtalet alla arbeten som utförs i stuveriföretagens regi, inklusive verkstadsarbete.

Kollektivavtalsbrotten

Avtalskontrollen och tvisteförhandlingarna

Transport har genom åren återkommande begärt att få information från bolaget om hur arbetstagarna arbetar och vilka ersättningar de får. Bolaget har inte lämnat de begärda uppgifterna. Vid ett tillfälle, då Transport hade påkallat tvisteförhandling för brott mot övertidsbestämmelserna i kollektivavtalet, vägrade bolaget att lämna ut övertidsjournaler, men betalade 180 200 kr till Transport för att lösa tvisten.

Transport har inte tidigare prioriterat att driva tvist mot bolaget för brott mot regeln om granskning av handlingar i § 16 Mom 5 i kollektivavtalet. I samband med att bolaget skulle ta över verksamhet i Luleå hamn från ett kommunalägt bolag med flera medlemmar hos Transport prioriterade dock Transport upp frågan.

Transport genomförde slutligen en avtalskontroll hos bolaget den 19 maj 2015 avseende arbete under tiden den 1 december 2013 till och med den 30 november 2014. Då uppdagades ett antal brott mot kollektivavtalet. Transport påkallade tvisteförhandlingar som hölls i juni 2015. Transport vet inte vilka arbetstagare som kollektivavtalsbrotten avser eller om någon av dessa arbetstagare är medlemmar i Transport, eftersom bolaget inte velat låta Transport ta del av personuppgifter om arbetstagarna. Vid tvisteförhandlingar har bolaget inte bestritt sakomständigheterna. Bolaget och Sveriges Hamnar har bara invänt att det avtal som ska tillämpas är bolagets kollektivavtal med Hamnarbetarförbundet samt att Transports anspråk skulle vara preskriberade.

Särskild förläggning av arbetstiden i hamnarna i Piteå och Skellefteå

Bolaget hade i hamnarna i Piteå och Skellefteå förlagt arbete enligt schema för tillsvidareanställda utanför den ordinarie arbetstiden enligt § 4 A Mom 1 i kollektivavtalet på det sätt som avses med bestämmelsen om särskild förläggning av arbetstiden i § 4 B i kollektivavtalet. Schemaläggningen hade inte föregåtts av överläggningar mellan Sveriges Hamnar och Transport. Bolaget hade i samma hamnar betalat viss ersättning till tillsvidareanställda och blixtar för arbete förlagd på sådan tid, benämnd ”OB-tillägg EM”, men inte ersättning för övertid enligt § 5 Mom 7 punkt 1 och 2 i kollektivavtalet (yrkandena under punkt 1 och 2).

Bestämmelsen i § 4 B Mom 1 i kollektivavtalet reglerar enligt sin ordalydelse *fast* förläggning av ordinarie arbetstid. Efter överläggning mellan de avtalsslutande parterna kan ett särskilt lokalt arbetstidsschema upprättas för berörda arbetstagare. Ett sådant schema är ett schema som sträcker sig en viss tid framåt, ett ”fast schema”.

Tillfällig förskjutning av ordinarie arbetstid (FA-tid) i hamnarna i Kalix, Luleå, Piteå och Skellefteå

Bestämmelsen i § 4 D Mom 1 i kollektivavtalet reglerar tillfällig förskjutning av ordinarie arbetstid. Bolaget hade vid arbete i hamnarna i Kalix, Luleå, Piteå och Skellefteå förskjutit ordinarie arbetstid för tillsvidareanställda utan att Sveriges Hamnar och Transport har kommit överens om att förlägga arbetstiden enligt lokalt upprättat arbetstidsschema som avviker från den ordinarie arbetstidens förläggning enligt § 4 A Mom 1 i kollektivavtalet. Vidare hade bolaget betalat FA-tillägg till blixtar (yrkandena under punkt 3 och 4).

Skiftarbete i hamnen i Piteå

Bolaget hade infört schemaläggning som innebar skiftarbete enligt § 4 C Mom 1 i kollektivavtalet för vissa arbetstagare som arbetade med s.k. inlagring i hamnen i Piteå, utan att det hade föregåtts av överenskommelse mellan Sveriges Hamnar och Transport (yrkandet under punkten 5).

Förläggningen av den ordinarie arbetstiden i hamnarna i Kalix, Luleå, Piteå och Skellefteå

Enligt uppgifter från bolagets lönekontor hade bolaget ändrat förläggningen av den ordinarie arbetstiden så att ingen hamnarbetare längre hade sin ordinarie arbetstid förlagd till kl. 7.00–16.30 enligt § 4 A Mom 1 i kollektivavtalet (yrkandet under punkten 6). Arbetstiden har under hela 2014 varit förlagd i Luleå hamn till kl. 6.00–14.00, i Skellefteå hamn till kl. 6.30–15.00 och i Piteå och Kalix hamnar till kl. 6.00–14.30.

Utebliven dygnsvila

Enligt uppgifter från bolagets lönekontor hade bolaget under 2014 betalat ut ersättning för så kallad ”kort övergång”. Med ”kort övergång” menas att arbetet har förlagts så att arbetstagarna fått kortare dygnsvila än elva timmar, dvs. med avvikelse från 7 § i arbetstidsavtalet i bilaga 3 till kollektivavtalet (yrkandet under punkten 7). Transport vet inte om detta förekommit i alla bolagets hamnar eller bara i några.

Brottet mot förhandlingsskyldigheten

Transport fick genom en av sina ITF-inspektörer reda på att bolaget i april 2015 hade hyrt in arbetskraft för lastning och lossning i hamnen i Skellefteå. Det berättade en facklig förtroendeman vid det kommunala hamnbolaget för inspektören vid ett besök.

Vid tvisteförhandlingar har arbetsgivarsidan inte bestritt sakomständigheterna. Bolaget och Sveriges Hamnar har då bara invänt att bolaget hade förhandlat med Hamnarbetarförbundet. Vid lokal tvisteförhandling anförde bolaget att det avvisade skadeståndskravet, eftersom det haft muntlig kontakt med Hamnarbetarförbundet lokalt och fått ett godkännande.

Transport hade åtminstone en medlem som var arbetstagare hos bolaget (den arbetstagare som arbetade i verkstaden). Därutöver har Transport haft medlemmar som återkommande och regelbundet varit anställda hos bolaget som blixtar.

Enligt § 1 i kollektivavtalet har bolagets arbetstagare en arbetsskyldighet som omfattar alla arbeten som utförs i stuveriföretagens regi, dvs. även verkstadsarbete. Arbetsskyldigheten är inte begränsad till en enskild ort.

Bolaget har inte haft fog för att tro att Transport generellt avstått från sina rättigheter enligt 11 och 38 §§ medbestämmandelagen. Bolaget har varit fullt införstått med sin skyldighet att förhandla med Transport enligt 11 och 38 §§ medbestämmandelagen.

Det är inte riktigt att Transport inte sedan medbestämmandelagen trädde i kraft skulle ha gjort gällande att bolaget är skyldigt att primärförhandla med Transport vare sig enligt 11 eller 38 § medbestämmandelagen. Bolaget har tidigare genomfört primärförhandlingar enligt 11 § medbestämmandelagen med Transport, t.ex. 2010 inför tillsättningen av platschefer.

Transport har inte regelmässigt avstått från förhandling när det gäller tillfällig inhyrning av personal. Sveriges Hamnar och Transport är dock överens om att inlåning av personal från ett bolag som omfattas av kollektivavtalet till ett annat bolag som också omfattas av kollektivavtalet inte behöver förhandlas enligt 11 och 38 §§ medbestämmandelagen. Bolaget hyrde emellertid in personal från företaget ISAB, som inte omfattas av kollektivavtalet. Bolaget har varit skyldigt att genomföra förhandling enligt 11 och 38 §§ medbestämmandelagen innan bolaget hyrde in personal från ISAB.

En arbetsgivares beslut att hyra in personal för att utföra ett visst arbete i stället för att låta egna arbetstagare utföra arbetet är en sådan fråga som en arbetstagarorganisation typiskt sett vill förhandla om. Därmed finns det en skyldighet att förhandla enligt 11 § medbestämmandelagen.

Det bestrids att det skulle finnas skäl för att skadeståndet helt ska falla bort eller sättas ner.

Sveriges Hamnar och Transport har aldrig godtagit att bolaget tillämpar kollektivavtal med Hamnarbetarförbundet som innebär avvikelser från kollektivavtalet

Den information som Transport fått om lokala överenskommelser med Hamnarbetarförbundet har varit att vissa stuveribolag troligen haft sådana överenskommelser. När det gäller bolaget har Transport inte kunnat säkerställa att så har varit fallet, eftersom Transport aldrig har fått se några kollektivavtal mellan bolaget och Hamnarbetarförbundet.

Det har inte varit allmänt känt och accepterat i branschen att bolaget träffat lokala kollektivavtal med Hamnarbetarförbundet. Sveriges Hamnar och Transport har inte godtagit att bolaget tillämpar lokala kollektivavtal med Hamnarbetarförbundet som innebär avvikelser från kollektivavtalet. Sveriges Hamnar har inte godtagit att lokala avtal med avvikelser från kollektivavtalet sluts mellan medlemsföretagen och Hamnarbetarförbundet. Transport har inte accepterat att Hamnarbetarförbundet intagit och upprätthållit ställningen som lokal part i vissa hamnar som en allmänt vedertagen praxis på avtalsområdet. Bolaget har påstått att Transport skulle ha förstått att bolaget menade att Hamnarbetarförbundets berörda avdelning skulle bli den lokala förhandlingsparten i bolagets hamnar. Detta bestrids.

Enligt Sveriges Hamnars (SH) egen kommentar till kollektivavtalet avses med ”de lokala parterna” företaget och Transport lokalt. I kommentaren anges följande.

> Det är SH och Transport centralt, de så kallade centrala parterna, som tecknar HSA. Det finns bestämmelser i avtalet som ger möjlighet för de lokala parterna, företaget och Transport lokalt, att träffa överenskommelser i vissa frågor. […]
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> Svenska Hamnarbetarförbundet (SH) är inte part i avtalet. Det betyder att lokala och centrala avtal inte får träffas med HF. Om ett företag med enbart HF-medlemmar är i behov av lokala regler, måste överenskommelse ändå träffas med Transport.

Sveriges Hamnars tolkning av kollektivavtalet överensstämmer med Transports tolkning och den gemensamma partsavsikten när kollektivavtalet träffades.

Bolaget har haft diskussioner med Transport om ett lokalt avtal mellan Transports avdelning och bolaget. Transport har dock inte fått se de överenskommelser som bolaget säger sig ha haft med Hamnarbetarförbundet. Vid förhandling sommaren 2016 mellan bolaget och Transports avdelning presenterade bolaget en sammanställning som enligt bolaget återspeglade villkoren i de avtal bolaget sade sig ha med Hamnarbetarförbundet. Transports avdelning påpekade att det i sammanställningen fanns vare sig scheman eller varselregler för bilagda arbetstider. Enligt bolagets HR-chef fanns reglerna i minst 200 protokoll, men inget av dessa presenterade under förhandlingen. Transport har inte i februari 2007 informerats om villkoren i bolagets lokala avtal med Hamnarbetarförbundet.

P.W. har varit lokal ombudsman sedan 1999 och förbundsombudsman sedan 2013. Han har vid flera tillfällen begärt att få ut de lokala överenskommelser som bolaget hänvisat till. Bolaget har inte lämnat ut några överenskommelser. P.W. har också vid flera tillfällen, såväl muntligt som skriftligt, begärt att få tillgång till övertidsjournaler. Bolaget har inte lämnat ut några övertidsjournaler. P.W. har inte heller fått del av något utkast till anpassning av lokalavtalet för Piteå hamn till kollektivavtalet.

Bolagets uppgifter om arbetstider och lönetillägg

Transport vitsordar att arbetstiden för hamnarbetare i Luleå hamn varit förlagd till kl. 6.00–14.00 och att arbetstiden för hamnarbetare i Skellefteå hamn varit förlagd till kl. 6.30–15.00. Beträffande bolagets uppgifter i övrigt om arbetstider har Transport ingen insikt i de faktiska förhållandena, varför förbundet inte kan vitsorda de uppgifterna.

Bolaget har anfört att den ersättning som av bolaget benämnts ”OB-tillägg EM” kan jämställas med skifttillägg. Bolaget har betalat ”OB-tillägg EM” till både tillsvidareanställda och blixtar. Varken tillsvidareanställda eller blixtar som betalats med ”OB-tillägg EM” har arbetat skift. Däremot arbetade en mindre grupp anställda i Piteå hamn under 2014 skift med s.k.

inlagring. Som framgår av § 4 C Mom 1 i kollektivavtalet är skiftarbete bara tillåtet om Sveriges Hamnar och Transport har träffat överenskommelse om att arbetstiden kan förläggas enligt lokalt upprättat arbetstidsschema. I praktiken har detta tillämpats på så sätt att om Transport lokalt har varit överens med företaget har de centrala parterna godtagit detta och villkoret om överenskommelse i § 4 C Mom 1 i kollektivavtalet har ansetts uppfyllt. Som nämnts har det inte träffats någon överenskommelse mellan Sveriges Hamnar och Transport om skiftarbete vid bolaget.

Beräkning av skadeståndsyrkandena under punkt 2 och 4

För två av Transports sju yrkanden om allmänt skadestånd för kollektiv-avtalsbrott (yrkandena under punkt 2 och 4) har det allmänna skadeståndets storlek beräknats med ledning av den förtjänst som bolaget gjort genom att bryta mot kollektivavtalet och inte betala ut övertidsersättning enligt § 5 Mom 7 i kollektivavtalet. Yrkandena har beräknats som skillnaden mellan den ersättning bolaget betalat ut och övertidsersättning, jämte ersättning för den kränkning som kollektivavtalsbrotten innebär.

Mot den bakgrunden saknar den av bolaget upprättade jämförelsen mellan vad bolaget betalat och ett annat lokalt kollektivavtal betydelse. Bolagets jämförelse tar vidare inte hänsyn till att blixtar ska betalas med timlön måndag–fredag kl. 7.00–16.30 och att allt arbete på annan tid ska ersättas som övertid enligt § 5 Mom 7 i kollektivavtalet. Den ersättning bolaget har betalat innebär en halvering av blixtarnas inkomst och en ekonomisk förtjänst för bolaget. Blixtar är bara anställda när de arbetar och för att kompensera för sina begränsade rättigheter jämfört med övriga arbetstagare har de en högre ersättning när de väl arbetar.

Det allmänna skadeståndets uppgift är att, där det är behövligt, effektivt avhålla från avsteg från vad lag och avtal innehåller. Lagstiftaren har angett att en viktig princip är att det inte i något fall ska te sig lönsamt för en arbetsgivare att sätta arbetstagarnas rätt åt sidan från vad lag och avtal innehåller (se bl.a. prop. 1975/76:105 bil. 1 s. 302).

Vid beräkningarna av bolagets förtjänst har förbundet inte gått längre tillbaka än 2014.

Yrkandet under punkten 2 beräknades i stämningsansökan till mellan-skillnaden mellan av bolaget betalt ”OB-tillägg EM” och ersättning för kvalificerad övertid enligt § 5 Mom 7 punkt 2 i kollektivavtalet för arbetade timmar. Den sammanlagda förtjänst som bolaget gjort genom att bryta mot kollektivavtalet beräknades då uppgå till 2 134 180 kr. Resterande belopp upp till tidigare yrkade 2 500 000 kr avsåg ersättning för den kränkning som detta kollektivavtalsbrott innebär.

Med utgångspunkt i den redogörelse som bolaget lämnat för arbetstiderna i hamnarna kan Transport nu konstatera att bolaget betalat ”OB-tillägg EM” till arbetstagare som arbetat mellan kl. 14.30 och 23.00 i hamnen i Piteå samt mellan kl. 13.00 och 21.00 i hamnen i Skellefteå. De första två

timmarna (14.30–16.30) i hamnen Piteå ligger inom ordinarie arbetstid enligt § 4 A Mom 1 i kollektivavtalet. De därpå följande två timmarna (16.30–18.30) ska betalas med övertidsersättning enligt § 5 Mom 7 punkten 1 i kollektivavtalet. Resterande 4,5 timmar (18.30–23.00) ska betalas med kvalificerad övertidsersättning enligt § 5 Mom 7 punkt 2 i kollektivavtalet. De första 3,5 timmarna (13.00–16.30) i hamnen i Skellefteå ligger inom ordinarie arbetstid enligt § 4 A Mom 1 i kollektivavtalet. De därpå följande två timmarna (16.30–18.30) ska betalas med övertidsersättning enligt § 5 Mom 7 punkt 1 i kollektivavtalet. Resterande 2,5 timmar (18.30–21.00) ska betalas med kvalificerad övertidsersättning enligt § 5 Mom 7 punkt 2 i kollektivavtalet. Den beräkning som gjorts av bolagets förtjänst i stämningsansökan är med dessa utgångspunkter inte korrekt. Förtjänsten kan uppskattas till hälften av 2 134 180 kr. Yrkandet under punkten 2 har därför satts ned till 1 000 000 kr.

Yrkandet under punkten 4 beräknades i stämningsansökan till mellanskillnaden mellan av bolaget betald FA-ersättning enligt § 4 D Mom 2 i kollektivavtalet och övertidstillägg enligt § 5 Mom 7 punkt 2 i kollektivavtalet för arbetade timmar. Den förtjänst som bolaget gjort genom att bryta mot kollektivavtalet uppgick med det beräkningssättet till 865 662 kr. Resterande belopp upp till tidigare yrkade 1 000 000 kr avsåg ersättning för den kränkning som detta kollektivavtalsbrott innebär. Bolaget har nu redogjort för att bolaget betalat FA-tillägg till blixtar som arbetat i hamnen i Piteå kl. 14.30–23.00, i hamnen i Skellefteå kl. 15.00–23.00, i hamnen i Luleå kl. 14.00–22.00 och i hamnen i Kalix kl. 14.30–23.00. Med utgångspunkt i bolagets redogörelse har Transport justerat sin beräkning. De två första timmarna efter kl. 16.30 ska betalas med övertidsersättning enligt § 5 Mom 7 punkt 1 i kollektivavtalet. Tid därefter ska betalas med kvalificerad övertidsersättning enligt § 5 Mom 7 punkt 2 i kollektivavtalet. Förtjänsten kan uppskattas till hälften av 865 662 kr. Yrkandet under punkten 4 har därför satts ned till 500 000 kr.

Transport bestrider att bolagets lokala avtal med Hamnarbetarförbundet skulle vara mer förmånliga för arbetstagarna än jämförbara avtal som Transports avdelningar har tecknat. Som exempel kan nämnas följande. Bolaget har betalat ”OB-tillägg EM” med 36,49 kr/timme eller 37,22 kr/timme. Om bolaget hade iakttagit ordningen i kollektivavtalet och upprättat lokalt arbetstidsschema efter överläggning mellan Sveriges Hamnar och Transport, skulle arbetstagarna ha fått OB-tillägg enligt § 4 B Mom 2 i kollektivavtalet med högre belopp, 41,44 kr/timme eller 42,27 kr/timme.

Påstådd preskription

Transports talan är inte preskriberad. Transport har agerat så snart Transport fick kännedom om att bolaget bröt mot kollektivavtalets bestämmelser. Som nämnts har Transport genom åren återkommande begärt att få information från bolaget om hur arbetstagarna arbetar och vilken ersättning de får, men inte fått någon sådan information. Det var först i samband med avtals-

kontrollen hos bolaget i maj 2015 som Transport fick reda på kollektiv-avtalsbrotten. Transport påkallade tvisteförhandlingar i direkt anslutning till att kollektivavtalsbrotten uppdagades, och lokala tvisteförhandlingar hölls i juni 2015.

Rättslig argumentation

Det står en arbetsgivare fritt att binda sig genom kollektivavtal med flera arbetstagarorganisationer. Är kollektivavtalen i fråga om anställningsvillkor oförenliga, ska dock det först träffade kollektivavtalet tillämpas på arbets-tagarna hos arbetsgivaren. Eftersom kollektivavtalet är först träffat avtal, får tillämpningen av ett annat kollektivavtal inte innebära avvikelser från kollektivavtalet. Bolaget var redan bundet av kollektivavtalet när det eventuellt träffade kollektivavtal med Hamnarbetarförbundet.

Ett kollektivavtal binder – förutom avtalsparterna – medlemmar och under-ordnade organ hos avtalsparterna. Sveriges Hamnar och Transport kan däremot inte träffa ett kollektivavtal som binder någon annan, t.ex. Hamn-arbetarförbundet. Hamnarbetarförbundet kan för egen del inte grunda några rättigheter på kollektivavtalet mellan Sveriges Hamnar och Transport. För det fall bolaget vill avvika från kollektivavtalet krävs ett kollektivavtal mellan Sveriges Hamnar och Transport. När det enligt aktuella bestämmel-ser i kollektivavtalet krävs överläggning eller överenskommelse för tillåtna avvikelser avses överläggning eller överenskommelse mellan Sveriges Hamnar eller bolaget och Transport eller dess berörda avdelning, inte över-läggningar och överenskommelser mellan bolaget och Hamnarbetarför-bundet eller dess berörda avdelning. När det i § 4 A Mom 1 i kollektiv-avtalet anges att annat i fråga om den ordinarie dagarbetstiden ”överens-kommes lokalt” avses en överenskommelse mellan bolaget och Transports berörda avdelning, inte en överenskommelse mellan bolaget och Hamn-arbetarförbundets berörda avdelning. Detta följer av bestämmelsernas ordalydelse och den gemensamma partsavsikten.

Bolaget

Sammanfattning av grunderna för bestridandet

Till följd av en händelsekedja som tog sin början på 1970-talet har bolaget förhandlat och tecknat kollektivavtal med Hamnarbetarförbundet eller dess berörda avdelning.

Påstådda kollektivavtalsbrott

Enligt § 4 A Mom 1 i kollektivavtalet förläggs den ordinarie dagarbetstiden på visst sätt, ”såvida inte annat överenskommes lokalt”. Den lokala överens-kommelsen kan alltså föreskriva en helt annan ordinarie arbetstid än den som föreskrivs i kollektivavtalet. Det anges inte i § 4 A Mom 1 i kollektiv-

avtalet att den lokala överenskommelsen måste vara träffad mellan ”avtalsparterna” eller arbetsgivaren och Transports berörda avdelning. Detta kan ha varit den tolkning som avtalsparterna ursprungligen har haft, men med tanke på den faktiska tillämpningen i många svenska hamnar, har en i praxis väl etablerad retroaktiv gemensam partsvilja i vart fall uppkommit som innebär att arbetsgivare som är bundna av kollektivavtalet kan, med avvikelse från kollektivavtalet, komma överens om den ordinarie arbetstiden även med Hamnarbetarförbundet eller dess berörda avdelning.

Bolaget har i fråga om arbetstid sedan 1996 tillämpat ett kollektivavtal som träffats mellan bolaget och Hamnarbetarförbundet. Det kollektivavtalet träffades enligt uppgift helt i samförstånd och transparens mellan Sveriges Hamnar, Transport och Hamnarbetarförbundet. Sveriges Hamnar och Transport har sedan snart 20 år känt till och accepterat att bolaget i fråga om arbetstid, med avvikelse från kollektivavtalet, tillämpat kollektivavtalet mellan bolaget och Hamnarbetarförbundet.

Bolaget och Hamnarbetarförbundet eller dess berörda avdelning har alltså träffat överenskommelser om dygnsvila, skiftarbete, betalning av ersättningar och ändrad ordinarie arbetstid som bolaget, med avvikelse från kollektivavtalet, fått följa och har följt. Bolaget har därför inte brutit mot kollektivavtalet.

Det bestrids inte, utom i fråga om övertid, att bolaget i och för sig förfarit i förhållande till kollektivavtalet på det sätt Transport gjort gällande. Det är riktigt att det inte i de hänseenden Transport angett förekommit överläggningar eller överenskommelser mellan Sveriges Hamnar eller bolaget och Transport eller dess berörda avdelning.

Enligt § 3 i arbetstidsavtalet i bilaga 3 till kollektivavtalet är övertid den tid som överstiger ordinarie arbetstid (40 timmar per helgfri vecka) och jourtid. Det följer av arbetstidsavtalet att övertidsersättning bara ska betalas till tillsvidareanställda som arbetat mer än 40 timmar under en helgfri vecka och blixtar som arbetat mer än 8 timmar under en dag. Varken tillsvidareanställda eller blixtar hos bolaget har enligt denna definition arbetat någon övertid. Övertidsersättning enligt § 5 Mom 7 i kollektivavtalet ska således inte betalas bara för att det rör sig om arbete utanför ordinarie arbetstid. Oavsett om bolaget träffat lokala överenskommelser med Hamnarbetarförbundet har det alltså inte varit fråga om ett kollektivavtalsbrott att inte betala övertidsersättning.

Transports talan om allmänt skadestånd för kollektivavtalsbrott är preskriberad enligt kollektivavtalets förhandlingsordning eller enligt lag. Enligt § 16 Mom 4 i kollektivavtalet gäller att ”part som vill yrka skadestånd eller annan fullgörelse enligt MBL eller detta avtal ska påkalla lokal förhandling inom fyra månader efter det att han fått kännedom om den omständighet vartill yrkandet hänför sig och senast inom två år efter det att omständigheten inträffade.” Transport har kontinuerligt ända sedan 1970-talet haft kännedom om de arbetstider och ersättningar som tillämpats i bolagets fyra

hamnar enligt överenskommelser med Hamnarbetarförbundet eller dess berörda avdelning utan att påkalla förhandling. De omständigheter som Transport använder som beräkningsgrund för sina yrkanden under punkt 2 och 4 har inträffat betydligt längre tillbaka än två år innan Transport påkallade förhandling. Under alla förhållanden är alla krav som grundar sig på händelser som inträffat mer än fyra månader innan Transport påkallade lokal förhandling preskriberade. Preskriptionsinvändningen har närmast bäring på skadeståndets storlek.

Ett eventuellt skadestånd ska i vart fall jämkas, i första hand till noll.

Påstått brott mot förhandlingsskyldigheten

Det är riktigt att bolaget inte har påkallat förhandling med Transport inför inhyrningen av arbetskraft från företaget ISAB i Skellefteå AB 2015 för att utföra hamnarbete. Bolaget har däremot erbjudit sig att förhandla inför inhyrningen med Hamnarbetarförbundet, som dock valde att godkänna inhyrningen och avstå från sin eventuella förhandlingsrätt därför att åtgärden i allt väsentligt motsvarade en åtgärd som Hamnarbetarförbundet tidigare godtagit. Vid tidpunkten för inhyrningen hade Transport en medlem som var tillsvidareanställd hos bolaget. Denne arbetade i verkstaden i Luleå. I Skellefteå, som berördes av inhyrningen, hade Transport inte någon medlem.

Transport har inte sedan medbestämmandelagen trädde i kraft den 1 januari 1977 tidigare gjort gällande eller krävt att bolaget ska primärförhandla med Transport enligt vare sig 11 eller 38 § medbestämmandelagen, i vart fall inte när det varit fråga om inhyrning av arbetskraft eller förändrade arbetsvillkor. Bolaget har med fog uppfattat denna passivitet från Transports sida som att Transport generellt avstod från sin eventuella förhandlingsrätt enligt medbestämmandelagen och att bolaget kunde fortsätta att fullgöra sin förhandlingsskyldighet enbart mot Hamnarbetarförbundet. Först under det senaste året har Transport begärt att få primärförhandla med bolaget, vilken begäran har tillmötesgåtts av bolaget i fråga om förhandlingar enligt 11 § medbestämmandelagen. Bolaget har dock inte uppfattat att Transports begäran även avsåg förhandling enligt 38 § medbestämmandelagen i samband med tillfällig inhyrning av personal eller andra entreprenader, eftersom ingen av Transports medlemmar har berörts.

Inhyrningen avsåg ett mindre antal arbetare under fem dagar för att få verksamheten att fungera. Inhyrningen innebar därför inte en sådan viktigare förändring av verksamheten som föranleder förhandlingsskyldighet enligt 11 § medbestämmandelagen. Transport har – med hänsyn till medlemssituationen – typiskt sett saknat intresse av att förhandla.

Transport har regelmässigt avstått från förhandling när det gäller tillfällig inhyrning av personal. Inhyrningen motsvarade i allt väsentligt vad som tidigare godtagits. Så sent som den 4 mars 2016 avstod Transport från en förhandling som rörde inhyrning av personal från Skellefteå kommun till

bolaget. Transports ombudsman P-O.N. har justerat förhandlingsprotokollet med detta avstående, dock har han i en s.k. protokolljustering felaktigt knutit avståendet till att frågan om att utföra arbete i andra hamnar redan är reglerad i kollektivavtalet.

Omständigheterna är sådana att det under alla förhållanden är skäligt att ett allmänt skadestånd för brott mot förhandlingsskyldigheten helt bortfaller.

Bakgrund

Bolaget är ett transport- och logistikföretag som bedriver hamn- och speditionsverksamhet, skeppsklarering samt är entreprenör inom maskin- och transportområdet. Bolaget, som tidigare hette Bottenvikens Stuveri Aktiebolag, bytte 2013 firma till ShoreLink AB.

Bolaget bedriver verksamhet i hamnarna i Skellefteå, Piteå, Luleå och Kalix. I hamnen i Luleå har bolaget tidigare delat verksamheten med det kommunalägda bolaget Luleå Hamn AB. Bolaget har numera tagit över viss verksamhet från Luleå Hamn AB.

Centralt kollektivavtal mellan Sveriges Stuvareförbund och Transport fanns då lokala kollektivavtal 1969–1970 träffades med Transports avdelningar för hamnarna i Skellefteå, Piteå, Luleå och Kalix.

Innan det första riksavtalet träffades 1974 mellan dåvarande Sveriges Stuvareförbund och Transport hade det bara slutits lokala avtal mellan varje hamnbolag och respektive avdelning inom Transport om anställningsvillkor. Även efter att det riksomfattande kollektivavtalet hade träffats fortsatte hamnbolag att träffa lokala avtal angående bl.a. arbetstid med lokala arbetstagarorganisationer.

I februari 1972 uteslöt Transport ett stort antal medlemmar och avdelningar. I mars 1972 bildade de uteslutna avdelningarna Hamnarbetarförbundet. Hamnarbetarförbundets avdelningar fick samma nummer som avdelningarna hade haft när de var avdelningar inom Transport. Efter mars 1972 fortsatte bolaget att teckna lokala avtal med samma representanter för arbetstagarsidan. Dessa representanter företrädde då Hamnarbetarförbundet i stället för Transport.

De första avtalen mellan bolaget och Hamnarbetarförbundet träffades i början av 1970-talet. Sedan länge har det varit praxis och allmänt accepterat i branschen att bolaget har tecknat lokala avtal med Hamnarbetarförbundet.

Avtalssituationen före 1996 – då bolaget och Hamnarbetarförbundet träffade ett samlat kollektivavtal – har betydelse i målet bara som bevis för att Transport kände till bolagets avtalsförhållanden med Hamnarbetarförbundet.

Det är riktigt att kollektivavtalet ska tillämpas även på arbetstagare som inte är medlemmar i Transport.

Bolaget har, liksom de flesta andra medlemsföretagen inom Sveriges Hamnar, haft behov av att förlägga arbetstiden på annat sätt än måndag–fredag kl. 7.00–16.30, som föreskrivs i § 4 A Mom 1 i kollektivavtalet. Anledningen till det är att fartyg angör bolagets hamnar på andra tider och av ekonomiska skäl inte kan vänta på lossning eller lastning tills det blir ordinarie dagarbetstid. Rent logistiskt skulle det vara svårt eller omöjligt att lossa och lasta samtliga fartyg måndag–fredag kl. 7.00–16.30.

Att hamnbolag förlägger arbetstiden på annat sätt än måndag–fredag kl. 7.00–16.30 är vanligt förekommande. De flesta hamnar i Sverige har lokala kollektivavtal om annan förläggning av arbetstiden. Det är riktigt att det varken hållits överläggningar eller träffats överenskommelser om arbetstid hos bolaget mellan Sveriges Hamnar eller bolaget och Transport eller dess berörda avdelning. Vidare är det riktigt att det inte hos bolaget finns något lokalt arbetstidsschema som Sveriges Hamnar eller bolaget överenskommit med Transport eller dess berörda avdelning.

Bolaget har under närmare ett halvt sekel varit bundet av kollektivavtal med Hamnarbetarförbundet. Bolaget har inte gjort något försök att dölja detta för Sverige Hamnar eller Transport. Det har varit allmänt känt och accepterat i branschen att bolaget alltsedan 1970-talet träffat lokala kollektivavtal med Hamnarbetarförbundet som omfattat överenskommelser om arbetstidsförläggning och ersättningar. Även Transport har känt till detta utan att ifrågasätta ordningen utan har tillåtit och tyst accepterat den. Bolaget har t.ex. i februari 2007 till Transports ombudsman P.W. översänt en grundlig sammanställning av avtalsvillkoren i överenskommelserna med Hamnarbetarförbundet. Syftet med sammanställningen var att anpassa det lokala avtalet med Hamnarbetarförbundet till kollektivavtalet. Det finns också flera exempel på förhandlingar som bolaget har genomfört med både Transport och Hamnarbetarförbundet närvarande där bolagets lokala kollektivavtal och andra anställningsvillkor har diskuterats. Transport har alltså haft detaljkännedom om villkoren i bolagets lokala avtal med Hamnarbetarförbundet under lång tid. Att bolaget haft kollektivavtal med Hamnarbetarförbundet framgår också av AD 2001 nr 89.

Det lokala avtalet med Hamnarbetarförbundet följer samma upplägg som andra lokala avtal i svenska hamnar som Transport har varit med och förhandlat fram. Sveriges Hamnar har cirka 60 anslutna företag varav så gott som samtliga har tecknat lokala avtal som komplement till kollektivavtalet. Detta är i princip en förutsättning för att kunna bedriva en fungerande verksamhet i respektive hamn. Kollektivavtalet tillåter lokala avvikelser i förhållandevis stor utsträckning jämfört med andra avtalsområden. Bolagets lokala avtal med Hamnarbetarförbundet är inte på något sätt onormala för branschen. Bolagets lokala avtal är mer förmånliga för arbetstagarna än jämförbara avtal som Transport tecknat.

Arbetstider och lönetillägg under perioden 2013-12-01–2014-12-31

Piteå hamn

I Piteå hamn fanns det under 2014 omkring 52 tillsvidareanställda och 31 visstidsanställda (blixtar) arbetare.

I Piteå hamn är hamnarbetarnas arbetstid förlagd till kl. 6.00–14.30 (förmiddagspass) med möjlighet för bolaget att förlägga arbetstiden till kl. 14.30–23.00 (eftermiddagspass) eller 23.00–6.00 (nattpass). När hamnarbetarna arbetar på eftermiddagspasset får de FA-tillägg. Storleken på FA-tillägget är högre än enligt kollektivavtalets regler.

Terminalarbetarna och lastbilschaufförerna har sin arbetstid förlagd till kl. 6.00–14.30 (förmiddagspass) med möjlighet för bolaget att förlägga arbetstiden till kl. 14.30–23.00 (eftermiddagspass). Redan 1996 gick Sveriges Hamnar och Transport ut med en gemensam tolkning om att ”vid annan förläggning av ordinarie arbetstid t ex vid chaufförsarbete utanför den ordinarie dagarbetstiden tillämpas lokalt överenskomna ob-tillägg, vanligen de tillägg som gäller inom åkeribranschen enligt det s.k. BA-avtalet”. De terminalarbetare och lastbilschaufförer som utför terminalarbetaruppgifter får lönetillägg när de arbetar eftermiddagspass. I sitt lönesystem har bolaget kallat det tillägget för ”OB-tillägg EM”. Lönetillägget är inte ett OB-tillägg enligt § 4 B Mom 2 i kollektivavtalet. Det är i stället ett lönetillägg som kan jämställas med skifttillägg enligt kollektivavtalet och som är på samma belopp. De lönetillägg som terminalarbetarna fick sammanfaller med de skifttillägg som betalas enligt § 4 C Mom 13 i kollektivavtalet.

Skellefteå hamn

I Skellefteå hamn fanns det under 2014 omkring sju tillsvidareanställda och nio visstidsanställda (blixtar) arbetare.

I Skellefteå hamn är hamnarbetarnas arbetstid förlagd till kl. 6.30–15.00 (förmiddagspass) med möjlighet för bolaget att förlägga arbetstiden till kl. 15.00–23.00 (eftermiddagspass) eller 23.00–6.30 (nattpass). När hamnarbetarna arbetar eftermiddagspass får de FA-tillägg. Det FA-tillägget bolaget betalat är högre än enligt kollektivavtalet.

Terminalarbetarna har sin arbetstid förlagd till kl. 6.30–15.00 (förmiddagspass) med möjlighet för bolaget att förlägga arbetstiden till kl. 13.00–21.00 (eftermiddagspass). När de utför terminalarbetaruppgifter får de lönetillägg när de arbetar eftermiddagspass. I sitt lönesystem har bolaget kallat det tillägget för ”OB-tillägg EM”. Lönetillägget är inte ett OB-tillägg enligt § 4 B Mom 2 i kollektivavtalet. Det är i stället ett lönetillägg som kan jämställas med skifttillägg enligt kollektivavtalet, men på ett högre belopp. Det lönetillägg som terminalarbetarna fick är omkring två kronor högre än det skifttillägg som betalas enligt § 4 C Mom 13 i kollektivavtalet.

Luleå hamn

I Luleå hamn fanns det under 2014 omkring 13 tillsvidareanställda och 35 visstidsanställda (blixtar) arbetare.

I Luleå hamn är hamnarbetarnas arbetstid förlagd till kl. 6.00–14.00 (förmiddagspass) med möjlighet för bolaget att förlägga arbetstiden till kl. 14.00–22.00 (eftermiddagspass) eller 22.00–6.00 (nattpass). När hamnarbetarna arbetar eftermiddagspass får de FA-tillägg. Det FA-tillägg bolaget betalat är högre än enligt kollektivavtalet.

Kalix hamn

I Kalix hamn fanns det under 2014 en tillsvidareanställd och sju visstids-anställda (blixtar) arbetare.

I Kalix hamn är hamnarbetarnas arbetstid förlagd till kl. 6.00–14.30 (förmiddagspass) med möjlighet för bolaget att förlägga arbetstiden till 14.30–23.00 (eftermiddagspass) eller 23.00–6.00 (nattpass). När hamn-arbetarna arbetar eftermiddagspass får de FA-tillägg. Det FA-tillägg bolaget betalat är högre än enligt kollektivavtalet.

Bakgrunden till arbetstiderna och betalningen

Bolaget justerade arbetstiderna och ersättningarna 1996 när bolaget införde månadslön. De arbetstider som är aktuella i målet har tillämpats sedan dess. Hamnarbetarna respektive terminalarbetarna och lastbilschaufförerna har också fått FA-tillägg respektive ”OB-tillägg EM” enligt beskrivningen ovan sedan 1996, dvs. i över 20 år. Arbetstidsreglementena och ersättningarna bygger på avtal som bolaget har träffat med Hamnarbetarförbundet.

Anledningen till att bolaget kom överens med Hamnarbetarförbundet i stället för Transport var att samtliga fackligt anslutna arbetare var medlemmar i Hamnarbetarförbundet. Bolaget har behövt diskutera och komma överens med en facklig motpart som representerat arbetstagarna, funnits tillgänglig och varit aktiv på arbetsplatsen samt känt till de lokala förhållandena. Att bolaget kommit överens om arbetstider och ersättnings-former med Hamnarbetarförbundet har både Sveriges Hamnar och Transport hela tiden känt till men inte reagerat mot.

I samband med att bolaget införde månadslön 1996 hade Sveriges Stuvare-förbund och Hamnarbetarförbundet ett stort antal förhandlingar. Vid dessa förhandlingar framgick det klart att bolaget hade tidigare lokala överenskommelser om arbetstid och ersättningar med Hamnarbetarför-bundet. En förutsättning för förhandlingarna med Hamnarbetarförbundet 1996 var att Sveriges Stuvareförbund skulle godkänna bolagets överens-kommelse med Hamnarbetarförbundet. Dåvarande ordföranden för Transport H.W. hölls också informerad om innehållet i förhandlingarna. De

villkor förhandlingarna resulterade i träffades således i full transparens med Sveriges Stuvareförbund och Transport.

Även andra medlemsföretag inom Sveriges Hamnar än bolaget, t.ex. Stockholms Hamn och Karlshamns Hamn, har haft lokala överens-kommelser med Hamnarbetarförbundet om arbetstider m.m. Transport var medvetet och fullt införstått med detta utan att agera. Det var först i mitten av 2000-talet som dessa hamnar konverterade sina lokala överenskommelser med Hamnarbetarförbundet till överenskommelser med Transport.

Jämförelse mellan lokala kollektivavtal

Bolagets verksamhet i Luleå hamn bedrevs tidigare i samverkan med det kommunalägda bolaget Luleå Hamn AB. Luleå Hamn AB är också medlem i Sveriges Hamnar och bundet av kollektivavtalet. Från och med april 2016 tog bolaget över den del av Luleå Hamn AB:s verksamhet som det bolaget drev i den s.k. Victoriahamnen. Övertagandet innebar en verksamhets-övergång enligt 6 b § anställningsskyddslagen.

Bolaget har gjort en jämförelse mellan Luleå Hamn AB:s lokala överens-kommelser med Transport och bolagets lokala överenskommelser med Hamnarbetarförbundet för Luleå hamn. De lokala överenskommelserna med Transport respektive Hamnarbetarförbundet har vuxit fram parallellt under en lång period i samma hamn, under samma centrala avtal och under samma ekonomiska, geografiska och demografiska förhållanden. Bolaget har för 2014 jämfört de enskilda ersättningarna och de totala årslönerna mellan arbetarna i Luleå Hamn AB och bolagets egna arbetare i Luleå hamn. Jämförelsen visar att de båda lokala överenskommelserna är helt jämförbara och likvärdiga. De skillnader som finns är marginella.

Transports lokala avtal med Luleå hamn från den 1 november 2003 avviker från det centrala avtalet i fråga om exempelvis ersättning för förkortad nattvila och rätt att beordra förskjuten arbetstid.

Bolaget har sommaren 2016 till Transports berörda avdelning på Transports begäran översänt en komplett sammanställning av bolagets lokala kollektiv-avtal avseende Luleå Hamn. Transport känner alltså mycket väl till inne-hållet i bolagets lokala kollektivavtal som ligger till grund för jämförelsen.

De lokala överenskommelser bolaget har med Hamnarbetarförbundet för hamnarna i Piteå, Skellefteå och Kalix skiljer sig inte på något avgörande sätt från den lokala överenskommelse bolaget har med Hamnarbetarför-bundet för hamnen i Luleå. Det finns ingen anledning att tro att dessa lokala överenskommelser hade på något avgörande sätt sett annorlunda ut om det hade varit en lokalavdelning inom Transport som förhandlat fram dem i stället för Hamnarbetarförbundets lokalavdelning.

Transport har baserat majoriteten av sina skadeståndsyrkanden på påstå-enden om att bolaget skulle ha gjort ekonomisk förtjänst genom att teckna

lokala kollektivavtal med Hamnarbetarförbundet i stället för Transport. Som framgår av jämförelsen är detta påstående felaktigt.

Yrkandena om skadestånd för påstådda kollektivavtalsbrott

Transport har under den period som är aktuell i målet bara haft en medlem som varit arbetstagare hos bolaget. Medlemmen är dock varken hamn- eller terminalarbetare utan verkstadsarbetare. Han har inte fått något FA-tillägg under perioden och berörs över huvud taget inte av denna tvist. Transport har därmed inte kunnat yrka något ekonomiskt skadestånd i målet och har därför valt att i stället yrka allmänt skadestånd, som till viss del beräknats på ett sätt som är förvillande likt beräkningen av yrkanden om ekonomiskt skadestånd vid kollektivavtalsbrott.

Bolaget har inte gjort någon ekonomisk förtjänst genom den tillämpning som skett. Transport har självt för de flesta svenska hamnar gjort sådana avvikelser från kollektivavtalet som bolaget tillämpat. Bolagets lokala överenskommelser med Hamnarbetarförbundet är helt likvärdiga eller till och med bättre för arbetarna än de lokala överenskommelser Transport träffat. Bolaget har inte gjort någon förtjänst eller obehörig vinst genom att träffa överenskommelserna med Hamnarbetarförbundet.

Att arbetstagarna hos bolaget har arbetat utanför kollektivavtalets ordinarie arbetstid innebär inte att de arbetat övertid. Kollektivavtalet anger inte att arbetsgivaren ska betala övertidsersättning eller kvalificerad övertidsersättning när arbetstagarna inte har arbetat övertid, dvs. för tillsvidareanställda mer än 40 timmar under en vecka och för visstidsanställda blixtar mer än 8 timmar under en dag.

Bolaget har varit i god tro om att den rådande ordningen har varit avtalsenlig och fullt ut accepterad av Transport. Genom att inte vid något tidigare tillfälle ha reagerat eller protesterat mot sakernas tillstånd har Transport varit medvållande till eventuella kollektivavtalsbrott. Den långa period under vilken Transport accepterat sakernas tillstånd måste tillmätas avgörande betydelse. Det bör också beaktas att Transport inte har några medlemmar som berörs av tvisten. Någon egentlig skada har alltså inte drabbat Transport eller någon av dess medlemmar.

Bolaget har utan egen förskyllan hamnat i skottlinjen mellan två fackförbund och har knappast kunnat agera på annat sätt än det gjort. Situationen har varit svåröverblickbar och svårbedömd. Det ligger i sakens natur att bolaget har velat träffa lokala kollektivavtal med den arbetstagarorganisation som faktiskt har medlemmar på bolagets arbetsplatser. Det har inte varit något försök att tillskansa sig ekonomisk förtjänst genom att inte respektera kollektivavtalet. Transport har vägrat att förhandla om lokala överenskommelser. Bolaget har gjort stora ansträngningar genom åren för att hitta lösningar och träffa lokalt kollektivavtal även med Transport. Bolaget har vid flera tillfällen överlämnat avtalsförslag och försökt att träffa en lokal överenskommelse med Transports berörda avdelning. Transport har aldrig återkommit med synpunkter eller egna förslag. Mot bakgrund av detta samt

att det inte ens har gjorts gällande att någon medlem hos Transport har lidit ekonomisk skada på grund av bolagets agerande kan det inte vara skäligt att bolaget ska betala skadestånd till Transport.

Om bolaget hade träffat en lokal överenskommelse med Transport, skulle överenskommelsen sannolikt ha haft ungefär samma villkor som bolagets överenskommelser med Hamnarbetarförbundet.

Preskription

Samtliga Transports yrkanden är preskriberade. Transport har under lång tid haft kännedom om att bolaget träffat överenskommelser med Hamnarbetarförbundet om avvikelser från kollektivavtalet. Enligt kollektivavtalet har Transport haft rätt att när som helst göra framställan om att granska handlingar och bolaget en skyldighet att ”förete avlöningslistor, arbetstidskort, arbetstidsschema samt andra handlingar, som organisationen behöver för att tillvarata medlemmarnas gemensamma intressen i förhållande till arbetsgivaren.”

När nu Transport har valt att yrka ett högt allmänt skadestånd baserat på vidlyftiga helt fiktiva beräkningar av påstådd ekonomisk vinst är det rimligt att bolaget kan göra invändning mot den del av beräkningsgrunden som skulle ha varit preskriberad för den händelse det varit fråga om verklig ekonomisk skada.

Rättslig argumentation

Det finns inte några hinder i lagstiftningen mot att en arbetsgivare binder sig genom kollektivavtal med flera olika fackliga organisationer för ett och samma arbete. Det finns heller inga rättsliga medel för en facklig organisation att hävda ensamrätt i frågan om att teckna kollektivavtal för ett visst arbete, ett visst företag eller en viss bransch.

Principen om att det först träffade kollektivavtalet ska tillämpas på arbetstagarna på arbetsplatsen om kollektivavtalen är oförenliga i fråga om anställningsvillkor har uttryckts i Arbetsdomstolens praxis (AD 1937 nr 149 och AD 1939 nr 24).

Det framgår av 27 § medbestämmandelagen samt AD 1965 nr 28 och AD 1990 nr 48 att lokala kollektivavtal inte får strida mot centrala kollektivavtal som parterna är bundna av. Kollektivavtalet tillåter emellertid lokala avvikelser. Innebörden av kollektivavtalet blir en fråga om kollektivavtalstolkning genom i första hand kollektivavtalets lydelse, därefter vad som är allmänt vedertaget och frågan om passiv accepterat av Transport.

Kollektivavtalet innehåller ingen föreskrift om att lokal förhandlingspart måste vara en avdelning inom Transport. Det har förekommit liknande förhållanden – dvs. avtal med annan lokal part än en avdelning inom Transport – i andra hamnar. I detta fall har det träffats lokala avtal mellan bolaget och Hamnarbetarförbundet under en lång följd av år. Transport har

känt till detta och låtit det ske, se AD 2001 nr 89. Ett förfarande som pågått under ett halvt sekel får anses allmänt vedertaget och känt i branschen.

Det skulle vara ett missbruk av 11 och 38 §§ medbestämmandelagen om bolaget skulle tvingas förhandla med två konkurrerande arbetstagar-organisationer i samma förhandlingsfråga. Transport är visserligen part i kollektivavtalet, men är inte part i de kollektivavtal bolaget har med Hamn-arbetarförbundet och dess berörda avdelning. Det skulle vara orimligt om bolaget skulle vara skyldigt att förhandla med en utomstående arbetstagar-organisation (Transport) när den arbetstagarorganisation som har det kollektivavtal som tillämpas och vars medlemmar berörs (Hamnarbetar-förbundet) redan har godkänt åtgärden. Det gäller i synnerhet som Transport saknade medlemmar på den berörda arbetsplatsen. Under alla förhållanden är omständigheterna i detta fall sådana att det är skäligt att eventuellt skade-stånd helt bortfaller.

Utredningen

Målet har avgjorts efter huvudförhandling. På Transports begäran har vittnesförhör hållits med förbundsombudsmannen P.W., avdelningsombudsmannen P-O.N. och förre förhandlingschefen vid Sveriges Hamnar P.H. På bolagets begäran har förhör under sanningsförsäkran hållits med bolagets VD S.J. samt vittnesförhör hållits med platschefen L-Å.W., tidigare ordföranden vid en av Hamnarbetarförbundets avdelningar H.D., tidigare förhandlingschefen på Sveriges Hamnar J.A. och bolagets löneadministratör C.B. Parterna har åberopat skriftlig bevisning.

Domskäl

Parterna tvistar dels om bolaget har brutit mot bestämmelser i kollektiv-avtalet om förläggning av arbetstid och betalning av ersättning för övertid, dels om bolaget brutit mot förhandlingsskyldigheten enligt 11 och 38 §§ medbestämmandelagen i samband med att bolaget vid ett tillfälle hyrt in arbetskraft. Transport har yrkat sammanlagt 2,2 miljoner kronor i allmänt skadestånd. Bolaget har framställt en preskriptionsinvändning mot yrkandena om allmänt skadestånd för kollektivavtalsbrott och invändningar mot storleken på eventuella allmänna skadestånd.

Preskriptionsinvändningen

Enligt förhandlingsordningen – och 64 § medbestämmandelagen – ska lokal förhandling påkallas inom fyra månader efter det att parten fått kännedom om den omständighet vartill yrkandet hänför sig och senast inom två år efter det att omständigheten inträffade.

Enligt bolaget har Transport sedan länge känt till de arbetstider och ersättningar som tillämpats i bolagets fyra hamnar enligt överenskommelser med Hamnarbetarförbundet eller dess berörda avdelning.

Enligt Transport är yrkandena om allmänt skadestånd för kollektivavtalsbrott inte preskriberade.

Transports yrkanden om allmänt skadestånd för kollektivavtalsbrott avser den arbetstidsförläggning och den betalning som bolaget gjort tidigast från och med december 2013. Transport har påkallat lokala tvisteförhandlingar som hölls i juni 2015. Yrkandena är därför, enligt Arbetsdomstolens mening, inte preskriberade enligt tvåårsregeln.

Enligt Transport var det först i samband med en avtalskontroll hos bolaget i maj 2015 som Transport fick reda på kollektivavtalsbrotten.

Bolaget har, enligt Arbetsdomstolens mening, inte lyckats bevisa att Transport tidigare än så känt till hur bolaget från och med december 2013 förlagt arbetstiden och betalat, dvs. de omständigheter som yrkandena hänför sig till. Det finns nämligen inget i utredningen som talar för det. Frågan om Transport sedan länge känt till att bolaget haft överenskommelser om förläggning av arbetstid och ersättningar med Hamnarbetarförbundet eller dess berörda avdelning, vilken fråga domstolen återkommer till i annat sammanhang, har inte någon betydelse för bedömningen av preskriptionsfrågan.

Det är Arbetsdomstolens slutsats att Transports yrkanden om allmänt skadestånd för kollektivavtalsbrott inte är preskriberade.

Har bolaget brutit mot kollektivavtalet?

Bolaget har inte ifrågasatt att bolaget i förhållande till Transport varit skyldigt att tillämpa anställningsvillkoren i kollektivavtalet på bolagets samtliga arbetstagare.

<u>När ska övertidsersättning betalas?</u>

Enligt Transport har bolaget brutit mot kollektivavtalet genom att inte betala övertidsersättning enligt § 5 Mom 7 i kollektivavtalet till arbetstagare som utfört arbete utanför den ordinarie dagarbetstiden enligt § 4 A Mom 1 i kollektivavtalet.

Bolaget har invänt att övertidsersättning enligt § 5 Mom 7 i kollektivavtalet bara ska betalas till tillsvidareanställda arbetstagare som arbetat mer än 40 timmar under en helgfri vecka och s.k. blixtar, som är visstidsanställda arbetstagare, som arbetat mer än 8 timmar under en dag. Detta följer enligt bolaget av att övertid enligt § 3 i arbetstidsavtalet i bilaga 3 till kollektivavtalet definieras som den tid som överstiger ordinarie arbetstid (40 timmar per helgfri vecka) och jourtid.

Enligt Transport har arbetstidsavtalet i bilaga 3 till kollektivavtalet ingen betydelse för vilken ersättning som ska betalas för arbete i enlighet med §§ 4 och 5 i själva kollektivavtalet. Transport har också åberopat ett justerat protokoll från en central förhandling i juni 2015 mellan på ena sidan Sveriges Hamnar och Oxelösund AB och på andra sidan Transport som innehåller följande:

> Parterna är […] överens om att blixt ersätts enligt Hamn- och Stuveriavtalet med timlön helgfri måndag–fredag mellan klockan 7:00–16:30, eller lokal dagarbetstid, och för övrig tid med timlön plus övertidsersättning.

Någon utredning om vad kollektivavtalsparterna avsett med bestämmelsen i § 5 Mom 7 i kollektivavtalet med betalningsregler vid övertid har inte lagts fram. Arbetsdomstolen är därför vid tolkningen i första hand hänvisad till ordalydelsen och konstruktionen av kollektivavtalet.

I § 4 A Mom 1 i kollektivavtalet anges mellan vilka klockslag måndag–fredag den ordinarie dagarbetstiden förläggs. Av § 4 B, C och D framgår att det, förutom arbete under den ordinarie dagarbetstiden, kan förekomma arbete på annan tid, nämligen schemalagt arbete (§ 4 B), skiftarbete (§ 4 C) respektive förskjutning av ordinarie arbetstid (§ 4 D), om det finns ett lokalt upprättat arbetstidsschema. I § 5 Mom 1–6 i kollektivavtalet finns det bestämmelser om när och hur övertid kan tas ut. I § 5 Mom 7 i kollektivavtalet finns så betalningsregler vid övertid. Där finns också definitioner av övertid respektive kvalificerad övertid, som tydligt hänför sig till arbete mellan vissa klockslag (”arbete på måltidsraster och den arbetstid om två timmar, som infaller direkt efter den ordinarie arbetstidens slut eller är skild därifrån endast av måltidsrast” respektive ”all tid som inte är ordinarie tid eller övertid”).

Arbetstidsavtalet i bilaga 3 till kollektivavtalet innehåller inga betalningsregler. Genom bilagan har kollektivavtalsparterna gjort undantag från arbetstidslagen i dess helhet. Bilagan innehåller bl.a. bestämmelser om arbetstidens och övertidens omfattning, främst under längre beräkningsperioder. I bilagan, som innehåller en hänvisning till bestämmelserna om arbetstidens förläggning i § 4 i själva kollektivavtalet, anges att den ordinarie arbetstiden utgör i genomsnitt 40 timmar per helgfri vecka.

Enligt Arbetsdomstolens mening talar såväl en naturlig läsning av avtalsbestämmelserna som kollektivavtalets konstruktion – med bestämmelser om klockslag och betalning i själva kollektivavtalet och bestämmelser om den totala omfattningen av arbetstiden under främst längre beräkningsperioder i en bilaga – tydligt emot en sådan sammanläggning, kumulation, av definitionerna av övertid i arbetstidsavtalet i bilaga 3 till kollektivavtalet respektive av övertid/kvalificerad övertid i § 4 Mom 5 i själva kollektivavtalet som bolaget förespråkar. En sådan uppdelning i kollektivavtal av bestämmelser om betalning för övertid respektive om begränsning av arbetstidens/övertidens omfattning är vanlig. Det vore också ovanligt med kollektivavtalsbestämmelser som innebär att en arbetstagare skulle få extra betalt för att

arbeta en hel arbetsdag utan att få sin schemalagda måltidsrast bara om arbetstagaren skulle komma att arbeta minst 40 timmar samma vecka eller, vid visstidsanställning som blixt, 8 timmar samma arbetsdag.

Arbetsdomstolens slutsats är att kollektivavtalet, i enlighet med Transports tolkning, innebär att en arbetstagare har rätt till betalning för övertid enligt § 5 Mom 7 i kollektivavtalet så snart han eller hon arbetar utanför den ordinarie arbetstid som är tillämplig för arbetstagaren enligt § 4 A–D i kollektivavtalet, dvs. enligt ett lokalt upprättat arbetstidsschema enligt § 4 B–D i kollektivavtalet eller, i avsaknad av ett sådant schema, enligt § 4 A Mom 1 i kollektivavtalet.

Förläggning av arbetstid

Bolaget har inte bestritt att den förläggning av arbetstiden som förekommit, med förläggning av arbetstid till annan tid än måndag–fredag kl. 7.00–16.30 eller med kortare dygnsvila än som föreskrivits, för att vara förenlig med kollektivavtalet förutsatt åtminstone en lokal överenskommelse/ett lokalt upprättat arbetstidsschema. Parterna är överens om att bolaget och Transport eller dess berörda avdelning inte har gjort några lokala överenskommelser om förläggning av arbetstid/lokala arbetstidsscheman.

Enligt Arbetsdomstolens mening kan det hållas för visst att kollektivavtals-parterna, vid avtalstidpunkten, med bestämmelser om att något i fråga om arbetstid kan överenskommas eller upprättas ”lokalt” avsåg sådant som arbetsgivaren och Transports berörda avdelning kommer överens om eller gemensamt upprättar, inte vad arbetsgivaren kunde komma överens om eller upprätta tillsammans med en med Transport konkurrerande arbetstagar-organisation. Det får också anses framgå av bestämmelsernas ordalydelse. Bolaget verkar inte heller vilja göra gällande något annat.

Bolaget har i stället hävdat att Sveriges Hamnar och Transport sedan lång tid känt till och accepterat att bolaget i fråga om arbetstid, med avvikelse från kollektivavtalet, tillämpat överenskommelser mellan bolaget och Hamnarbetarförbundet eller dess berörda avdelning. Därigenom skulle det, enligt bolaget, genom en väl etablerad praxis ha uppkommit en ”retroaktiv gemensam partsvilja”.

Enligt Transport har Sveriges Hamnar och Transport inte godtagit att bolaget tillämpar överenskommelser med Hamnarbetarförbundet som innebär avvikelser från kollektivavtalet. Bolaget har, enligt Transport, visserligen vid olika tillfällen berättat för Transport att bolaget har kollektivavtal och överenskommelser med Hamnarbetarförbundet eller dess berörda avdelning, men Transport har aldrig fått se själva avtalen eller överenskommelserna.

Enligt de flesta av de aktuella kollektivavtalsbestämmelserna – § 4 B om särskild förläggning av arbetstiden, C om skiftarbete och D om förskjutning av ordinarie arbetstid – krävs det att det lokalt upprättade arbetstidsschemat

har föregåtts av överläggningar eller överenskommelse mellan de avtalsslutande parterna, dvs. Sveriges Hamnar och Transport. Parterna är överens om att bolagets schemaläggning inte har föregåtts av några sådana överläggningar eller överenskommelser.

Bolaget verkar inte ha gjort gällande att Sveriges Hamnar och Transport, före denna tvist, känt till och accepterat just de arbetstidsscheman bolaget faktiskt tillämpat. I vart fall ger utredningen inte något stöd för att så varit fallet. Bolagets inställning är i stället, som Arbetsdomstolen uppfattat den, att Sveriges Hamnar och Transport känt till och accepterat att bolaget, med avvikelse från kollektivavtalet, träffar eller upprättar sådana lokala överenskommelser och lokala arbetstidsschema som avses i kollektivavtalet med Hamnarbetarförbundet eller dess berörda avdelning i stället för med Transports berörda avdelning och utan föregående överläggningar eller överenskommelser mellan Sveriges Hamnar och Transport. Bolaget har bevisbördan för sitt påstående i detta avseende. Stränga beviskrav måste ställas på den som påstår något så ovanligt som att en central arbetstagarorganisation skulle ha accepterat att ge upp sitt, och sina avdelningars, inflytande enligt ett centralt kollektivavtal till förmån för en med denna organisation konkurrerande arbetstagarorganisation samt att detta accepterats också av den centrala arbetsgivarparten.

Enligt Arbetsdomstolens mening är det uppenbart att bolaget inte uppfyllt sin bevisbörda. Det får i och för sig anses utrett att Sveriges Hamnar och Transport känt till att bolaget träffat kollektivavtal och överenskommelser med Hamnarbetarförbundet eller dess berörda avdelning. Utredningen ger också vid handen att Sveriges Hamnar och Transport åtminstone borde ha insett att bolaget inte bedrev sin hamnverksamhet genom att betala ersättning för övertid enligt kollektivavtalet för allt arbete på annan tid än måndag–fredag kl. 7.00–16.30. Det har dock inte framkommit något som talar för att Sveriges Hamnar eller Transport – uttryckligen eller tyst – accepterat att bolaget med stöd av överenskommelser med Hamnarbetarförbundet eller dess berörda avdelning avvikit från kollektivavtalet i fråga om arbetstidens förläggning. Redan vad bolaget anfört om att det genom åren vid flera tillfällen försökt träffa överenskommelser med Transport eller dess berörda avdelning talar för att inte ens bolaget då ansett att Transport accepterat att bolaget avvek från kollektivavtalet med stöd av överenskommelser med Hamnarbetarförbundet eller dess berörda avdelning. Det förekommer i utredningen visserligen andrahandsuppgifter om att Transports dåvarande ordförande H.W. 1995 skulle ha varit inblandad i bolagets förhandlingar om kollektivavtal med Hamnarbetarförbundet, som ska ha skötts av en företrädare för numera Sveriges Hamnar, men inte ens dessa uppgifter ger något stöd för att Sveriges Hamnar och Transport accepterat avvikelser från sitt kollektivavtal i fråga om bolagets förläggning av arbetstid med stöd av överenskommelser med Hamnarbetarförbundet eller dess berörda avdelning.

Arbetsdomstolens slutsats

Med stöd av det sagda kommer Arbetsdomstolen till slutsatsen att bolaget har brutit mot kollektivavtalet i enlighet med vad Transport hävdat.

Har bolaget brutit mot förhandlingsskyldigheten enligt 11 och 38 §§ medbestämmandelagen?

Den 27 april 2015 hyrde bolaget in arbetskraft från företaget ISAB i Skellefteå för att utföra arbete med lastning och lossning av ett fartyg i hamnen i Skellefteå. Transport har inte ifrågasatt bolagets uppgifter om att inhyrningen avsåg ett mindre antal arbetstagare under fem dagar. Bolaget förhandlade inte med Transport inför inhyrningen. Parterna är överens om att bolaget haft åtminstone en medlem i Transport anställd.

Enligt Transport har bolaget inför inhyrningen haft förhandlingsskyldighet enligt 11 § medbestämmandelagen, eftersom beslut om att hyra in personal i stället för att låta egna arbetstagare utföra det aktuella arbetet är en sådan viktigare förändring av verksamheten som en arbetstagarorganisation typiskt sett vill förhandla om.

Bolaget har, förutom annat, invänt att inhyrningen inte inneburit en sådan viktigare förändring av verksamheten att bolaget haft förhandlingsskyldighet enligt 11 § medbestämmandelagen.

Det har inte framkommit annat än att inhyrningen var en enstaka tillfällig åtgärd. Enligt Arbetsdomstolens bedömning har den tillfälliga inhyrningen av ett mindre antal arbetstagare under fem dagar för lastning och lossning av ett enda fartyg inte inneburit en sådan viktigare förändring av bolagets verksamhet som avses i 11 § medbestämmandelagen. Bolaget har alltså inte brutit mot den paragrafen.

Transport har vidare gjort gällande att bolaget inför inhyrningen varit skyldigt att förhandla med Transport enligt 38 § medbestämmandelagen.

Bolaget har inte ifrågasatt att situationen i och för sig varit sådan att det funnits förhandlingsskyldighet enligt 38 § medbestämmandelagen gentemot Transport, men invänt att Transport avstått från sin rätt att få förhandla enligt den paragrafen och att Transport i vart fall regelmässigt avstått från förhandling när det gällt tillfällig inhyrning av personal och därigenom tidigare godtagit en sådan åtgärd.

Transport har bestritt att Transport avstått från sin förhandlingsrätt. Transport har vidare bestritt att Transport regelmässigt avstått från förhandling vid tillfällig inhyrning av personal. Transport har dock vidgått att Transport godtagit att inlåning av personal från ett bolag som omfattas av kollektivavtalet till ett annat bolag som också omfattas av kollektivavtalet sker utan förhandling enligt 38 § medbestämmandelagen, men invänt att det aktuella företaget inte omfattades av kollektivavtalet, vilken uppgift bolaget inte ifrågasatt.

Enligt Arbetsdomstolens bedömning saknas det stöd i utredningen för bolagets uppfattning att Transport generellt avstått från sin förhandlingsrätt. Inte heller ger utredningen något stöd för att den aktuella inhyrningen, från ett företag som inte var bundet av kollektivavtalet, i allt väsentligt motsvarade någon åtgärd som tidigare hade godtagits av Transport. Arbetsdomstolens slutsats är därmed att bolaget brutit mot sin förhandlingsskyldighet enligt 38 § medbestämmandelagen i förhållande till Transport. Vad bolaget anfört om att det vore orimligt om bolaget skulle vara skyldigt att förhandla med Transport trots att Hamnarbetarförbundet, vars medlemmar berördes, godtagit åtgärden och avstått från förhandling (jämför AD 1993 nr 24) och trots att Transport, enligt bolaget, inte hade någon medlem på det aktuella arbetsstället förändrar inte den slutsatsen.

Skadestånd

Arbetsdomstolen har i det föregående kommit fram till att bolaget brutit mot kollektivavtalet i enlighet med vad Transport hävdat och att bolaget dessutom brutit mot 38 § medbestämmandelagen i förhållande till Transport vid ett tillfälle. Bolaget är därför skyldigt att betala Transport allmänt skadestånd. Något skäl för att i någon del låta skadeståndet helt falla bort finns inte.

Transport har yrkat sammanlagt 2 miljoner kronor i allmänt skadestånd för kollektivavtalsbrotten, varav 1,5 miljoner kronor avser brotten mot bestämmelserna i § 5 Mom 7 i kollektivavtalet med betalningsregler vid övertid, och 200 000 kr i allmänt skadestånd för brott mot förhandlingsskyldighet. Transport har beräknat de yrkade beloppen för brotten mot betalningsreglerna vid övertid med ledning av den förtjänst Transport uppskattat att bolaget gjort genom att inte tillämpa reglerna. Bolaget har på sin sida presenterat en jämförelse mellan den ersättning bolaget betalat för arbete i Luleå hamn och den ersättning som skulle ha betalats vid tillämpning av en lokal överenskommelse som ett annat bolag träffat med Transports berörda avdelning för arbete i samma hamn.

Det allmänna skadeståndets uppgift är att, när det behövs, effektivt avhålla från avsteg från vad lag och avtal innehåller. En viktig princip har angetts vara att det inte i något fall ska te sig lönsamt för en arbetsgivare att sätta arbetstagarnas rätt åt sidan från vad lag och avtal innehåller (bl.a. prop. 1975/76:105 bil. 1 s. 302). I enlighet med detta synsätt har Arbetsdomstolen i några fall dömt ut allmänt skadestånd med ett belopp beräknat på den vinst som arbetsgivaren ansetts ha gjort genom en oriktig tillämpning av regler om övertidsersättning (AD 1982 nr 114 och AD 2001 nr 82). Av domstolens praxis framgår emellertid att även när det är bevisat att arbetsgivaren gjort en vinst genom en oriktig lag- eller avtalstillämpning måste skadeståndsbedömningen på sedvanligt sätt ske efter en helhetsbedömning av samtliga omständigheter i målet (AD 2009 nr 54 och AD 2013 nr 92).

Arbetsdomstolen anser att det i detta fall bör fastställas ett gemensamt belopp i allmänt skadestånd för kollektivavtalsbrotten efter en helhetsbedömning av samtliga omständigheter i målet, utan försök att mer eller mindre exakt uppskatta någon ”vinst” för bolaget. Arbetsdomstolen anser sig nämligen ha anledning att utgå från att kollektivavtalsparterna, när de utformade de omfattande möjligheterna till lokal anpassning av arbetstidens förläggning och betalningsreglerna för övertid, inte förutsåg att sådan hamnverksamhet som bolaget bedriver skulle i praktiken bedrivas någon längre tid utan sådan lokal anpassning och med betalning för övertid för allt arbete under annan tid än måndag–fredag kl. 7.00–16.30. Å andra sidan kan den av bolaget gjorda jämförelsen inte heller anses ge ledning för bedömningen av skadeståndsbeloppets storlek, eftersom den bl.a. inte beaktar att möjligheterna till lokal anpassning, i kombination med betalningsreglerna vid övertid, ger arbetstagarsidan – och i vissa fall Sveriges Hamnar – en betydande möjlighet att påverka arbetsförhållandena i hamnarna som Transport och dess berörda avdelning gått miste om genom bolagets kollektivavtalsbrott.

Vid helhetsbedömningen beaktar Arbetsdomstolen – förutom den nyss nämnda mistade möjligheten till inflytande – bl.a. följande. Det har varit fråga om flagranta brott mot viktiga bestämmelser i kollektivavtalet om förläggning av arbetstid och ersättning utöver grundlönen, som inneburit att kollektivavtalet i dessa hänseenden inte fått något nämnvärt genomslag i bolagets fyra hamnar för ett betydande antal berörda arbetstagare. Arbetsdomstolen kan inte dra annan slutsats av utredningen, inte minst vad bolaget självt anfört, än att bolaget medvetet brutit mot kollektivavtalet. Av bolagets egen redogörelse framgår att motsvarande förhållanden som omfattas av yrkandena avseende kollektivavtalsbrott, från och med tidigast december 2013, förekommit under lång tid dessförinnan och fortfarande finns. Att Transport knappt har några medlemmar hos bolaget bör inte i detta fall påverka skadeståndsbedömningen. Det allmänna skadeståndet måste, enligt Arbetsdomstolens mening, sättas på en så avskräckande hög nivå att bolaget, trots eventuella förpliktelser mot Hamnarbetarförbundet, inte frestas att framhärda med brott mot det kollektivavtal bolaget åtagit sig att följa, med ett ännu mer kännbart allmänt skadestånd som trolig följd. Eftersom bolaget brutit mot kollektivavtalsbestämmelser som ersatt arbetstidslagens bestämmelser om dygnsvila, bör även den lagens bestämmelser om sanktionsavgifter beaktas (AD 2003 nr 17) trots att parterna i detta fall inte lämnat tillräckliga uppgifter för en exakt beräkning. Det gäller även om bolaget kan ha följt ett annat kollektivavtal som också har ersatt arbetstidslagens bestämmelser om dygnsvila.

Arbetsdomstolen anser att det allmänna skadeståndet för kollektivavtalsbrotten ska bestämmas till ett gemensamt belopp om 550 000 kr.

Det allmänna skadeståndet för brottet mot förhandlingsskyldigheten enligt 38 § medbestämmandelagen bör, enligt Arbetsdomstolens mening, bestämmas till 50 000 kr.

Rättegångskostnader

Arbetsdomstolen har kommit fram till att bolaget, som inte gått med på att betala något skadestånd över huvud taget, är skyldigt att betala allmänt skadestånd i alla de avseenden Transport hävdat, utom såvitt avser brott mot 11 § medbestämmandelagen, och att Transport ska få 600 000 kr i allmänt skadestånd mot yrkade 2,2 miljoner kronor. Bolaget har som skäligt i och för sig vitsordat vad Transport begärt för rättegångskostnader, 397 326 kr, varav 390 500 kr avser ombudsarvode inklusive moms.

När det är fråga om att skönsmässigt bestämma ett allmänt skadestånd brukar det normalt inte påverka fördelningen av rättegångskostnaderna att den som fått något inte fått allt det den yrkat. Den som fått allmänt skadestånd, trots att motparten inte gått med på att betala något alls, betraktas som huvudregel ändå som vinnande part, om tvisten i huvudsak gällt annat än just storleken på det allmänna skadeståndet. I detta fall har den reella tvisten emellertid gällt inte bara om det finns skyldighet att betala skadestånd utan också skadeståndsbeloppets storlek, och både Transport och bolaget har lagt fram utredning och argumenterat i fråga om hur stort skadeståndet bör bli. Transport har bara förlorat lite i fråga om skadeståndsskyldigheten i sig, men fått endast drygt en fjärdedel av det sammanlagda skadeståndsbelopp som slutligen yrkats. Vid en samlad bedömning anser Arbetsdomstolen att Transport vunnit mest så att Transport bör få 303 465 kr för rättegångskostnader.

Trots att Sveriges Hamnar inledningsvis fört talan i målet, genom att komma in med svaromål, bör skäligen bolaget ensamt få betala Transport det beloppet, med ränta enligt lag.

Domslut

1. Arbetsdomstolen förpliktar ShoreLink AB att till Svenska Transportarbetareförbundet betala allmänt skadestånd för kollektivavtalsbrott med 550 000 kr, med ränta enligt 6 § räntelagen från den 15 oktober 2015 till dess betalning sker.

2. Arbetsdomstolen förpliktar ShoreLink AB att till Svenska Transportarbetareförbundet betala allmänt skadestånd för brott mot 38 § medbestämmandelagen med 50 000 kr, med ränta enligt 6 § räntelagen från den 15 oktober 2015 till dess betalning sker.

3. ShoreLink AB ska ersätta Svenska Transportarbetareförbundet för rättegångskostnader med 303 465 kr, varav 300 000 kr för ombudsarvode inklusive moms, med ränta enligt 6 § räntelagen på det förstnämnda beloppet från dagen för denna dom till dess betalning sker.

Ledamöter: Sören Öman, Håkan Lundquist, Berndt Molin, Karl Olof Stenqvist, Elisabeth Ankarcrona, Carina Lindberg och Erland Olauson. Enhälligt.

Rättssekreterare: Per Fabricius

ARBETSDOMSTOLEN

Dom nr 10/18
Mål nr A 51/17

En facklig företrädare för en arbetstagarorganisation, som inte är bunden av kollektivavtal om allmänna anställningsvillkor med arbetsgivaren, har under lång tid fått lön för fackligt arbete. Fråga om det varit avtalsbaserat eller en av arbetsgivaren ensidigt reglerad förmån. Fråga också om arbetsgivarens indragning av lön för fackligt arbete och beslut att den fackliga företrädaren ska återgå till produktionen inneburit ett avskedande, en olovlig stridsåtgärd enligt 41 a § medbestämmandelagen eller föreningsrättskränkning respektive om arbetsgivaren före indragningen av lönen borde ha förhandlat enligt 13 § medbestämmandelagen. – Även fråga om vissa löneavdrag för andra arbetstagare inneburit kvittning i kvittningslagens mening.

ARBETSDOMSTOLEN	DOM	Dom nr 10/18
	2018-02-21	Mål nr A 51/17
	Stockholm

KÄRANDE
Svenska Hamnarbetarförbundet, Sydatlanten 15, 418 34 Göteborg
Ombud: advokaten Anders Karlsson, Advokatfirman Anders Karlsson AB, Box 3388, 103 68 Stockholm

SVARANDE
1. Sveriges Hamnar, Box 5384, 102 49 Stockholm
2. APM Terminals Gothenburg AB, 556785-6306, Indiska Oceanen 12, 418 34 Göteborg
Ombud för båda: chefsjuristen Jan Bergman, Transportföretagen TF AB, Box 5384, 102 49 Stockholm

SAKEN
olovlig stridsåtgärd m.m.

____

Bakgrund

APM Terminals Gothenburg AB (APM), som tidigare hette Skandia Container Terminal AB, övertog den 1 februari 2010 hamn- och stuveriverksamhet i Göteborgs hamn från det kommunala bolaget Göteborgs Hamn AB (Göteborgs Hamn). APM är bundet av hamn- och stuveriavtalet, som tecknats mellan Sveriges Hamnar och Svenska Transportarbetareförbundet.

Omkring 85 procent av hamnarbetarna i Göteborgs hamn är medlemmar i Svenska Hamnarbetarförbundet (förbundet). Svenska Hamnarbetarförbundets avdelning 4 (avdelningen) verkar i Göteborgs hamn. APM är inte bundet av kollektivavtal om allmänna anställningsvillkor i förhållande till förbundet eller avdelningen.

De arbetstagare som anges i bilagan (uteslutes här) är medlemmar i förbundet.

Tvisten rörande P.A.

P.A. anställdes den 4 maj 1994 som hamnarbetare hos Göteborgs Hamn och är i dag anställd hos APM. P.A. är

medlem i förbundet och sedan 2006 avdelningens ordförande. Han har under flera år fått lön från sin arbetsgivare när han arbetat med fackligt arbete som avsett arbetsgivaren, utom i vissa fall när det fackliga arbetet rört stridsåtgärder. P.A. har sedan 2012 arbetat heltid med fackligt arbete. Han är tjänstledig sedan den 23 mars 2017.

Under perioden den 8 november 2016–30 april 2017, utom den 28 november 2016 kl. 13.30–5 december 2016 kl. 16.00, 1–5 januari och 1–12 mars 2017, har avdelningen vidtagit stridsåtgärder riktade mot APM. Avdelningen hade varslat om stridsåtgärder riktade mot APM även för perioden den 28 november 2016 kl. 13.30–5 december 2016 kl. 16.00, men avdelningen meddelade, utan att återkalla varslen, att varslen frystes under den nämnda perioden, då medling pågick. APM har för perioden den 8 november 2016–30 april 2017 gjort vissa löneavdrag för P.A.

APM beslutade, efter förhandling enligt 13 § medbestämmandelagen med avdelningen den 17 mars 2017, att från och med den 30 mars 2017 inte betala P.A. lön för fackligt arbete och att P.A. den 30 mars 2017 skulle återgå i arbete som hamnarbetare. P.A. kom emellertid inte att arbeta som hamnarbetare, eftersom han och APM kom överens om att han i stället skulle vara helt tjänstledig.

Parterna är överens om att P.A:s månadslön, inklusive personligt tillägg, var 45 219 kr. Parterna är även överens om att P.A. från APM fått lön enligt följande.

- I december 2016: 11 370 kr avseende november 2016
- I januari 2017: 38 422 kr avseende december 2016
- I februari 2017: åtminstone 1 568 kr (men förbundet hävdar att 2 614 kr har betalats) avseende januari 2017
- I mars 2017: 19 081 kr avseende februari 2017
- I april 2017: 0 kr avseende mars 2017
- I maj 2017: 6 698 kr

Förbundet har, utan invändning från arbetsgivarparterna, gjort gällande att eventuella löneavdrag för P.A. ska göras med 261 kr per timme.

Parterna tvistar i den här delen om en rad olika frågor:

a) Är APM och förbundet bundna av ett kollektivavtal som ger P.A. rätt till den lön för fackligt arbete som APM inte betalat?
b) Har P.A. enligt sitt enskilda anställningsavtal rätt till den lön för fackligt arbete som APM inte betalat?
c) Har den uteblivna betalningen av lön för fackligt arbete inneburit att APM vidtagit en enligt 41 a § medbestämmandelagen olovlig stridsåtgärd, som inte föregåtts av varsel enligt 45 § medbestämmandelagen?
d) Borde den uteblivna betalningen av lön för fackligt arbete ha föregåtts av förhandling med avdelningen enligt 13 § medbestämmandelagen?

e) Har den uteblivna betalningen av lön för fackligt arbete och APM:s beslut om P.A:s anställningsförhållanden för tiden efter den 30 mars 2017 inneburit en föreningsrättskränkning i strid med 8 § med-bestämmandelagen?
f) Har Sveriges Hamnar aktivt medverkat till och rekommenderat APM att vidta de åtgärder som avses i punkten e ovan på ett sådant sätt att Sveriges Hamnar brutit mot 9 § medbestämmandelagen?
g) Är den uteblivna betalningen av lön för fackligt arbete respektive APM:s beslut om P.A:s anställningsförhållanden för tiden efter den 30 mars 2017 att jämställa med ett avskedande i strid med 18, 19 och 30 §§ anställningsskyddslagen och i strid med ett kollektivavtal mellan APM och förbundet?

Tvisten om kvittning

Enligt hamn- och stuveriavtalet ska avdrag för frånvaro respektive utbetalning av förekommande tillägg verkställas vid löneutbetalningen månaden efter. APM gör normalt löneutbetalning den 25:e i varje månad.

De arbetstagare som anges i bilagan, utom J.O., och J.A. var under maj 2016 frånvarande på ett sådant sätt att vissa löneavdrag skulle ha gjorts vid löneutbetalningen i juni 2016. På grund av olika administrativa misstag gjordes korrekta löneavdrag avseende maj 2016 för de arbetstagare som anges i bilagan, utom A.M., J.O. och D.S., och J.A. inte förrän vid löneutbetalningarna i oktober och november 2016. J.A., som på grund av sjukfrånvaro skulle ha helt löneavdrag för maj 2016, fick vid löneutbetalningen i oktober 2016 ut 1 074 kr, medan de andra 34 berörda arbetstagarna fick större utbetalningar.

För A.M. och D.S. gjorde APM vid löneutbetalningen i juli 2016 avdrag som var hänförliga till april och maj 2016.

För J.O. gjorde APM vid löneutbetalningen i december 2016 avdrag som var hänförliga till juli, augusti och september 2016.

APM inhämtade inte inför de nämnda löneutbetalningarna några s.k. beneficiumbesked från Kronofogdemyndigheten enligt 6 § kvittningslagen.

Parterna tvistar i den här delen om de löneavdrag APM gjorde i juli, oktober, november och december 2016 är kvittningar enligt kvittningslagen. Parterna tvistar också om löneavdragen vid löneutbetalningarna i juli och december 2016 har varit föremål för tvisteförhandling den 27 januari 2017 mellan APM och avdelningen.

Yrkanden

Förbundet har förklarat att samtliga yrkanden i målet framställs parallellt, dvs. alla yrkanden ska enligt förbundet bifallas samtidigt.

Tvisten rörande P.A.

Förbundet har yrkat att Arbetsdomstolen ska förplikta APM att till

1 a. P.A. betala ekonomiskt skadestånd motsvarande lön och semesterersättning för perioden den 8 november 2016–30 april 2017 med 184 823 kr, med ränta enligt 2 och 5 §§ räntelagen på 22 365 kr från och med den 25 december 2016, på 33 404 kr från och med den 25 februari 2017, på 26 138 kr från och med den 25 mars 2017, på 43 914 kr från och med den 25 april 2017 och på 59 002 kr från och med den 25 maj 2017, allt till dess betalning sker,

1 b. P.A. betala allmänt skadestånd med 120 000 kr för brott mot 18 § anställningsskyddslagen eller kollektivavtalet mellan APM och förbundet samt allmänt skadestånd med 40 000 kr för brott mot formaliareglerna i 19 och 30 §§ anställningsskyddslagen, allt med ränta enligt 6 § räntelagen från dagen för delgivning av stämning (den 9 maj 2017) till dess betalning sker,

2 a. P.A. betala allmänt skadestånd med 50 000 kr för föreningsrättskränkning, med ränta enligt 6 § räntelagen från dagen för delgivning av stämning (den 9 maj 2017) till dess betalning sker,

2 b. avdelningen betala allmänt skadestånd med 100 000 kr för föreningsrättskränkning, med ränta enligt 6 § räntelagen från dagen för delgivning av stämning (den 9 maj 2017) till dess betalning sker,

3 a. P.A. betala allmänt skadestånd med 5 000 kr för olovlig stridsåtgärd enligt 41 a § medbestämmandelagen, med ränta enligt 6 § räntelagen från dagen för delgivning av stämning (den 9 maj 2017) till dess betalning sker,

3 b. avdelningen betala allmänt skadestånd med 200 000 kr för olovlig stridsåtgärd enligt 41 a § medbestämmandelagen, med ränta enligt 6 § räntelagen från dagen för delgivning av stämning (den 9 maj 2017) till dess betalning sker,

4. avdelningen betala allmänt skadestånd med 20 000 kr för uteblivet varsel enligt 45 § medbestämmandelagen, med ränta enligt 6 § räntelagen från dagen för delgivning av stämning (den 9 maj 2017) till dess betalning sker, och

5. avdelningen betala allmänt skadestånd med 100 000 kr för brott mot 13§ medbestämmandelagen med ränta enligt 6 § räntelagen från dagen för delgivning av stämning (den 9 maj 2017) till dess betalning sker.

Förbundet har yrkat att P.A. ska förbehållas rätten att återkomma med krav på ekonomiskt skadestånd för tiden efter den 30 april 2017.

Arbetsgivarparterna har bestritt yrkandena och inte vitsordat något belopp som skäligt i och för sig. Sätten att beräkna ränta har vitsordats.

Förbundet har vidare yrkat att Arbetsdomstolen ska förplikta Sveriges Hamnar att till

6 a. P.A. betala allmänt skadestånd med 50 000 kr för föreningsrättskränkning, med ränta enligt 6 § räntelagen från dagen för delgivning av stämning (den 4 maj 2017) till dess betalning sker, och

6 b. förbundet betala allmänt skadestånd med 100 000 kr för föreningsrättskränkning, med ränta enligt 6 § räntelagen från dagen för delgivning av stämning (den 4 maj 2017) till dess betalning sker.

Sveriges Hamnar har bestritt yrkandena och inte vitsordat något belopp som skäligt i och för sig. Sättet att beräkna ränta har vitsordats.

Tvisten om kvittning

Förbundet har yrkat att Arbetsdomstolen ska förplikta APM att betala allmänt skadestånd för brott mot kvittningslagen till J.A. med 5 000 kr och till var och en av de 34 arbetstagare som anges i bilagan med 2 000 kr, med ränta enligt 6 § räntelagen på respektive belopp från dagen för delgivning av stämning (den 9 maj 2017) till dess betalning sker.

Arbetsgivarparterna har yrkat att talan såvitt avser skadestånd med anledning av löneutbetalningarna i juli och december 2016 ska avvisas, eftersom talan i den delen inte har varit föremål för förhandlingar mellan APM och avdelningen.

Förbundet har bestritt avvisningsyrkandet.

Arbetsgivarparterna har i sak bestritt yrkandena och inte vitsordat något belopp som skäligt i och för sig. Sättet att beräkna ränta har vitsordats.

Parterna har yrkat ersättning för rättegångskostnader.

Parterna har till stöd för sin talan anfört i huvudsak följande.

Förbundet

Rättsliga grunder för käromålet

Tvisten rörande P.A.

Den 4 april 2006 träffades ett kollektivavtal mellan Göteborgs Hamn och förbundet som innebar att P.A., såsom ordförande i avdelningen, skulle få lön för fackligt arbete motsvarande en halvtidstjänst. Göteborgs Hamns verksamhet har den 1 februari 2010 delvis övergått till Skandia Container

Terminal AB, som sedermera bytt namn till APM, genom en sådan övergång av verksamhet som omfattas av 6 b § anställningsskyddslagen. Skandia Container Terminal AB var vid övergången inte bundet av något kollektivavtal som reglerade ersättning till ordföranden i avdelningen för fackligt arbete. Därför gäller, enligt 28 § första stycket medbestämmandelagen, kollektivavtalet från den 4 april 2006 för APM. Innehållet i kollektivavtalet har även blivit en del av P.A:s anställningsavtal med APM.

Hösten 2012 träffade APM, genom dåvarande HR-chefen P.S., och P.A. en överenskommelse om att P.A., såsom ordförande för avdelningen, skulle utföra fackligt arbete på heltid. Överenskommelsen, som blivit en del av P.A:s enskilda anställningsavtal, innebar att P.A. skulle utföra fackligt arbete på heltid med bibehållen lön. Löneavdrag ska dock enligt överenskommelsen göras för av P.A. inrapporterad tid för externa fackliga kurser, förbundsstyrelsemöten i Stockholm och förhandlingar och fackligt arbete hos annan arbetsgivare än APM.

Det har inte, enligt kollektivavtalet från 2006 eller överenskommelsen från 2012 eller annars, gällt några bestämmelser om löneavdrag för P.A. vid stridsåtgärder.

P.A. har under perioden den 8 november 2016–30 april 2017 utfört fackligt arbete som avsett APM men som inte rört stridsåtgärder. APM har inte betalat fullt ut för det arbetet. P.A. har enligt kollektivavtalet från 2006 och överenskommelsen från 2012 därför rätt till ekonomiskt skadestånd motsvarande ytterligare lön och semesterersättning med 142 177,73 kr för perioden den 8 november 2016–30 mars 2017. För perioden den 31 mars–30 april 2017 har P.A. enligt kollektivavtalet från 2006 rätt till ekonomiskt skadestånd motsvarande ytterligare lön och semesterersättning med 42 645,07 kr.

> På den lön P.A. har rätt till har han rätt att få 13 procent semesterersättning. Enligt § 7 Mom 6 och 8 i hamn- och stuveriavtalet, som blivit en del av P.A:s anställningsavtal, är semesterlönen och semesterersättningen 13 procent av arbetstagarens förfallna lön.
>
> Vid beräkningen av yrkandet om ekonomiskt skadestånd motsvarande lön (yrkande 1 a) har avdrag gjorts för tid för fackligt arbete som rört stridsåtgärder.
>
> Vid löneutbetalningen i december 2016 skulle P.A. ha fått lön med 33 735 kr, men han fick bara 11 370 kr, varför han har rätt till ytterligare (33 735 – 11 370 =) 22 365 kr. Löneavdrag skulle bl.a. ha gjorts för 2 timmar den 10 november 2016 (logent), 4 timmar den 11 november 2016 (träff Sveriges Hamnar), 8 timmar den 14 november 2016 (träff Sveriges Hamnar), 8 timmar den 15 november 2016 (1 timme K.J. och 7 timmar Sveriges Hamnar), 6 timmar den 28 november 2016 (medling), 4 timmar den 29 november 2016 (medling) och 1 timme den 30 november 2016 (medling).
>
> Vid löneutbetalningen i januari 2017 fick P.A. korrekt lön utbetald.

Vid löneutbetalningen i februari 2017 skulle P.A. ha fått lön med 36 019 kr, men han fick bara 2 615 kr, varför han har rätt till ytterligare (36 019 – 2 615 =) 33 404 kr. Löneavdrag skulle bl.a. ha gjorts för 8 timmar den 8 januari 2017 (strejk), 5 timmar den 16 januari 2017 (medling), 1 timme den 17 januari 2017 (medling) och 2 timmar den 20 januari 2017 (logent).

Vid löneutbetalningen i mars 2017 skulle P.A. ha fått lön med 45 219 kr, men han fick bara 19 081 kr, varför han har rätt till ytterligare (45 219 – 19 081 =) 26 138 kr. Inget löneavdrag skulle ha gjorts.

Vid löneutbetalningen i april 2017 skulle P.A. ha fått lön med (45 219 – (5 x 261) =) 43 914 kr, men han fick ingen lön alls. Löneavdrag skulle ha gjorts för 3 timmar den 7 mars 2017 (medling) och 2 timmar den 21 mars 2017 (logent).

Vid löneutbetalningen i maj 2017 skulle P.A. ha fått lön med (45 219 – (3 x 261) =) 44 436 kr, men han fick bara 6 697 kr, varför han har rätt till ytterligare (44 436 – 6 697 =) 37 739 kr. Löneavdrag skulle ha gjorts för 1 timme den 10 april 2017 (henrik), 1 timme den 18 april 2017 (logent) och 1 timme den 28 april 2017 (apmt).

För perioden den 8 november 2016–30 april 2017 har P.A. således rätt till ytterligare sammanlagt 163 560 kr. Den semesterersättning om 13 procent på lönen som P.A. har rätt till uppgår till (163 560 x 0,13 =) 21 263 kr.

Om Arbetsdomstolen finner att P.A. har rätt till betalning på halvtid, men inte heltid, för fackligt arbete, ska beloppen för lön och semesterersättning halveras.

Eftersom APM inte betalat P.A. lön enligt kollektivavtalet från 2006, har P.A. rätt till allmänt skadestånd av APM för kollektivavtalsbrott.

Genom att i strid med kollektivavtalet från 2006 och överenskommelsen från 2012 inte månatligen betala P.A. lön för det fackliga arbetet har APM vidtagit åtgärder som, var för sig eller i vart fall sammantagna, är att jämställa med ett avskedande av P.A. Det avskedandet har skett utan att APM följt formaliareglerna i 19 och 30 §§ anställningsskyddslagen.

P.A. hade enligt sitt anställningsavtal, till följd av överenskommelsen från 2012, inte skyldighet att arbeta som hamnarbetare. Även APM:s beslut att från och med den 30 mars 2017 inte betala P.A. lön för fackligt arbete och att P.A. den 30 mars 2017 skulle börja arbeta som hamnarbetare, som meddelats P.A., är att jämställa med ett avskedande av P.A. Även det avskedandet har skett utan att APM följt formaliareglerna i 19 och 30 §§ anställningsskyddslagen

APM har inte haft grund enligt anställningsskyddslagen för att skilja P.A. från anställningen. APM är därför enligt anställningsskyddslagen skyldigt att betala P.A. dels ekonomiskt skadestånd motsvarande lön, med semesterersättning om 13 procent på lönebeloppet, om 42 645,07 kr för tiden efter avskedandet den 30 mars 2017, dels allmänt skadestånd. APM är

vidare skyldigt att betala P.A. allmänt skadestånd för brott mot formaliareglerna i anställningsskyddslagen.

APM:s åtgärder att, i strid med kollektivavtalet från 2006 och överenskommelsen från 2012, inte månatligen betala P.A. lön för allt fackligt arbete och att den 17 mars 2017 meddela P.A. att APM från och med den 30 mars 2017 inte alls skulle betala P.A. lön för fackligt arbete och att P.A. den 30 mars 2017 skulle börja arbeta som hamnarbetare, vilka var för sig eller sammantagna är att jämställa med ett avskedande av P.A., har skett i syfte att försvåra för P.A. att verka för förbundet och avdelningen och deras medlemmar och att förmå honom att inte göra det. Därför har P.A. rätt till allmänt skadestånd av APM för brott mot 8 § medbestämmandelagen. Åtgärderna har också inneburit intrång i avdelningens verksamhet. Därför har även avdelningen rätt till allmänt skadestånd av APM för brott mot 8 § medbestämmandelagen.

P.A. har inte enligt förbundets stadgar rätt till ersättning från förbundet motsvarande bibehållna anställningsförmåner för den tid han arbetar fackligt. Det är dock riktigt att P.A. har fått ersättning från förbundet som kompensation för bortfallet av lön. P.A. är skyldig att återbetala den ersättningen så snart han fått korrekt ersättning från APM.

Sveriges Hamnar har aktivt medverkat till och rekommenderat APM att vidta de tidigare nämnda åtgärderna. Det har skett genom Sveriges Hamnars representant K.E. vid förhandlingar mellan APM och avdelningen den 14 och 15 november 2016, då hon uttalat hot om indragen lön för P.A. om avdelningen fortsatte att vidta stridsåtgärder och inte ingick ett hängavtal med APM, och genom ett meddelande om ny policy gällande fackföreningar från Sveriges Hamnar till APM daterat den 22 mars 2017. Därigenom har Sveriges Hamnar brutit mot 9 § medbestämmandelagen. Därför är Sveriges Hamnar skyldig att betala P.A. och förbundet allmänt skadestånd.

APM:s innehållande av P.A:s lön för utfört fackligt arbete under perioden den 8 november 2016–30 april 2017 har skett i syfte att förmå P.A. att för avdelningen träffa kollektivavtal med APM och därmed utgjort en stridsåtgärd. Eftersom stridsåtgärden varit olovlig enligt 41 a § medbestämmandelagen, har P.A. och avdelningen rätt till allmänt skadestånd av APM.

Eftersom APM:s stridsåtgärd inte föregåtts av varsel till avdelningen enligt 45 § medbestämmandelagen, har avdelningen rätt till allmänt skadestånd av APM.

APM har inte före beslutet att sluta betala P.A. lön för utfört fackligt arbete, avseende tiden från och med november 2016, förhandlat med avdelningen enligt 13 § medbestämmandelagen. APM är därför skyldigt att betala avdelningen allmänt skadestånd.

Brott mot kvittningslagen

APM har, utan att först inhämta s.k. beneficiumbesked enligt 6 § kvittningslagen, vid löneutbetalningarna i juli, oktober, november och december 2016 kvittat fordringar på felaktigt utbetald lön. APM har därigenom brutit mot kvittningslagen och ska betala de berörda arbetstagarna allmänt skadestånd.

Även skadeståndskrav med anledning av löneutbetalningarna i juli och december 2016 omfattades av den tvisteförhandling som hölls mellan APM och avdelningen den 27 januari 2017. Avdelningen hade inför tvisteförhandlingen på begäran av APM sänt APM en pdf-fil med de lönespecifikationer tvisteförhandlingen skulle handla om, som omfattade också löneutbetalningarna i juli och december 2016. Avdelningen hade med sig en utskrift av pdf-filen till tvisteförhandlingen.

Tvisten rörande P.A. – Utveckling av talan

Kollektivavtalet 2006

H.K. var avdelningens ordförande 1986–2006. Det fanns när H.K. 1986 tillträdde uppdraget en överenskommelse mellan Göteborgs Hamn och avdelningen om att avdelningens ordförande kvarstod i arbete i produktionen, men löpande beviljades av Göteborgs Hamn betald facklig ledighet i den mån ordföranden själv ansåg sig behöva det. Efter att H.K. drabbats av sjukdom 1994 beslutades det att H.K. skulle arbeta fackligt på heltid med lön från Göteborgs Hamn motsvarande hans dåvarande schemalön. Avdelningens årsmöte 2006 valde P.A. till ny avdelningsordförande. M.B. var då avdelningens förtroendeman. Med anledning av ordförandebytet kallade Göteborgs Hamn förbundet till förhandling, som hölls den 4 april 2006. Vid förhandlingen träffade Göteborgs Hamn och förbundet ett kollektivavtal som intogs i det underskrivna protokollet över förhandlingen.

Göteborgs Hamn och förbundet kom genom kollektivavtal överens om att P.A. och M.B. skulle dela lika på en av Göteborgs Hamn betald heltidstjänst för fackligt arbete som avdelningens ordförande. P.A. skulle arbeta fackligt ojämna veckor och M.B. jämna veckor. Kostnaden för tiden för fackligt arbete hänfördes till dåvarande personalavdelningen och kostnaden för resterande tid till produktionen.

Sedan kollektivavtalet träffats arbetade P.A. fackligt på halvtid, varannan vecka, med lön från Göteborgs Hamn.

År 2007 efterträddes M.B. av L.L. och kollektivavtalet från 2006 tillämpades därefter på L.L. i stället för M.B. På motsvarande sätt tillämpades kollektivavtalet på E.H. under 2009 när denne arbetade som tillförordnad förtroendeman i stället för L.L. och sedan 2010 då E.H. ersatte L.L. som förtroendeman.

År 2009 gjorde Göteborgs Hamn en ensidig avsiktsförklaring som bekräftade innehållet i kollektivavtalet från 2006. Avsiktsförklaringen har inte någon självständig rättslig betydelse.

APM:s bundenhet av kollektivavtalet

Den 1 februari 2010 tog Skandia Container Terminal AB över en del av Göteborgs Hamns verksamhet (containerterminalen) genom en sådan övergång av verksamhet som omfattas av 6 b § anställningsskyddslagen. Skandia Container Terminal AB var inte bundet av något kollektivavtal som reglerade ersättning till ordföranden i avdelningen för fackligt arbete. Kollektivavtalet från 2006 sades inte upp i samband med övergången. Därmed blev Skandia Container Terminal AB, enligt 28 § första stycket medbestämmandelagen, bundet av kollektivavtalet från 2006. Efter att APM Terminals Holding Gothenburg Holding AB i oktober 2011 köpt aktierna i Skandia Container Terminal AB bytte det sistnämnda bolaget namn till APM Terminals Gothenburg AB, dvs. APM.

Efter övergången betalade Skandia Container Terminal AB P.A. lön för fackligt arbete på halvtid. Ett annat företag, som hade tagit över en annan del av Göteborgs Hamns verksamhet, betalde E.H. lön för fackligt arbete på halvtid.

Överenskommelsen 2012

Efter det att flera företag övertagit verksamheten i Göteborgs hamn från Göteborgs Hamn förekom det att arbetstagare hos andra företag utförde fackligt arbete hos APM. APM:s dåvarande HR-chef P.S. kontaktade i maj 2012 avdelningen om avdelningsordförandens lön. P.A. hade en tillsvidareanställning hos APM, medan E.H. arbetade som behovsanställd s.k. blixt hos alla de tre företag som bedrev verksamheten i Göteborgs hamn. P.S. framförde att APM föredrog att fackliga förhandlingar med APM sköttes av en facklig företrädare som var anställd hos APM och att APM inte ville betala för fackligt arbete utfört av icke anställda. APM erbjöd P.A., såsom ordförande i avdelningen, en betald facklig heltidstjänst. Avdelningen och P.A. accepterade erbjudandet. Det skedde under hösten 2012. Organisatoriskt och administrativt hänfördes P.A:s anställning därefter helt till HR-avdelningen. APM och P.A. träffade alltså en överenskommelse, som blev en del av P.A:s anställningsavtal, om att P.A. ska få lön för att arbeta fackligt på heltid som avdelningens ordförande. Överenskommelsen innebar också att P.A. inte var skyldig att utföra annat arbete än fackligt arbete.

I samband med överenskommelserna 2006 och 2012 fördes ingen diskussion om vilka löneavdrag som skulle göras för P.A. Senare under 2012 kom man dock överens om att tid som avsåg fackligt arbete hos annan arbetsgivare än APM skulle medföra löneavdrag. P.A. har löpande till APM rapporterat den tid för vilken löneavdrag ska göras. Det har inte funnits någon överenskommelse beträffande vilka avdrag som ska göras vid stridsåtgärder. Det har däremot förekommit att P.A:s arbetsgivare vid strejk har gjort löneavdrag för P.A., såsom avdelningens ordförande, men sådant löneavdrag har inte gjorts vid fackliga blockader.

Händelseförloppet från våren 2016 och framåt

Avdelningen har sedan våren 2016 vidtagit olika stridsåtgärder mot APM. Efter ett varsel från avdelningen om stridsåtgärder i november 2016 förde APM och avdelningen flera förhandlingar under perioden den 4–15 november 2016. En representant för Sveriges Hamnar, K.E., deltog vid samtliga förhandlingstillfällen. Vid förhandlingarna framförde K.E. hot om indragen lön för P.A. om avdelningen fortsatte att vidta stridsåtgärder och inte ingick ett hängavtal med APM. K.E. varken sade eller gjorde någonting under förhandlingarna för att antyda att hon deltog i förhandlingarna i någon annan roll än sin ordinarie roll som jurist vid Sveriges Hamnar. Hon presenterade sig vid förhandlingarna som jurist vid Sveriges Hamnar, och hon hade behörighet att företräda Sveriges Hamnar vid förhandlingar.

Den 15 november 2016 bröt förhandlingarna slutligen samman på grund av att avdelningen upplevde att APM inte var villigt att gå den till mötes i någon fråga. Vid ett möte den 21 november 2016 mellan APM och P.A. meddelade APM att APM hade beslutat att, med verkan från början av november 2016, dra in P.A:s betalning för fackligt arbete. Därigenom och genom efterföljande löneavdrag, med början vid löneutbetalningen i december 2016, omreglerade APM ensidigt P.A:s anställningsavtal på ett sätt som är att jämställa med ett avskedande. APM bröt därmed också mot kollektivavtalet från 2006. APM fortsatte emellertid att delvis betala P.A. för hans fackliga arbete, dock med stora avdrag med hänvisning till stridsåtgärder.

Därefter förekom medling mellan APM och avdelningen. Medlarna föreslog att APM och avdelningen skulle träffa ett kollektivavtal, vilket avvisades av APM. Under medlingen, för perioden den 28 november–5 december 2016, frös avdelningen alla stridsåtgärder.

Avdelningen påkallade den 1 mars 2017 tvisteförhandling med APM om bl.a. brott mot P.A:s anställningsavtal och olovlig stridsåtgärd, rörande den uteblivna betalningen för P.A:s fackliga arbete.

Den 3 mars 2017 begärde APM förhandling enligt 13 § medbestämmande-lagen om omreglering av P.A:s anställningsavtal. Den förhandlingen genomfördes den 17 mars 2017. Samma dag beslutade APM att beordra P.A. att arbeta som hamnarbetare från och med den 30 mars 2017. I vart fall därigenom omreglerade APM ensidigt P.A:s anställningsavtal på ett sätt som är att jämställa med ett avskedande. APM bröt därmed också mot kollektivavtalet från 2006.

APM:s avskedande av P.A. utgjorde en direkt repressalie till följd av avdelningens stridsåtgärder som vidtagits i syfte att försvåra för P.A. att verka för förbundet och avdelningen och deras medlemmar och att förmå honom att inte göra det.

Sveriges Hamnar har sänt ut ett meddelande, daterat den 22 mars 2017, med följande innehåll.

> **Ny policy gällande fackföreningar**
>
> Sveriges Hamnars styrelse har enhälligt beslutat om en ny policy gällande förhållningssättet till de olika fackföreningar som har medlemmar i hamnarna. Bakgrund till beslutet är behovet av att alla medlemsföretag i Sveriges Hamnar agerar på samma sätt i dessa frågor.
>
> Den svenska arbetsrättsliga lagstiftningen gör skillnad på fackföreningar med kollektivavtal och fackföreningar utan kollektivavtal. Fackföreningar med kollektivavtal avstår sin rätt att använda stridsåtgärder i utbyte mot bland annat särskilda fackliga rättigheter och fackligt inflytande. Detta gäller exempelvis rätten till medbestämmandeförhandlingar inför vissa beslut, rätten till fackligt arbete på arbetstid med eller utan lön eller rätten till plats i bolagsstyrelse. Fackföreningar utan kollektivavtal saknar dessa rättigheter.
>
> I dag finns fackföreningarna Unionen, Sveriges Ingenjörer, Svenska Transportarbetareförbundet, Ledarna och Svenska Hamnarbetarförbundet representerade i hamnarna. Sveriges Hamnar har kollektivavtal med samtliga fackföreningar, utom Svenska Hamnarbetarförbundet.
>
> *Policyn i korthet*
>
> Policyn innebär att det inte är tillåtet för ett medlemsföretag att ge mer rättigheter eller förmåner till en fackförening utan kollektivavtal än vad som följer av skyldigheten enligt lag.
>
> *Företagsbesök och implementering*
>
> Under våren kommer Sveriges Hamnar besöka alla berörda hamnar för att tillsammans med respektive bolag upprätta individuella planer för hur den nya policyn ska kunna implementeras lokalt. Förändringen kommer ta olika lång tid beroende på förhållandena lokalt men utgångspunkten är att genomföra detta under första halvan av 2017.
>
> […]

Överenskommelsen från 2006 har hela tiden varit grunden för förbundets och avdelningens agerande, men det är riktigt att överenskommelsen inte förrän i målet rättsligt kvalificerats av arbetstagarsidan som ett kollektivavtal.

Tvisten om kvittning – Utveckling av talan

Löneavdragen avseende maj 2016 skulle ha gjorts vid löneutbetalningen i juni 2016, men gjordes först vid löneutbetalningarna i oktober och november 2016. Löneutbetalningarna i juni–september 2016 har varit misstagsutbetalningar. När löneavdragen gjordes i oktober och november 2016 var det inte fråga om en lönereglering i enlighet med APM:s löneberäkningssystem.

De förklaringar som arbetsgivarparterna lämnat till att löneavdragen inte skedde förrän i oktober och november 2016 ifrågasätts inte.

När det gäller A.M. gjordes vid löneutbetalningen i juli 2016 avdrag som avsåg april och maj 2016. Avdragen gällde arbetskonflikt, föräldraledighet och tillfällig vård av barn. När det gäller D.S. gjordes vid löneutbetalningen juli 2016 avdrag som avsåg april och maj 2016. Avdragen gällde kompensationsledighet och arbetskonflikt. När det gäller J.O. gjordes vid löneutbetalningen i december 2016 avdrag som avsåg juli, augusti och september 2016. Avdragen gällde 61 olika poster avseende övertidsbetalning, trucktillägg, rastersättning och övertidskrona. Det som det gjorts avdrag för vid löneutbetalningarna i juli och december 2016 avser misstagsutbetalningar, och det har när löneavdragen gjordes inte varit fråga om en lönereglering i enlighet med APM:s löneberäkningssystem. Förbundet har ingen kommentar till de förklaringar som arbetsgivarparterna lämnat till att löneavdragen vid löneutbetalningarna i juli och december 2016 skedde.

Även löneavdragen vid löneutbetalningarna i juli och december 2016 omfattades av tvisteförhandlingen den 27 januari 2017.

Arbetsgivarparterna

Rättsliga grunder för bestridandet

Tvisten rörande P.A.

Ersättningen till P.A. för fackligt arbete, som avsåg APM, vilade på en ensidig utfästelse som APM fritt förfogat över. Utfästelsen om ersättning för fackligt arbete var villkorad av att det rådde arbetsfred. APM utfäste sig alltså inte att betala ersättning för fackligt arbete under tid då förbundet eller avdelningen hade varsel om eller vidtog stridsåtgärder riktade mot APM. Villkoret innebar att P.A. inte skulle få någon ersättning alls för fackligt arbete under sådan tid.

Göteborgs Hamn och förbundet har inte träffat ett kollektivavtal den 4 april 2006. Skandia Container Terminal AB, som senare bytte namn till APM, var vid verksamhetsövergången 2010 medlem i Sveriges Hamnar och därmed, efter s.k. inrangeringsförhandling den 21 januari 2010 med Svenska Transportarbetareförbundet, redan bundet av hamn- och stuveriavtalet. Därför har något kollektivavtal i vart fall inte övergått till APM.

APM och P.A. har inte träffat någon överenskommelse om betalt fackligt arbete på heltid.

P.A. har inte enligt sitt enskilda anställningsavtal haft rätt till ersättning för fackligt arbete.

APM har till den 30 mars 2017 tillämpat den ensidiga utfästelsen, dock att APM har betalat P.A. för visst fackligt arbete under den tid avdelningen haft varsel om eller vidtagit stridsåtgärder mot APM. APM drog den 30 mars 2017 in P.A:s förmån enligt utfästelsen, dvs. återkallade den ensidiga utfästelsen. Det beslutade APM den 17 mars 2017 efter förhandling enligt 13 § medbestämmandelagen med avdelningen.

Eftersom avdelningen vidtagit stridsåtgärder riktade mot APM under perioden den 8 november 2016–30 april 2017, utom den 28 november–5 december 2016, 1–5 januari och 1–12 mars 2017, och då avdelningen lagt ett varsel om stridsåtgärder mot APM under perioden den 28 november–5 december 2016 som inte återkallats, har APM inte enligt sin ensidiga utfästelse behövt betala P.A. mer lön för fackligt arbete än vad APM redan betalat. Från och med den 23 mars 2017 var P.A. på egen begäran beviljad tjänstledighet och P.A. fick därför ingen ersättning från APM.

Att APM tillämpat den ensidiga utfästelsen och, efter förhandling med avdelningen enligt 13 § medbestämmandelagen, beslutat att per den 30 mars 2017 återkalla utfästelsen och beordra P.A. att i enlighet med sitt anställningsavtal utföra arbete som hamnarbetare är inte att jämställa med ett avskedande. Det görs inte gällande att APM haft grund enligt anställningsskyddslagen för att skilja P.A. från anställningen. Det är i och för sig riktigt att APM inte följt formaliareglerna i anställningsskyddslagen.

Att APM inte betalade P.A. ersättning för allt utfört fackligt arbete under perioden den 8 november 2016–30 mars 2017 var och syftade bara till en tillämpning av APM:s ensidiga utfästelse. P.A:s fordran på lön för utfört fackligt arbete var tvistig. Åtgärden har inte företagits i föreningsrättskränkande syfte och den utgör inte en stridsåtgärd i strid med 41 a § medbestämmandelagen. Åtgärden har inte varit till skada för P.A., eftersom han i enlighet med förbundets stadgar har rätt till bibehållna anställningsförmåner från förbundet under den tid han arbetar fackligt. Åtgärden har inte heller försvårat det fackliga arbetet, som P.A. fått ledigt för att utföra.

Beslutet den 17 mars 2017 att per den 30 mars 2017 återkalla den ensidiga utfästelsen och beordra P.A. att utföra arbete som hamnarbetare syftade bara till att begränsa APM:s skyldigheter i fråga om ledighet och ersättning för fackligt arbete till vad som gäller enligt förtroendemannalagen. Beslutet, som inte ledde till att någon lön innehölls, eftersom P.A. begärde och fick tjänstledighet från och med den 23 mars 2017, är inte en stridsåtgärd i strid med 41 a § medbestämmandelagen. Beslutet är i och för sig en åtgärd i den mening som avses i 8 § medbestämmandelagen, men den åtgärden har APM inte företagit i föreningsrättskränkande syfte. Åtgärden har inte varit till skada för P.A., eftersom han i enlighet med förbundets stadgar har rätt till bibehållna anställningsförmåner från förbundet under den tid han arbetar fackligt och enligt egen uppgift har fått sådan ersättning. Åtgärden har inte heller försvårat det fackliga arbetet, som P.A. fortsatt att utföra under sin tjänstledighet.

Sveriges Hamnar har inte uppmanat APM att vidta de påtalade åtgärderna och inte heller medverkat till dem. Sveriges Hamnar har inte uppfattat APM:s åtgärder som föreningsrättskränkande. K.E., som i och för sig var anställd som arbetsrättsjurist och förhandlare hos Transportföretagen, vilken är den förbundsgrupp som Sveriges Hamnar ingår i, företrädde vid förhandlingarna som inleddes den 4 november 2016 och avslutades den 14 och 15 samma månad inte Sveriges Hamnar utan APM. K.E:s åtgärder och

uttalanden vid förhandlingarna skedde i uppdraget som företrädare för APM och inte som företrädare för Sveriges Hamnar.

Det är riktigt att APM inte har varslat avdelningen om någon stridsåtgärd.

APM har inte varit skyldigt att förhandla med avdelningen enligt 13 § medbestämmandelagen innan APM tillämpade sin ensidiga utfästelse och inte betalade lön för fackligt arbete utfört under den tid avdelningen haft varsel om eller vidtagit stridsåtgärder riktade mot APM.

Tvisten om kvittning

De löner som APM utbetalar är preliminära och korrigeras genom tillägg och avdrag. Vanligtvis sker detta månaden efter, men inte alltid. I de aktuella fallen har det inte varit möjligt att göra avdragen tidigare. De löneavdrag som gjordes i oktober och november 2016 har utgjort korrigeringar av tidigare preliminärt utbetald lön, avseende maj 2016. Löneavdragen är inte uttryck för att APM haft någon fordran mot arbetstagarna. APM har inte vidtagit kvittning mot arbetstagarnas löner och därför inte behövt inhämta beneficiumbesked enligt 6 § kvittningslagen.

Den förhandlingsframställan som avdelningen gjorde den 1 december 2016 anger att framställan avser ”brott mot kvittningslagen”. Framställan innehåller inga uppgifter om när de påstådda kvittningarna ska ha ägt rum eller annan information som identifierar dem. På begäran av APM förtydligade avdelningen inför förhandlingen att framställan avsåg kvittning på lön som var gjord av arbetsgivaren under oktober och november. Det är riktigt att avdelningen inför förhandlingen översände en pdf-fil till APM som innehöll bl.a. de aktuella lönebeskeden avseende löneutbetalningarna i juli och december 2016. Förhandlingen, som hölls den 27 januari 2017, gällde emellertid uteslutande de löneavdrag som härrörde från maj 2016 och som APM gjort avdrag för vid löneutbetalningarna i oktober och november 2016. Vid förhandlingen berördes inte varje enskild arbetstagare, men påståendet från avdelningen var att APM genom dessa avdrag hade vidtagit otillåtna kvittningar, vilket bestreds av APM som lämnade förklaringar till varför löneavdragen avseende maj 2016 inte hade gjorts förrän vid löneutbetalningarna i oktober och november 2016. Förhandlingarna gällde således bara löneutbetalningarna i oktober och november 2016. Skadeståndskrav med anledning av avdragen vid löneutbetalningarna i juli och december 2016 har inte förhandlats mellan parterna, varför talan i den delen ska avvisas då förhandlingskravet i 4 kap. 7 § arbetstvistlagen inte är uppfyllt.

Såvitt avser löneavdragen vid löneutbetalningarna i juli och december 2016 görs i sak gällande detsamma som avseende löneavdragen vid löneutbetalningarna i oktober och november 2016.

Tvisten rörande P.A. – Utveckling av talan

Inledning

P.A. anställdes den 4 maj 1994 som hamnarbetare hos Göteborgs Hamn och han har fortfarande en anställning som hamnarbetare, men nu hos APM.

Inget kollektivavtal träffades 2006

Protokollet från förhandlingen den 4 april 2006 utgör inget kollektivavtal. Ingen av de förhandlande parterna – Göteborgs Hamn och förbundet – ville hamna i ett kollektivavtalsförhållande till motparten. De förhandlande parterna hade således inte någon avsikt att ingå ett avtal, utan Göteborgs Hamn har lämnat ett förslag som förbundet inte haft något att invända mot.

Arbetstagarsidan har inte förrän i målet hävdat att P.A. enligt ett kollektivavtal har rätt till ersättning för fackligt arbete. Avdelningen har i november 2016 varslat om stridsåtgärder i syfte att förmå APM att inte dra in ersättningen för fackligt arbete för avdelningens företrädare.

Den ensidiga utfästelsen

Vid ett möte den 30 november 2009 gjorde företrädare för Göteborgs Hamn en ensidig utfästelse om hur Göteborgs Hamn avsåg att hantera avdelningen och dess företrädare. Denna innebar att avdelningen skulle respekteras som fullvärdig facklig part, att avdelningen skulle få information samtidigt som Svenska Transportarbetareförbundets avdelning 2, att Göteborgs Hamn skulle förhandla med båda fackföreningarna samtidigt, att regler och rutiner för Göteborgs Hamn endast kunde ändras efter förhandling samt att avdelningens företrädare skulle ges ersättning för facklig tid enligt vedertagen modell. Den ensidiga utfästelsen gällde under förutsättningen att det rådde arbetsfred, dvs. att avdelningen och förbundet iakttog fredsplikt och inte hade varsel om eller vidtog stridsåtgärder riktade mot Göteborgs Hamn. Ersättning för fackligt arbete har betalats under den förutsättningen och så länge det fackliga arbetet har gällt den egna arbetsplatsen. Den ensidiga utfästelsen dokumenterades av Göteborgs Hamn enligt följande.

> **Avsiktsförklaring (gäller under fredsplikt)**
>
> 1. H4 respekteras som fullvärdig facklig part
> 2. Information samtidigt i alla frågor
> 3. Förhandling samtidigt i alla frågor (relationen T2/H4 styr om det sker i samma rum)
> 4. Regler och rutiner förändras efter förhandling
> 5. Facklig tid = heltid. Enligt vedertagen modell.
>
> Denna avsiktsförklaring gäller under de centrala förhandlingarna om kollektivavtal.

P.A. har sedan 2006 i varierande utsträckning och efter beslut från arbetsgivaren fått ersättning för fackligt arbete för del av sin arbetstid. För att underlätta för både arbetsgivaren och avdelningen har beviljandet av ersättning för fackligt arbete avsett heltids- eller deltidssysselsättning och

P.A. har inte behövt redovisa vad för slags facklig syssla han ägnat sig åt, så länge det gällt den egna arbetsplatsen. Han har emellertid inte varit anställd som facklig företrädare för avdelningen.

Övergång av verksamhet

Det är riktigt att Skandia Container Terminal AB den 1 februari 2010 genom en övergång av verksamhet enligt 6 b § anställningsskyddslagen tog över en del av Göteborgs Hamns verksamhet. Skandia Container Terminal AB, som senare bytt namn till APM, var emellertid sedan den 1 januari 2010 medlem i Sveriges Hamnar. Vid förhandling den 21 januari 2010 mellan Sveriges Hamnar, APM och Svenska Transportarbetareförbundet inrangerades APM under hamn- och stuveriavtalet.

Efter att Skandia Container Terminal AB 2010 delvis övertagit verksamheten från Göteborgs Hamn tillämpade Skandia Container Terminal AB den ensidiga utfästelsen på motsvarande sätt som Göteborgs Hamn hade tillämpat den. Så gjorde APM också efter namnbytet och ägarskiftet 2012.

Ingen överenskommelse träffades 2012

Under 2012 förekom det dock diskussioner mellan APM och avdelningen med anledning av att APM förklarat att APM inte avsåg att fortsättningsvis betala ersättning för fackligt arbete till andra än arbetstagare hos APM. P.A. var vid denna tid ledig till hälften från sin anställning hos APM för fackligt arbete och ersattes av APM för det fackliga arbetet med bibehållna anställningsförmåner. APM förklarade sig berett att betala fackliga företrädare för avdelningen som var anställda hos APM ersättning motsvarande en heltidsanställning. Förutsättningarna för att utge ersättning vilade i övrigt på det som var angivet i 2009 års ensidiga avsiktsförklaring. Det var alltså fortfarande ett ensidigt åtagande, nu från APM, som förutsatte arbetsfred på arbetsplatsen, dvs. att avdelningen och förbundet iakttog fredsplikt och inte hade varsel om eller vidtog stridsåtgärder riktade mot APM. Avdelningen valde att låta P.A. utföra av APM betalt fackligt arbete på heltid.

Utvecklingen efter ägarskiftet 2012

De två första åren efter ägarskiftet 2012 fokuserade APM på investeringar i verksamheten. I slutet av 2013 inleddes ett samverkansprojekt med de kollektivavtalsbärande fackliga organisationerna och avdelningen med målsättningen att spara kostnader. På APM:s begäran avslutades projektet under våren 2015 på grund av att utsikten att nå de besparingsmål APM hade satt bedömdes vara obefintlig. Från och med 2015 gjorde APM en rad förändringar, såsom ändrade strukturer för skyddsarbete, införande av daglig planering avseende service, närvaro- och frånvaroplanering, nya rutiner för rekrytering och utbildning samt en ny förhandlingsordning.

Under 2015 och 2016 hade samtliga fackförbund med kollektivavtal på arbetsplatsen framfört kritik till APM som gick ut på att de ansåg det vara

orättvist att APM gav större möjligheter till avdelningens fackliga representanter att bedriva fackligt arbete under arbetstid i förhållande till övriga fackliga representanter. Detta bidrog till att APM utvärderade och såg över hur mycket facklig tid och andra förmåner som kunde vara skäligt för respektive fackförbund. I samband med utvärderingen reviderades också förutsättningarna för representanter för kollektivavtalsbärande fackförbund. Det infördes regler om att ledighet för fackligt arbete i vissa fall skulle föregås av en ansökan och ett beviljande och det gjordes utbildningsinsatser. APM klargjorde att avdelningens medlemmar, med undantag för dess ordförande P.A., inte längre hade rätt att bedriva fackligt arbete på betald arbetstid. Dessa justeringar genomfördes tidigt på våren 2016.

Varsel och stridsåtgärder under 2016 och 2017 samt löneavdrag för P.A.

I början av 2016 framförde avdelningen en rad krav till APM. Sedan APM ställt sig avvisande till flera av kraven varslade avdelningen om stridsåtgärder. De varslade strejkerna verkställdes under fyra dygn i april 2016 och följdes sedan av ytterligare strejker under maj 2016. Konflikten mellan parterna bestod därefter och följdes av ytterligare stridsåtgärder från avdelningen.

Sedan hösten 2016 har avdelningen varslat bl.a. APM om stridsåtgärder enligt följande:

– Den 28 oktober 2016 varslade avdelningen om övertids-, nyanställningar och inhyrningsblockad under tiden den 8 november 2016 kl. 16.00–31 december kl. 24
– Den 4 november 2016 varslade avdelningen om punktstrejker under tiden den 15–18 november 2016.
– Den 23 december 2016 varslade avdelningen om övertids-, nyanställnings- och inhyrningsblockad under tiden den 6 januari 2017–28 februari 2017 kl. 24.00.
– Den 13 januari 2017 varslade avdelningen om strejk under tiden den 24 januari 2017 kl. 12.00–20.00
– Den 1 mars 2017 varslade avdelningen om övertids-, nyanställnings- och inhyrningsblockad under tiden den 13 mars 2017 kl. 16.00–30 april 2017 kl. 24.00.
– Den 13 april 2017 varslade avdelningen om blockad mot att s.k. blixt fick utföra visst arbete under tiden 27 april kl. 0700–31 maj 2017 kl. 24.00.
– Den 4 maj 2017 utvidgades blockaden som avdelningen varslat om den 13 april till att omfatta tiden den 1 juni 2017 kl. 00.00 – 30 juni 2017 kl. 24.00.
– Den 4 maj 2017 varslade avdelningen även om övertids-, nyanställnings- och inhyrningsblockadunder tiden den 15 maj 2017 kl. 16.00–30 juni kl. 24.00.

Sedan den 8 november 2016 har avdelningen med undantag för den 28 november–5 december 2016, 1–5 januari och 1–12 mars 2017, oavbrutet vidtagit stridsåtgärder mot APM fram till den 30 juni 2017. Avdelningen har lagt varsel om stridsåtgärder för perioden den 28 november–5 december

2016 som inte återkallats, men som avdelningen meddelat att de ”frystes”. Därför har P.A. i enlighet med den ensidiga utfästelsen inte sedan den 8 november 2016 rätt till ersättning för fackligt arbete annat än under perioderna den 1–5 januari och 1–12 mars 2017, till dess förmånen avseende betalt fackligt arbete drogs in slutligt för honom den 30 mars 2017. APM har emellertid inte varit helt konsekvent i sitt agerande utan har till viss del ersatt P.A. för fackligt arbete även under perioder haft varsel om eller vidtagit stridsåtgärder.

> APM har låtit P.A. behålla sin lön vid de tillfällen APM eller bolaget påkallat förhandling i en fråga som inte berörts av pågående arbetskonflikt och vid den medling som förekom under perioden den 28 november–5 december 2016.
>
> APM har vid löneutbetalningen i december 2016 gjort löneavdrag för P.A. för perioden den 7–28 november 2016.
>
> APM har vid löneutbetalningen i januari 2017 betalat för mycket lön till P.A. Han borde ha fått lön för den 1 och 2 december 2016, då medling pågick, men inte i övrigt.
>
> APM har vid löneutbetalningen i februari 2017 gjort helt löneavdrag för P.A. förutom för 1 timme den 27 januari och för hela den 28 och 29 januari 2017, då det var förhandling med APM.
>
> APM har vid löneutbetalningen i mars 2017 gjort löneavdrag för P.A. för perioden från och med den 1 februari till och med kl. 12 den 17 februari 2017.
>
> APM har vid löneutbetalningen i april 2017 gjort löneavdrag för P.A. för perioden den 1–22 mars 2016, med undantag för 7,5 timmar den 1 mars 2017 och 1 timme den 17 mars 2017, då det var förhandling med APM.
>
> APM har vid löneutbetalningen i maj 2017 gjort helt löneavdrag för P.A. för april 2017, eftersom han var tjänstledig under april 2017.
>
> Det är riktigt att P.A:s semesterersättning uppgår till 13 procent av utgående lön.

Att P.A. varken på avtalad eller laglig grund haft rätt till ersättning för fackligt arbete har APM:s företrädare från tid till annan fört samtal med P.A. och avdelningen om. Det har därvid påtalats att APM inte har någon skyldighet att betala för fackligt arbete och att betalningen för fackligt arbete vilar på en ensidig utfästelse från APM:s sida, vilken kan återkallas. Inte vid något av dessa tillfällen eller under de förhandlingar som förekom mellan APM och avdelningen i november 2016 framförde avdelningen att P.A. hade rätt till ersättning för fackligt arbete grundad på kollektivavtal eller enskild överenskommelse.

Förhandlingarna 2016

Sveriges Hamnar var inte part eller deltagare i förhandlingarna mellan APM och avdelningen i november 2016, eftersom de gällde en lokal angelägenhet

om stridsåtgärder mot ett enskilt företag. K.E. företrädde vid förhandlingarna under perioden den 4–15 november 2016 APM och inte Sveriges Hamnar. Förhandlingarna fördes med anledning av de varsel avdelningen hade lagt och som avsåg stridsåtgärder bl.a. på grund av att APM avsåg att dra in ersättningen till P.A. för fackligt arbete. En indragning av ersättningen diskuterades ingående vid förhandlingarna. Avdelningen krävde att P.A. även i fortsättningen skulle ha betald ledighet för fackligt arbete. APM motiverade den aviserade indragningen med att det var nödvändigt för bolaget att göra skillnad mellan kollektivavtalsparter och de arbetstagarorganisationer som inte har kollektivavtal, eftersom de förra men inte de senare har åtagit sig fredsplikt. APM var vid förhandlingarna berett att erbjuda avdelningen rättigheter motsvarande de som en kollektivavtalsslutande arbetstagarorganisation har, om avdelningen åtog sig fredsplikt. K.E., som i och för sig under förhandlingarna varit aktiv och uttalat sig för APM:s räkning, har inte uttalat hot av det slag som förbundet påstår.

Den 15 november 2016 meddelade APM:s dåvarande personalchef S.T. P.A. muntligen att han med anledning av lagda varsel från och med 4 november 2016 skulle koda sin frånvaro som intern facklig tid vilken inte skulle ersättas av APM. S.T. upprepade den 21 november 2016 samma information i ett mejl till P.A. P.A. fortsatte dock, i strid med dessa riktlinjer, att till lönekontoret rapportera sin tid på samma sätt som han tidigare hade gjort.

Indragen förmån

Den 3 mars 2017 begärde APM förhandling med avdelningen i syfte att meddela att APM inte hade för avsikt att fortsätta att betala P.A. för fackligt arbete. Vid förhandlingen den 17 mars 2017 lämnades beskedet att APM hade för avsikt att dra in förmånen att få betalt för fackligt arbete från och med den 30 mars 2017, då P.A. skulle inställa sig för tjänstgöring i produktionen i stället, såvida han dessförinnan inte hade ansökt om och fått tjänstledighet för fackligt arbete.

Beslutet den 17 mars 2017 att dra in förmånen är fattat som ett led i APM:s strävan att behandla alla fackföreningar lika utifrån gällande lagstiftning. Eftersom det inte finns någon lagreglerad skyldighet att betala ersättning för fackligt arbete avseende annan fackförening än den som arbetsgivaren är bunden av kollektivavtal i förhållande till, beslutade APM att dra in förmånen för avdelningen och P.A. att få betalt för fackligt arbete.

P.A. har rätt till ersättning från förbundet för sitt fackliga arbete. Det sade förbundets ordförande till APM:s företrädare i samband med förhandlingar den 6 november 2016. Av § 17 Mom. 5 i förbundet stadgar framgår följande.

> **Mom. 5 Lokal förtroendeman**
>
> Efter förbundsstyrelsens medgivande kan tjänst som lokal förtroendeman inrättas i avdelning. Lokal förtroendeman anställs efter allmän omröstning och med sex månaders ömsesidig uppsägning. Lön åt lokal förtroendeman,

jämte sjuklön och semester, fastställs av förbundsstyrelsen, i samråd med avdelningsstyrelsen, i enlighet med av kongressen uppdragna riktlinjer. Då lokal förtroendeman på grund av sjukdom eller av annan anledning icke är i tjänst, kan avdelningens styrelse utse vikarie för viss tid. Bland de uppgifter som åligger lokal förtroendeman ingår ansvar för avdelningens kassa och att i samråd med avdelningsstyrelsen i övrigt föra de förhandlingar vid vilka avdelningen ska vara representerad.

Sveriges Hamnars meddelande daterat den 22 mars 2017 innebär inte att Sveriges Hamnar medverkat till eller rekommenderat APM att dessförinnan göra löneavdrag för P.A. eller fatta beslutet den 17 mars 2017.

Tvisten om kvittning – Utveckling av talan

Inledning

Vid APM betalas lön ut den 25:e för innevarande månad. Eventuella tillägg eller avdrag sker vanligtvis månaden efter, men ibland dröjer det längre. Den utbetalda lönen är därför alltid preliminär. APM anlitar två leverantörer för att hantera utbetalning av lön, Aditro, som räknar fram varje enskild lön och ser till att den utbetalas, och Commentor, som är leverantör av tidredovisningssystemet från vilket underlag skickas till Aditro.

APM har en avdelning för resursplanering som hanterar såväl personella som maskinella resurser inom den enhet stuveriarbetarna tillhör. Avdelningen kodar planerad frånvaro, godkänner korta ledigheter och tar emot sjukanmälningar. Det är personalen vid denna avdelning, eller cheferna, som registrerar eventuell frånvaro eller när extra tillägg ska betalas, såsom vid övertid, m.m. Den enskilde arbetstagaren lämnar inte några sådana uppgifter. Tidredovisningen attesteras antingen av chefer eller resursplaneringen och för varje kalenderdag upprättas ett tidkort för varje team. Tidkorten skapas av resursplaneringen och kodas och attesteras av chefer och resursplanering tillsammans.

Lönekorrigering vid löneutbetalningarna i oktober och november 2016

För maj 2016 blev tidkorten inte attesterade för 157 arbetstagare. Bland dem fanns ett antal tjänstemän samt 20 behovsanställda s.k. blixtar. Att tidkorten inte blev attesterade för dessa personer berodde på en handhavandemiss och när det upptäcktes av APM:s avdelning HR Lön var det för sent att göra något åt det. Den datafil som översändes till Aditro innehöll därför inte de tillägg och avdrag som skulle ha skett vid löneutbetalningen i juni 2016. För det 20-tal blixtar som arbetat under maj 2016 räknades lönen ut manuellt och betalades ut korrekt. På grund av tidsåtgång gjordes bedömningen att de som skulle bli helt utan lön dvs. blixtarna, var de som fick prioriteras med manuell hantering. Övriga anställda fick sin ordinarie lön utbetald.

Samtliga berörda chefer fick den 7 juni 2016 information via mejl om vad som hade skett. Cheferna vid APM förväntas lämna sådan information vidare till sina medarbetare. De kollektivanställda har inte arbetsmejl och kan därför inte nås snabbt på motsvarande sätt. De enskilda blixtar som kontaktade HR Lön fick besked om att deras lön skulle utbetalas manuellt.

Ingen av de berörda arbetstagarna hörde av sig för att uppmärksamma APM på att avdrag för maj 2016 inte hade gjorts på deras lön, trots att flera av deras kollegor fått avdrag för de dagar de strejkat i maj 2016, fått vidkännas sjukavdrag eller avdrag på grund av andra frånvaroorsaker.

När tidkorten för maj 2016 blev attesterade blev uppgifterna ändå inte tillgängliga för Aditro på grund av följande. APM utgick från att uppgifterna med automatik, via systemleverantören, skulle överföras till Aditro när attesterna skedde men den 20 juli 2016 upptäcktes att så inte hade skett. I samband med detta fick cheferna information via mejl om att de saknade tidkorten för maj 2016 inte hade beaktats den här gången heller. Den enskilda blixt som kontaktade HR Lön fick besked om att hans lön skulle utbetalas manuellt. Ingen anställd hörde av sig för att uppmärksamma APM på att avdrag för maj 2016 fortfarande inte hade gjorts. När APM:s företrädare kontaktade Commentor i anslutning till upptäckten erhölls beskedet att överföring inte skedde automatiskt men Commentor åtog sig att upprätta en korrigeringsfil med avdrag och tillägg avseende maj 2016, vilken skulle användas vid löneutbetalningen i augusti 2016. För blixtarna räknades lönen för juli 2016 ut manuellt på samma sätt som tidigare.

Den korrigeringsfil som senare erhölls från Commentor visade sig endast innehålla tilläggen men inga avdragsposter. Vid APM upptäcktes detta först den 22 augusti 2016 och då var det för sent att räkna om lönerna. Någon korrigering med avdrag för maj 2016 skedde därför inte heller vid löneutbetalningen i augusti 2016. Däremot erhölls de tillägg som hade tjänats in i maj 2016. Ingen anställd hörde av sig med synpunkter på eller förfrågningar om vad som hade hänt med avdragen avseende maj 2016 eller med anledning av att tilläggen från maj 2016 betalades ut i augusti 2016.

Commentor är en leverantör som APM samarbetat med i många år. Att skapa och leverera tidfiler som innehåller tillägg och avdrag för tidigare månader är en rutinsak som hade fungerat varje månad, varför APM inte haft som rutin att kontrollera leveransen. När felet påtalades erhöll APM i september 2016 en ny datafil från Commenor med avdragsposterna för maj 2016. Filen visade sig innehålla korrekta uppgifter om anställningsnummer, frånvaroorsak och datum, men inga uppgifter om antalet frånvarotimmar. Eftersom avdragen sker per timme och då personalen har olika schemalagda arbetstider, behövde en särskild granskning ske för varje anställd som berördes. Detta medförde att inga korrigeringar hann göras vid löneutbetalningen i september 2016.

APM:s avdelning HR Lön gick igenom samtliga avdragstransaktioner och kompletterade filen med förväntad arbetstid enligt varje medarbetares schema. Genomgången tog mycket tid i anspråk och med anledning av att löneutbetalningen i november har stor betydelse för arbetstagarnas disponibla inkomst för julhandel, gjordes bedömningen att avdragen skulle delas upp på löneutbetalningarna i oktober och november 2016. Ambitionen var att de flesta avdragen skulle göras vid löneutbetalningen i oktober 2016. Vid löneutbetalningen i november 2016 skulle löneavdrag avseende komptid och andra ledigheter göras, dvs. sådant som i de flesta fall inte skulle innebära avdrag i pengar.

Vid löneutbetalningen i oktober 2016 skedde korrigeringar för dem som under maj 2016 deltagit i stridsåtgärder, haft sjukfrånvaro m.m. Vid löneutbetalning i november 2016 skedde i huvudsak avdrag för frånvaro under maj på grund av vård av barn, annan föräldraledighet, tjänstledighet och kompledighet. Vid löneutbetalningen i november 2016 gjordes även retroaktiva transaktioner avseende de korrigerande avdrag som skett i oktober 2016 till följd av att Aditro felaktigt använt 2015 års lön vid beräkningen av löneutbetalningen i oktober 2016. Att det är en s.k. retroberäkning visas på lönespecifikationen genom att det står ett R efter datumet som transaktionen avser. Att avdrag skulle ske i enlighet med vad som nyss angetts informerade APM alla arbetstagare, avdelningen och Svenska Transportarbetareförbundets avdelning 2 om den 20 oktober 2016. Inga invändningar framfördes till APM i samband med det.

Lönekorrigering vid löneutbetalningen i juli 2016

Korrigeringar har skett vid löneutbetalningen i juli 2016 till A.M. och D.S. Korrigeringarna hänför sig till frånvaro i april och maj 2016. Anledningen till korrigeringarna var att ett nytt kollektivavtal hade träffats den 26 maj 2016 mellan Sveriges Hamnar och Svenska Transportarbetareförbundet med verkan från den 1 april 2016. Korrigeringarna är retroaktiva och har skett till följd av att A.M. och D.S., liksom alla andra hamnarbetare, hade fått nya, höjda löner från och med den 1 april 2016. Avdragen för frånvaron i april respektive maj 2016 har gjorts vid löneutbetalningarna i maj respektive juni 2016. Vid löneutbetalningen i juli 2016 korrigerades de vid löneutbetalningarna i maj och juni 2016 avdragna beloppen. För att markera att det var fråga om retroaktiva beräkningar har bokstaven R angetts efter respektive frånvaroperiod i lönebeskeden. Eftersom kollektivavtalet träffades i slutet av maj 2016, hann lönerevisionen inte verkställas förrän vid löneutbetalningen i juli 2016. Löneutbetalningen i juli 2016 innebar att A.M. och D.S. fick retroaktiva löneavdrag avseende april och maj 2016 och högre lön samt retroaktiva påslag på lön och tillägg för dessa månader.

Löneutbetalningen i december 2016

J.O. var anställd som vikarie hos APM. Löneutbetalningen i december 2016 till henne kom att bli felaktig till följd av oförutsedda kedjeeffekter på grund av att någon hade ändrat hennes startdatum i tidredovisningssystemet. När detta uppmärksammades räknades hennes lön ut korrekt och en tilläggsutbetalning om 21 687 kr gjordes till henne före årsskiftet 2016/2017. Fyra personer råkade ut för samma misstag. APM har således inte vidtagit någon aktiv åtgärd i form av kvittning på J.O:s lön, utan det har uppstått ett fel vid beräkningen och utbetalningen av hennes lön som korrigerats så snart det varit möjligt.

Utredningen

Målet har avgjorts efter huvudförhandling. På förbundets begäran har förhör under sanningsförsäkran hållits med avdelningsordföranden P.A. och förbundsordföranden E.R. samt vittnesförhör hållits med

förbundsstyrelseledamoten E.H. På arbetsgivarparternas begäran har vittnesförhör hållits med den f.d. personalchefen P.S., den f.d. personalchefen S.T., den löne- och HR-systemansvarige E.P., arbetsrättsjuristen K.E. och advokaten J.L.

Parterna har åberopat skriftlig bevisning.

Domskäl

Tvisten rörande P.A.

<u>Inledning</u>

Flera av de yrkanden förbundet framställt är beroende eller påverkas av om det, såsom förbundet har gjort gällande men arbetsgivarparterna förnekat, har träffats ett kollektivavtal 2006 mellan Göteborgs Hamn och förbundet respektive ett avtal 2012 mellan APM, genom dåvarande personalchefen P.S., och P.A. Arbetsdomstolen inleder därför med att i tur och ordning pröva om det har träffats sådana avtal.

Avtalen ska enligt förbundet ha gällt P.A:s rätt, såsom avdelningens ordförande, till lön för fackligt arbete. Det är utrett att arbetsgivaren sedan P.A. blev avdelningens ordförande 2006 har, med undantag för en period 2009, betalat P.A. lön för fackligt arbete som avsett arbetsgivaren, först på halvtid och sedan 2012 på heltid, till dess att den ersättningen med verkan från början av november 2016 delvis och sedan helt drogs in. Arbetsgivarparternas inställning är att P.A. har varit ledig för fackligt arbete och genom en ensidig utfästelse från arbetsgivaren fått lön för den lediga tiden. Förbundet har inte grundat sin talan på någon ensidig utfästelse av APM.

Det arbetsgivarparterna kallat en ensidig utfästelse är vad som vanligen brukar betecknas som en ensidigt reglerad förmån. Arbetsdomstolen använder därför den formuleringen i fortsättningen.

<u>Har det träffats ett kollektivavtal 2006?</u>

Den 4 april 2006 förekom det en förhandling mellan Göteborgs Hamn och förbundet. Förbundet har gjort gällande att det vid förhandlingen träffades ett kollektivavtal mellan Göteborgs Hamn och förbundet innebärande att P.A., såsom ordförande för avdelningen, skulle få lön för fackligt arbete motsvarande en halvtidstjänst. Enligt arbetsgivarparterna har det inte träffats något sådant kollektivavtal, eftersom de parter som förhandlade inte hade för avsikt att ingå ett avtal.

Av utredningen framgår följande om bakgrunden till förhandlingen. Mellan Göteborgs Hamn och förbundet eller avdelningen gällde inte något kollektivavtal, men avdelningens dåvarande ordförande H.K. hade sedan omkring 1994 fått arbeta fackligt på heltid med lön. Före förhandlingen hade P.A. efterträtt H.K. som avdelningens ordförande. P.A. avsåg emellertid att

arbeta fackligt bara på halvtid, medan avdelningens dåvarande lokale förtroendeman M.B. också skulle sköta ordförandes

ysslor på halvtid. Göteborgs Hamn påkallade förhandlingen med anledning av ordförandebytet.

Det justerade protokollet över förhandlingen den 4 april 2006 har följande lydelse.

Protokoll

(2006-04-04)

Ärende: Förhandling Fackligt ordförandeskap Hamnarbetsförbundet
Plats: ”Sheraton” tredje våningen
Närvarande:

P.S.	GHAB	ordförande
H.K.	Hamnarbetarförbundet	
P.A.	”	
R.J.	GHAB	
J.P.	”	protokollförare

§1

Ordföranden hälsade alla välkomna och förklarade att förhandlingen tillkommit på arbetsgivarens begäran för att behandla ovanstående fråga.

§2

Ordföranden beskrev bakgrunden till dagens förhandling.
H.K. har återgått till hamntjänstgöring och ordförandeskapet för Hamnarbetsförbundet i Göteborgs Hamn AB kommer att delas av P.A. och M.B. fr o m 2006-04-01.

Bolaget accepterar att ordförandetjänsten är en heltidstjänst.

För den fackliga tiden kommer ansvarsställe 928 att användas, övrig tid ligger kvar på ansvarsställe 550.

P. och M. kommer att bemanna sin fackliga expedition under sina dagtidsveckor. P. kommer att arbeta fackligt under ojämna veckor och M. under jämna veckor under 2006. Resterande tid är på sena-skiftet på ”Fartyg”.

P. och M. kommer ej att delta i nattjouren efter 2006-04-01.

Fast lön kommer att utbetalas enligt gällande regelverk (040621), som utgör genomsnittslön för hamnarbetare föregående år. Fr o m 2006-04-01 är den fasta månadslönen 34 414 kr. Denna månadslön innefattar alla ersättningar som har utgått tidigare. De fackliga ordförandena får endast i undantagsfall arbeta övertid.

Telefonnummer till fackexpeditionen är fortfarande 031-51 54 51. Denna telefon är sedan överkopplad till respektive mobiltelefon.
Skulle P. eller M. nås direkt på mobiltelefon använd dessa nr:
P. […]
M. […]

§3

De fackliga organisationerna har inget att invända mot Ordförandes förslag.

§4

Beslutades att Ordförande och P.A. skall justera protokollet. Förhandlingen avslutades därefter.

Vid protokollet

J.P.

Justerat:

P.S. P.A.

Av de som var med vid förhandlingen har P.A. och P.S. hörts.

P.A. har berättat att H.K. ville att uppgörelsen med Göteborgs Hamn om att avdelningens ordförande fick arbeta fackligt på heltid med lön skulle finnas på papper så att nya företrädare för arbetsgivaren skulle känna till uppgörelsen. Enligt P.A. nedtecknade de en överenskommelse i protokollet. Av förhöret med P.A. framgår också att han inte vid kontakter med arbetsgivarsidan efter 2006 åberopat överenskommelsen, såvitt han kommer ihåg, eftersom det inte funnits anledning till det.

P.S., som sedan 1996 var personaldirektör och förhandlingsansvarig hos Göteborgs Hamn, har berättat följande. Vid alla viktigare förändringar bland de fackliga företrädarna kallade Göteborgs Hamn till medbestämmandeförhandling. Det var en stor förändring när H.K. efter många år avgick som avdelningens ordförande och skulle i ordföranderollen ersättas av två personer. Därför kallade Göteborgs Hamn förbundet till medbestämmandeförhandling. Göteborgs Hamn hade önskemål om att det alltid skulle finnas tillgång till en företrädare för avdelningen och såg det förslag som lämnades enligt protokollet som ett sätt att reglera den fackliga tiden för förbundet. Protokollet över förhandlingen, som en medarbetare till P.S. skrev, är utformat som de alltid gjorde, med ett förslag från arbetsgivarsidan som arbetstagarsidan hade eller inte hade invändningar mot och därefter ett avslutande av förhandlingen. Inte någon av de förhandlande parterna ville träffa kollektivavtal. Protokoll över förhandlingar som upptog kollektivavtal eller överenskommelser som träffades med Svenska Transport-arbetareförbundet, med förbundet närvarande vid förhandlingen, såg annorlunda ut. Göteborgs Hamn erbjöd ensidigt ett upplägg som förbundet inte invände mot. Göteborgs Hamn beslutade därefter att genomföra upplägget. P.A. har fått ledigt med lön från sin anställning som hamnarbetare för att arbeta fackligt.

Av förbundets uppgifter framgår att M.B:s roll enligt § 2 i protokollet övertagits först av L.L. 2007 och sedan av E.H. 2009, såvitt framkommit utan att detta nedtecknats.

Av utredningen har framkommit att Göteborgs Hamn under en period 2009 drog in ersättningen för fackligt arbete. Av E.H:s uppgifter framgår att han i

samband med det visade protokollet för professor Dennis Töllborg, som företrätt förbundet i målet och bl.a. undertecknat stämningsansökan där det inte gjordes gällande att det hade träffats ett kollektivavtal, som sade att det kunde nog vara fråga om ett kollektivavtal. Det har inte framkommit att förbundet eller avdelningen i samband med indragningen 2009 av ersättningen för fackligt arbete vid kontakter med arbetsgivaren hänvisade till en överenskommelse från 2006.

Vid förhandlingar mellan APM och avdelningen under sju dagar i november 2016 var, enligt förbundets förhörspersoner, APM:s möjlighet att dra in P.A:s ersättning för fackligt arbete ett återkommande tema från arbetsgivarsidan. Såvitt framkommit invände avdelningen vid förhandlingarna inte att den ersättningen var reglerad genom en överenskommelse.

Parterna är överens om att förbundet och avdelningen inte förrän under målets handläggning rättsligt kvalificerat innehållet i protokollet som ett kollektivavtal.

Arbetsdomstolen gör följande bedömning.

Det som står i § 2 i protokollet rör förhållandet mellan arbetsgivare och arbetstagare på det sätt som förutsätts i 23 § första stycket medbestämmandelagen. Det justerade protokollet uppfyller, enligt 23 § andra stycket medbestämmandelagen, i och för sig formkravet för ett kollektivavtal.

Även om de yttre förutsättningarna för ett kollektivavtal i 23 § medbestämmandelagen är uppfyllda finns det fall där en handling ändå inte anses ha kollektivavtalets natur. En avgörande fråga är om parterna över huvud taget har haft en avsikt att träffa ett avtal. Parternas vilja att träffa avtal måste alltså klarläggas (Mikael Hansson, Kollektivavtalsrätten – En rättsvetenskaplig berättelse, 2010, s. 146 ff., Olof Bergqvist, Lars Lunning och Gudmund Toijer, Medbestämmandelagen – Lagtext med kommentarer, andra upplagan 1997, s. 300 ff., Folke Schmidt m.fl., Facklig arbetsrätt, fjärde upplagan 1997, s. 183 ff., SOU 1975:1 s. 794, AD 2016 nr 52, AD 2008 nr 9, AD 2005 nr 25, AD 1996 nr 40, AD 1987 nr 36, AD 1986 nr 56, AD 1985 nr 136, AD 1980 nr 114 och AD 1980 nr 78, jämför AD 1990 nr 67). När det gäller justerade protokoll kan som kollektivavtal inte godtas vilket uttalande som helst som tagits med i protokollet. För att ett protokollsuttalande ska kunna betraktas som ett kollektivavtal fordras att parterna har enats om att uttalandet ska ha karaktären av en bindande överenskommelse (prop. 1975/76:105 Bil. 1 s. 373 och SOU 1975:1 s. 798).

I detta fall bör beaktas att det inte före förhandlingen fanns något kollektivavtal mellan Göteborgs Hamn och förbundet och att det, såvitt framkommit, inte heller därefter träffats något kollektivavtal mellan arbetsgivarsidan och förbundet eller avdelningen rörande den del av Göteborgs hamn som tvisten gäller. Ersättningen för H.K:s fackliga arbete var sålunda inte reglerad i ett kollektivavtal, utan utgavs ensidigt av Göteborgs Hamn. Av P.S:s uppgifter framgår att Göteborgs Hamn inte hade någon som helst avsikt att träffa något avtal med förbundet, vilka uppgifter Arbetsdomstolen inte har anledning att sätta i fråga.

Protokollet är, som P.S. framhållit, utformat på det sätt som är vanligt vid protokoll över en medbestämmandeförhandling, med ett arbetsgivarförslag som arbetstagarsidan har eller inte har något att invända emot, även om det inte står i protokollet att förhandlingen var en medbestämmandeförhandling eller att det inte innehåller ett kollektivavtal. Det anges sålunda inte att parterna enats eller kommit överens om något eller ens att förbundet accepterat Göteborgs Hamns förslag, utan det anges att de fackliga organisationerna inte har något att invända mot förslaget. Av ordalydelsen av protokollet framgår alltså inte att de förhandlande parterna kommit överens om något.

Protokollet innehåller vidare i § 2 sådant som vanligen inte tas in i kollektiv-avtal och inte heller annars brukar vara föremål för avtal, såsom telefon-nummer för fackexpeditionen och vilka ansvarsställen (kostnadsställen) arbetsgivaren ska använda. Det är vidare svårt att se vilket intresse Göteborgs Hamn skulle ha haft att ta initiativ till ett kollektivavtal i frågan.

Mot den bakgrunden ligger det nära till hands att anse att förbundet vid förhandlingen och när förbundet fick protokollet för justering måste ha insett att Göteborgs Hamn inte avsåg att träffa ett avtal, dvs. att det inte fanns någon gemensam partsavsikt att träffa ett rättsligt bindande avtal.

Även hur de inblandade senare har agerat kan belysa om det funnits en avtalsavsikt. Göteborgs Hamn drog under en period 2009 in ersättningen för fackligt arbete utan att P.A., avdelningen eller förbundet, såvitt framkommit, invände att ersättningen var avtalsreglerad. Inte heller när APM:s möjlighet att dra in ersättningen diskuterades vid förhandlingar i november 2016 invände P.A. eller avdelningen något om detta. Förbundet och avdelningen har alltså, enligt Arbetsdomstolens mening, inte förrän drygt ett decennium efter förhandlingen agerat som om det funnits ett avtal om P.A:s ersättning för fackligt arbete.

Arbetsdomstolens sammanfattande bedömning är att det är utrett att Göteborgs Hamn och förbundet inte vid förhandlingen haft en gemensam avsikt att träffa ett rättsligt bindande avtal. Det som står i protokollet är alltså inte ett kollektivavtal. Det kan tilläggas att det inte heller har fram-kommit att Göteborgs Hamn och P.A. skulle ha träffat något avtal vid förhandlingen.

Har det 2012 träffats ett avtal om P.A:s ersättning för fackligt arbete?

Förbundet har gjort gällande att APM, genom P.S., och P.A. hösten 2012 träffade en överenskommelse om att P.A., såsom ordförande för avdelningen, skulle utföra betalt fackligt arbete på heltid. Arbetsgivarparterna har bestritt att det träffats en sådan överenskommelse. Enligt arbetsgivarparterna var det ett ensidigt åtagande från APM att betala P.A. lön när han var ledig på heltid för fackligt arbete.

Det är förbundet som har bevisbördan för att det träffats en överenskom-melse.

P.A. har i förhör inte berättat om någon överenskommelse med P.S. 2012. Det P.S. berättat i förhör om vad som förekom när P.A. började arbeta fackligt på heltid innebär att det inte träffades någon överenskommelse om ledighet eller betalning utan att APM ensidigt gav P.A. ledighet och betalning. E.H., lokal förtroendeman vid avdelningen, har lämnat andrahandsuppgifter om att det 2012 skulle ha träffats en överenskommelse mellan P.S. och P.A. eller avdelningen om att P.A. skulle arbeta fackligt på heltid. Han har emellertid uttryckt det som att P.S. hade lämnat P.A. eller avdelningen ett erbjudande.

Förbundet har som skriftlig bevisning åberopat en handling daterad den 4 november 2016 som ser ut att härröra från E.P., löne- och HR-systemansvarig hos APM, och som innehåller följande.

Intyg om löneavdrag

> P.A., [personnummer], är facklig representant för Hamnarbetarfödundet avd 4 och som sådan heltidsanställd på APM Terminals i Göteborg.

Inte vare sig P.A. eller E.P. har i förhör berört handlingen. Inte heller i övrigt har det kommit fram något om bakgrunden till att handlingen upprättades eller anledningen till formuleringen i handlingen.

Inför att APM beslutade att definitivt sluta betala P.A. lön vid ledighet för fackligt arbete begärde APM, genom dåvarande personalchefen S.T., förhandling enligt 13 § medbestämmandelagen och angav att förhandlingen skulle avse ”omreglering av P.A:s anställningsavtal”. S.T. har förklarat formuleringen i förhandlingsframställan med att hon, när framställan gjordes, var osäker på om den praktiska tillämpningen hade medfört att något flutit in i P.A:s anställningsavtal, varför hon tog det säkra före det osäkra. Efter senare undersökningar kunde APM, enligt S.T., dock konstatera att så inte var fallet.

Arbetsdomstolen gör följande bedömning.

Den utredning som finns om vad som förekom mellan P.S. och P.A. ger inte stöd åt förbundets påstående att en överenskommelse träffats. Därför har förbundet inte förmått visa att det träffats en överenskommelse med APM om att P.A., såsom ordförande för avdelningen, ska utföra betalt fackligt arbete på heltid.

Ska P.A. anses ha blivit avskedad?

Förbundet har gjort gällande att APM vidtagit åtgärder som är att jämställa med ett avskedande av P.A. och åberopat följande åtgärder. Att APM från och med löneutbetalningen i december 2016 gjort löneavdrag för P.A. avseende tid då han arbetat fackligt. Att APM den 17 mars 2017 beslutat dels att från och med den 30 mars 2017 inte betala P.A. lön för fackligt arbete, dels att P.A. den 30 mars 2017 skulle återgå i arbete som hamnarbetare.

Enligt arbetsgivarparterna är åtgärderna inte att jämställa med ett avskedande. Löneavdragen var, enligt arbetsgivarparterna, en tillämpning av villkoren för den av APM ensidigt reglerade förmånen, som bl.a. innebar att ersättning för fackligt arbete inte skulle betalas under tid då förbundet eller avdelningen hade varsel om eller vidtog stridsåtgärder riktade mot APM. Beslutet den 17 mars 2017 innebar, enligt arbetsgivarparterna, att APM efter förhandling enligt 13 § medbestämmandelagen återkallade den ensidigt reglerade förmånen om att betala ersättning för fackligt arbete och att P.A. skulle återgå till sitt arbete som hamnarbetare.

Arbetsdomstolen har i det föregående kommit fram till att P.A. inte på anförda grunder – ett kollektivavtal från 2006 och en överenskommelse från 2012 – hade rätt till ersättning av APM vid fackligt arbete eller att arbeta med eller vara ledig för fackligt arbete. Löneavdragen och beslutet stod alltså inte i strid med P.A:s enskilda anställningsavtal eller något kollektivavtal som han och APM var bundna av. Åtgärderna kan därför inte objektivt sett jämställas med ett avskedande.

Av utredningen, bl.a. P.A:s egna uppgifter, framgår att löneavdragen inte gjordes förrän efter att APM, genom S.T., hade förklarat för P.A. varför de skulle göras, nämligen därför att det rådde arbetskonflikt. Beslutet den 17 mars 2017 fattades efter en medbestämmandeförhandling, där det får antas att APM redogjorde för bakgrunden. P.A. har därför, enligt Arbetsdomstolens mening, inte heller haft fog för att uppfatta åtgärderna som ett avskedande. Han kan således inte anses ha blivit avskedad.

Arbetsdomstolens bedömning så här långt innebär att yrkandena under punkt 1 a och 1 b ska avslås och att det inte är aktuellt med något förbehåll för P.A. att återkomma med krav på ekonomiskt skadestånd för tiden efter den 30 april 2017.

<u>Har APM brutit mot 13 § medbestämmandelagen eller vidtagit en olovlig stridsåtgärd?</u>

Förbundet har gjort gällande att APM varit skyldigt att förhandla med avdelningen enligt 13 § medbestämmandelagen innan APM beslutade att göra löneavdragen.

Enligt arbetsgivarparterna har APM inte varit skyldigt att förhandla enligt 13 § medbestämmandelagen innan APM tillämpade villkoren för sin ensidigt reglerade förmån och inte betalade lön för fackligt arbete utfört under den tid avdelningen haft varsel om eller vidtagit stridsåtgärder riktade mot APM.

Av 13 § medbestämmandelagen följer att en arbetsgivare är skyldig att på eget initiativ förhandla med en icke kollektivavtalsbärande arbetstagarorganisation innan arbetsgivaren beslutar om viktigare förändring av arbets- eller anställningsförhållandena för arbetstagare som tillhör organisationen. Detta gäller om frågan särskilt angår arbets- eller anställningsförhållandena för sådana arbetstagare.

Förbundet har vidare gjort gällande att löneavdragen inneburit en stridsåtgärd i syfte att förmå P.A. att för avdelningen träffa kollektivavtal med APM, vilket arbetsgivarparterna bestritt. Enligt arbetsgivarparterna var löneavdragen bara en tillämpning av villkoren för APM:s ensidigt reglerade förmån.

Enligt 41 a § första stycket första meningen medbestämmandelagen får en arbetsgivare inte såsom stridsåtgärd eller som ett led i en stridsåtgärd hålla inne lön eller någon annan ersättning för utfört arbete som har förfallit till betalning.

Arbetsdomstolen har som nämnts kommit fram till att P.A. inte på anförda grunder hade rätt till ersättning av APM vid fackligt arbete. Arbetsdomstolen utgår därför från att APM, såsom arbetsgivarparterna hävdat, betalat sådan ersättning såsom en av APM ensidigt reglerad förmån. Villkoren för den förmånen innebar, enligt vad arbetsgivarparterna gjort gällande med stöd av en skriftlig handling från 2009, att ersättning för fackligt arbete inte skulle betalas under tid då förbundet eller avdelningen hade varsel om eller vidtog stridsåtgärder riktade mot APM. Det beslut som fattats om löneavdrag med hänvisning till varslade eller inledda stridsåtgärder har därför inte inneburit någon förändring av P.A:s arbets- och anställningsförhållanden, utan varit en tillämpning av vad som enligt APM redan gällde. Inte heller kan tillämpningen anses ha skett i det syfte förbundet påstått. Det kan tilläggas att Arbetsdomstolen i AD 2007 nr 50 ansett att det inte kan råda något tvivel om att bestämmelserna i 41 a § medbestämmandelagen tar sikte bara på sådan lön eller annan ersättning för utfört arbete som arbetsgivaren har att betala på grund av ett åtagande i avtalsförhållandet mellan arbetsgivaren och de enskilda arbetstagarna, vilket betyder att förmåner av annat slag, som en arbetsgivare kan välja att utge genom sitt eget beslut, inte omfattas av dessa bestämmelser i lagen. Det rättsfallet gällde indragning för framtiden av en ensidigt reglerad förmån. APM har således, enligt Arbetsdomstolens mening, inte brutit mot vare sig 13 eller 41 a § medbestämmandelagen.

Arbetsdomstolens bedömning innebär att yrkandena under punkt 3 a, 3 b, 4 och 5 ska avslås.

<u>Har APM gjort sig skyldigt till föreningsrättskränkning?</u>

Förbundet har gjort gällande att löneavdragen gjorts och beslutet den 17 mars 2017 fattats i syfte att försvåra för P.A. att verka för förbundet och avdelningen och deras medlemmar och att förmå honom att inte göra det, vilket arbetsgivarparterna bestritt. Enligt arbetsgivarparterna var löneavdragen bara en tillämpning av villkoren för APM:s ensidigt reglerade förmån. Beslutet den 17 mars 2017 syftade, enligt arbetsgivarparterna, bara till att begränsa APM:s skyldigheter i fråga om ledighet och ersättning för fackligt arbete till vad som gäller enligt förtroendemannalagen.

Med föreningsrätt avses enligt 7 § medbestämmandelagen en rätt för arbetsgivare och arbetstagare att tillhöra en arbetsgivar- eller arbetstagarorganisation, att utnyttja medlemskapet och att verka för organisationen eller för att

sådan bildas. En föreningsrättskränkning föreligger enligt 8 § medbestämmandelagen, såvitt är aktuellt i målet, om en arbetsgivare vidtar en åtgärd mot en arbetstagare i syfte att förmå arbetstagaren att inte utnyttja sin föreningsrätt. I mål om kränkning av arbetstagares föreningsrätt följer av Arbetsdomstolens fasta praxis att det inledningsvis ankommer på arbetstagarparten att visa sannolika skäl för att motivet till en viss åtgärd är sådant att en kränkning av föreningsrätten förekommit. Om arbetstagarparten lyckas med detta, är det därefter arbetsgivarens sak att styrka att denne haft skälig anledning till sin åtgärd oberoende av föreningsrättsfrågan.

Arbetsdomstolen har som nämnts att utgå från att APM betalat P.A. ersättning för fackligt arbete till följd av en ensidigt reglerad förmån vars villkor bl.a. innebar att ersättning för fackligt arbete inte skulle betalas under tid då förbundet eller avdelningen hade varsel om eller vidtog stridsåtgärder riktade mot APM. Löneavdragen innebar en tillämpning av villkoren för den ensidigt reglerade förmånen. En ensidigt reglerad förmån kan återkallas.

Enligt Arbetsdomstolens bedömning har det inte framkommit något som tyder på att APM gjort löneavdragen i det syfte förbundet gjort gällande – för att förmå P.A. att inte verka fackligt. Ingen förhörsperson har t.ex. sagt något som antyder att APM skulle ha haft en negativ inställning till att just P.A. företrädde avdelningen och verkade fackligt. Tvärtom hade APM under den period löneavdragen avser gett P.A. ledigt på heltid för att göra just det. S.T. har förklarat att löneavdragen var en tillämpning av villkoren för den ensidigt reglerade förmånen. Arbetsdomstolen anser att förbundet inte förmått göra sannolikt att APM:s syfte med löneavdragen varit det förbundet gjort gällande.

När det gäller beslutet den 17 mars 2017 är det genom utredningen, bl.a. P.A:s egna uppgifter, klarlagt att det inte innebar att P.A. förvägrades ledighet för fackligt arbete. Med hänsyn till vad som nyss sagts om utredningen och till att P.A. kort tid efter beslutet, så snart han begärde det, beviljades hel tjänstledighet för att just arbeta fackligt ligger det nära till hands att anse att förbundet inte heller förmått göra sannolikt att APM:s syfte med beslutet varit det förbundet gjort gällande. Ett arbetsgivarbeslut om att en arbetstagare inte längre ska få lön för fackligt arbete är emellertid ett beslut som typiskt sett kan antas syfta till att förmå arbetstagaren att inte utföra sådant arbete. Det gäller särskilt om beslutet står i strid med lag eller avtal. I detta fall var det dock som nämnts APM:s ensidigt reglerade förmån som var grunden till att P.A. hade fått lön för fackligt arbete. Frågan blir då hur man bör se på i sig tillåtna arbetsgivarbeslut om att för en arbetstagare dra in en ensidigt reglerad förmån som främjar facklig verksamhet.

I vissa fall, när det är rättsenligt bortsett från förbudet mot föreningsrättskränkning, har arbetsgivare och arbetstagare samt deras organisationer ansetts kunna vidta en åtgärd för att hindra eller hämnas facklig verksamhet utan att det inneburit en föreningsrättskränkning. Det har gällt sådant som en i god tro utfärdad varning för att deltagande i strejk innebär brott mot anställningsavtalet och kan leda till uppsägning eller avskedande (AD 2008 nr 62, jämför AD 2008 nr 36) eller en stridsåtgärd för att träffa kollektivavtal som riktas mot någon just på grund av att denne eller någon hos denne

har utnyttjat sin föreningsrätt (AD 2013 nr 34). Av 41 a § första stycket andra meningen medbestämmandelagen lär vidare motsatsvis följa att en arbetsgivares innehållande av förfallen lön för utfört arbete med anledning av att arbetstagarna deltar i en stridsåtgärd inte är en föreningsrättskränkning (men väl en olovlig stridsåtgärd). Även om de angivna exemplen har samband med stridsåtgärder, får det antas att det finns fall av användande av rättsenliga möjligheter, som rör facklig verksamhet, som inte träffas av förbudet mot föreningsrättskränkning.

I detta fall har APM, utan att vara skyldigt till det, låtit P.A. vara ledig med lön för att utföra fackligt arbete och sedan beslutat att upphöra med att betala honom lön för det fackliga arbetet. Detta påstås ha skett för att förmå P.A. att inte arbeta fackligt och inte som hämnd för något fackligt som han redan gjort. I vart fall i en sådan situation får det, enligt Arbetsdomstolens mening, anses att indragningen av förmånen av betalt fackligt arbete inte träffas av förbudet mot föreningsrättskränkning. Det kan tilläggas att en annan bedömning inte i ett större perspektiv vore till förmån för arbetstagarsidan, eftersom den i så fall sannolikt skulle innebära att arbetsgivare inte skulle vara beredda att på det sättet frivilligt underlätta och betala för fackligt arbete. Detta kan också uttryckas som att Arbetsdomstolen funnit det styrkt att beslutet fattades för att begränsa APM:s skyldigheter i fråga om ersättning för fackligt arbete till vad som gäller enligt förtroendemannalagen och att detta är en godtagbar anledning.

Arbetsdomstolens bedömning innebär att yrkandena under punkt 2 a och 2 b ska avslås.

Eftersom APM:s påtalade åtgärder inte inneburit någon föreningsrättskränkning, ska även förbundets yrkanden under punkt 6 a och 6 b om allmänt skadestånd för att Sveriges Hamnars medverkat till APM:s åtgärder avslås.

Sammanfattning

Arbetsdomstolens bedömningar innebär att förbundets yrkanden rörande P.A. ska avslås.

Tvisten om kvittning

Inledning

Förbundet har gjort gällande att APM brutit mot kvittningslagen genom att vid löneutbetalningarna i juli, oktober, november och december 2016 göra löneavdrag för de arbetstagare som anges i bilagan utan att först hämta in s.k. beneficiumbesked från Kronofogdemyndigheten enligt 6 § kvittningslagen.

Arbetsgivarparterna har yrkat att talan såvitt avser krav med anledning av löneutbetalningarna i juli 2016 (till arbetstagarna A.M. och D.S.) och december 2016 (till arbetstagaren J.O.) ska avvisas, eftersom det s.k. förhandlingskravet i 4 kap. 7 § arbetstvistlagen enligt arbetsgivarparterna

inte är uppfyllt då den tvisteförhandling som APM och avdelningen genomförde den 27 januari 2017 inte omfattade sådana krav.

Enligt förbundet, som bestritt avvisningsyrkandet, omfattade tvisteförhandlingen även kraven med anledning av löneutbetalningarna i juli och december 2016.

Arbetsgivarparterna har i sak bestritt yrkandena och gjort gällande att löneavdragen inte inneburit kvittning enligt kvittningslagen.

Arbetsdomstolen inleder med att pröva om förhandlingskravet är uppfyllt.

Får kraven med anledning av löneavdragen i juli och december 2016 tas upp till prövning?

Följande är utrett. Avdelningen, genom P.A., gjorde den 1 december 2016 en förhandlingsframställan hos APM där det bara angavs att förhandlingen skulle avse brott mot kvittningslagen. Genom mejl samma dag bad S.T. P.A. att komplettera framställan med mer skriftlig fakta. P.A. svarade att framställan avsåg kvittning på lön för avdelningens medlemmar som var gjord av arbetsgivaren under oktober och november. Den 13 januari 2017 översände P.A. till S.T. ”inför kvittningsförhandlingen” en pdf-fil som innehöll lönespecifikationer för alla de arbetstagare som anges i bilagan, dvs. även de aktuella lönespecifikationerna för juli och december 2016. S.T. svarade samma dag ”Du behöver sammanställa på en separat slide vad det handlar om enligt min tidigare feedback. [J]ag finner fortfarande det lika otydligt vad det är som är fel på hur många individer. Underlaget behöver vara bättre”. P.A. svarade samma dag ”I PDF filen är markerat med grön eller blå överstrykningspenna på varje person där vi anser att ett brott mot kvittningslagen skett”. Lönespecifikationen från december 2016 för J.O. var väsentligt längre – fyra sidor – än de andra lönespecifikationerna och hade inga överstrykningar. De övriga lönespecifikationerna hade överstrykningar av poster med löneavdrag. Vid tvisteförhandlingen den 27 januari 2017 hade avdelningen med sig en utskrift av pdf-filen. Parterna gick dock vid förhandlingen inte igenom varje lönespecifikation eller arbetstagare, utan talade mer övergripande om löneavdrag. APM redogjorde för hur det kom sig att löneavdragen i oktober och november 2016 inte hade gjorts tidigare.

P.A. har förklarat att han inte gjorde överstrykningar i lönespecifikationen för J.O., eftersom den var så lång och innehöll flera sidor med löneavdrag.

E.P., som företrädde APM vid tvisteförhandlingen, har berättat att hon tror att de vid förhandlingen nog tog upp de s.k. retrokörningar som gällde A.M. och ytterligare en arbetstagare.

Arbetsdomstolen gör följande bedömning.

Avdelningen har på APM:s begäran översänt ett skriftligt underlag inför tvisteförhandlingen och angett vad i underlaget avdelningen ville förhandla om. Det skriftliga underlaget är visserligen omfattande på grund av att det rörde så många arbetstagare, men det får i och för sig anses tydligt med

lönespecifikationerna i alfabetisk ordning och de aktuella löneavdragen, utom J.O:s, markerade. Det har inte framkommit att underlaget innehöll flera lönespecifikationer än de avdelningen ville förhandla om. Med hänsyn till att den översända lönespecifikationen för J.O. innehöll en stor mängd löneavdrag, mångdubbelt fler än de positiva löneposterna, får det, enligt Arbetsdomstolens mening, anses att avdelningen tillräckligt tydligt angett att avdelningen även ville förhandla om dessa löneavdrag. Det gäller trots att löneavdragen gjordes efter förhandlingsframställan.

En part som i god tid före en tvisteförhandling får ett skriftligt underlag från motparten som tydligt utvisar vilka förhållanden motparten vill förhandla om har, enligt Arbetsdomstolens mening, att räkna med att tvisteförhandlingen omfattar alla dessa förhållanden. Detta gäller även om motparten inte uttryckligen säger det vid förhandlingen och parterna gemensamt nöjer sig med att behandla förhandlingsfrågorna mera översiktligt. Mot den bakgrunden finner Arbetsdomstolen att tvisteförhandlingen omfattade även krav med anledning av löneutbetalningarna i juli och december 2016. Arbetsgivarparternas avvisningsyrkande ska därför avslås.

Löneavdragen i oktober och november 2016

Av hamn- och stuveriavtalet framgår att löneutbetalningen varje månad är preliminär och att korrigeringar verkställs i efterhand, vid nästa månads löneutbetalning. Löneavdragen vid löneutbetalningarna i oktober och november 2016, vars storlek förbundet i och för sig inte ifrågasatt, avsåg olika former av frånvaro under maj 2016. Med utgångspunkt från att löneavdragen borde ha gjorts vid löneutbetalningen i juni 2016 har löneavdragen skett fyra eller fem månader för sent.

I Arbetsdomstolens praxis har frågan om gränsdragningen mellan kvittning och korrigering av preliminär löneutbetalning bedömts i flera fall (se t.ex. redogörelsen i AD 2012 nr 1). Omständigheterna i AD 1977 nr 101 och AD 1977 nr 27 var i viktiga hänseenden likartade. En frånvaroperiod för arbetstagaren i början av en längre sjukledighet beaktades inte av arbetsgivaren vid den närmast infallande löneutbetalningen som var preliminär. Det mot frånvaroperioden svarande löneavdraget genomfördes först avsevärd tid efter det att överkompensationen för arbetstagaren hade uppstått. I AD 1977 nr 27 förflöt mer än ett år och i AD 1977 nr 101 nio månader. I båda fallen betraktade domstolen löneavdragen inte som en lönekorrigering utan som en otillåten kvittning. I rättsfallet AD 1980 nr 59 blev utgången den motsatta. Löneavdraget i det fallet uppfattades som en lönekorrigering. Arbetsdomstolen uttalade att situationen i 1980 års fall i många avseenden var annorlunda än i de två fallen från 1977. Arbetstagarens lön blev i 1980 års fall slutligt korrigerad mindre än fyra månader efter det att överkompensationen uppkommit och korrigeringen gjordes så snart som det kunnat ske. Domstolen tillmätte också viss betydelse att anledningen till löneavdraget inte var sjukdom utan ledighet för studier, dvs. tid under vilken arbetstagaren frivilligt avstått från löneförmåner. I AD 1996 nr 70 hade arbetsgivaren gjort löneavdrag i oktober 1994 och i ett fall i december 1994 med anledning av att ett antal arbetstagare hos SAS varit uttagna i konflikt under ett dygn i juni samma år. Arbetsdomstolen uttalade följande.

> Enligt arbetsdomstolens mening bör omständigheterna i det enskilda fallet vara avgörande för hur länge arbetsgivaren kan dröja med löneavdraget och ändå kunna genomföra avdraget såsom lönekorrigeringen. Vid prövningen av de föreliggande omständigheterna bör särskild vikt fästas vid om arbetstagaren har haft skäl att uppfatta situationen på det sättet att den preliminära lönen ännu inte är slutligt reglerad. Ett klargörande besked till arbetstagaren att avdrag kommer att ske senare, eventuellt med angivande av avdragsbeloppets storlek bör rimligen tillmätas betydelse. Även de skäl arbetsgivaren kan åberopa för att dröja med lönekorrigeringen synes också böra vägas in vid prövningen. […]
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> […]
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> I föreliggande fall förflöt fyra till fem månader mellan den preliminära löneutbetalningen för den avlöningsperiod som innefattade den 16 juni 1994 och den löneutbetalning då avdraget genomfördes. Enligt arbetsdomstolens bedömande kan denna tidrymd inte anses vara så lång att en korrigering av den preliminärt utbetalade lönen under alla förhållanden varit utesluten.
>
> […] Av utredningen framgår att SAS i ett meddelande till piloterna som är daterat den 15 juni 1994 och som synes ha distribuerats kort tid därefter angav att löneavdrag avseende den 16 juni 1994 skulle komma att göras med tillämpning av vissa normer. Meddelandet föranledde Pilotföreningen att i en skrivelse till SAS anmärka mot det tilltänkta sättet att genomföra löneavdragen. […] Enligt domstolens bedömande får det anses ha varit ett rimligt tillvägagångssätt från SAS sida och godtagbart vid en bedömning utifrån de intressen som bär upp kvittningslagen att SAS avvaktade med att genomföra löneavdragen till dess det stod klart om enighet kunde uppnås mellan företaget och föreningen om hur avdragen skulle beräknas. Det anförda gäller oavsett att det kan förhålla sig så att Pilotföreningens invändningar mot den metod för beräkning av löneavdragen som SAS avsåg att tillämpa tog sikte endast på vissa piloter. Domstolen anser därför att löneavdragen i samtliga fall är att betrakta som en korrigering av preliminärt utbetald lön och inte som en kvittningsåtgärd.

Förbundet har i detta fall inte ifrågasatt arbetsgivarsidans förklaringar till att löneavdragen inte gjordes tidigare. Av dessa förklaringar framgår att det var en lång rad olika administrativa misstag som gjorde att löneavdragen inte kom att ske vid löneutbetalningarna i juni–september 2016. Dessa misstag upptäcktes först sedan respektive lönekörning gjorts. Av utredningen framgår att samtliga löneavdrag i och för sig hade kunnat ske vid löneutbetalningen i oktober 2016, men att APM valde att vänta till löneutbetalningen i november 2016 med att göra vissa löneavdrag för att löneavdragen vid varje löneutbetalning inte skulle bli så stora. Av arbetsgivarsidans förklaringar och E.P:s uppgifter framgår att APM vid flera tillfällen, med början i början av juni 2016, informerade berörda arbetstagare, genom deras närmaste chefer och informationsskärmar på arbetsplatsen, om att löneavdragen inte kunnat ske men att de skulle göras senare. Avdelningen informerades i förväg om att löneavdragen skulle ske vid löneutbetalningarna i oktober och november 2016, men framförde då inga invändningar.

Arbetsdomstolen gör följande bedömning.

Att APM av det uppgivna skälet väntade till löneutbetalningen i november 2016 med att göra de sista löneavdragen bör inte läggas APM till last vid bedömningen av om löneavdragen utgjort kvittningar eller lönekorrigeringar.

Omständigheterna i detta fall liknar till viss del de som bedömdes i AD 1996 nr 70, där löneavdragen inte ansågs som kvittningsåtgärder. Fördröjningen av korrigeringarna var ungefär lika lång och arbetsgivaren informerade genast arbetstagarna om att korrigering skulle ske senare. I detta fall informerade APM arbetstagarna vid flera tillfällen, medan arbetsgivaren i 1996 års fall höll arbetstagarorganisationen underrättad genom de förhandlingar som fördes om löneavdragens storlek. I 1996 års fall var det tvistigheter om storleken som fördröjde löneavdragen, medan det i detta fall var en rad administrativa misstag.

Genom att arbetstagarna tidigt informerades blev de varse att de fick för mycket pengar i juni 2016. De fick därmed möjlighet att spara pengarna. Det tillämpade lönesystemet innebar att arbetstagarna rimligen borde ha varit vana vid att det gjordes löneavdrag i efterhand så att de kunde behöva spara pengar från en månad till en annan. Såvitt framkommit framförde ingen av de berörda arbetstagarna någon invändning mot löneavdragen vid löneutbetalningarna i oktober och november 2016, som de hade informerats om i förväg.

Det är förstås inte acceptabelt – och förmodligen ett kollektivavtalsbrott – att det månad efter månad görs olika administrativa misstag som fördröjer lönekorrigeringar. Det framgår dock tydligt av bl.a. E.P:s uppgifter att APM ansträngt sig för att göra löneavdragen så fort som möjligt efter juni 2016. Arbetsdomstolen ifrågasätter inte att så varit fallit och att löneavdragen skett så snart det, med beaktande av de administrativa svårigheterna, varit möjligt för APM.

Med beaktande av på ena sidan de intressen som bär upp kvittningslagen och på andra sidan den ändå begränsade fördröjningstiden, informationen till arbetstagarna och att löneavdragen gjordes så snart det var möjligt anser Arbetsdomstolen vid en samlad bedömning att löneavdragen bör betraktas som lönekorrigeringar och inte som kvittningsåtgärder. Att löneutbetalningarna i juni–september 2016 varit misstagsbetalningar och att J.A. fick en låg utbetalning i oktober i stället för i juni 2016 förändrar inte den bedömningen.

<u>Löneavdragen i juli och december 2016</u>

Förbundet har inte haft några kommentarer till de förklaringar som arbetsgivarparterna lämnat till de korrigeringar som skedde vid löneutbetalningarna i juli och december 2016, varför Arbetsdomstolen lägger förklaringarna till grund för bedömningen i de delar de inte motsägs av utredningen.

Enligt arbetsgivarparterna gjordes korrigeringar avseende april och maj 2016 vid löneutbetalningen i december 2016 till A.M. och D.S. på grund av att ett nytt kollektivavtal hade träffats den 26 maj 2016 med retroaktiv

verkan från och med den 1 april samma år. Enligt E.P:s uppgifter gjordes korrigeringen emellertid inte av den anledningen utan för att A.M. och D.S. av någon annan orsak skulle ha högre lön för april och maj 2016, t.ex. för att de hade återgått i arbete efter föräldraledighet. Korrigeringarna innebar att A.M. och D.S. fick retroaktiv lön för april och maj 2016 och att de löneavdrag som tidigare hade gjorts för dessa månader räknades om med beaktande av den retroaktiva lönen, vilket angavs som retroaktiva löneavdrag på lönespecifikationerna. Slutresultatet blev att A.M. och D.S. fick, förutom lönen för juli 2016, retroaktiv lön för april och maj 2016 med de belopp de skulle ha med beaktande av den frånvaro de hade haft under dessa månader.

Arbetsdomstolen är tveksam till om de retroaktiva korrigeringarna med fog kan sägas ha inneburit att något löneavdrag gjorts. I vart fall har de retroaktiva löneavdrag som angetts på lönespecifikationerna, enligt Arbetsdomstolens mening, inte varit uttryck för att APM hade någon fordran på A.M. och D.S. Det gäller även om den för april och maj 2016 förhöjda lönen borde ha betalats ut tidigare. Enligt Arbetsdomstolens mening har någon kvittningsåtgärd således inte förekommit.

Löneavdragen vid löneutbetalningen i december 2016 till J.O. skedde av ett administrativt misstag. Löneavdragen var således inte uttryck för att APM hade någon fordran på J.O. och var därmed, enligt Arbetsdomstolens mening, inte heller någon kvittningsåtgärd.

Sammanfattning

Arbetsdomstolen har funnit att APM och avdelningen har tvisteförhandlat om det som förbundets yrkanden avser. Därför ska arbetsgivarparternas yrkande om avvisning på grund av att de aktuella kraven inte förhandlats avslås.

Arbetsdomstolen har därutöver kommit fram till att APM inte gjort någon kvittning i strid med kvittningslagen. Förbundets yrkanden om allmänt skadestånd för brott mot kvittningslagen ska alltså avslås.

Rättegångskostnader

Förbundet har förlorat och ska därför ersätta arbetsgivarparternas rättegångskostnader.

Arbetsgivarparterna har, med hälften vardera, begärt ersättning för rättegångskostnader med 716 434 kr, varav 648 000 kr avser ombudsarvode, 22 240 kr ersättning för 60 timmars arbete utfört av APM:s personal och resten ersättning för olika utlägg. Förbundet har överlämnat till Arbetsdomstolen att bedöma skäligheten av det begärda beloppet för ombudsarvode. Förbundet har inte vitsordat att arbete utfört av APM:s personal ska ersättas, men vitsordat övriga begärda belopp.

Enligt kostnadsräkningen avser ersättningen för arbetet utfört av APM:s personal flera personers arbete med framtagande av underlag till och

kontakter med arbetsgivarparternas ombud, genomgång av förbundets inlagor och yttranden, framtagande av skriftlig bevisning och förberedelse inför och närvaro vid huvudförhandlingen. Arbetsdomstolen anser att kostnaden är både ersättningsgill och skälig.

Även med beaktande av att målet varit ganska omfattande och delvis avsett äldre förhållanden anser Arbetsdomstolen, mot bakgrund även av det arbete APM:s personal lagt ned, att det begärda ombudsarvodet är för högt. En högre ombudskostnad än 550 000 kr har, enligt Arbetsdomstolens bedömning, inte varit skäligen påkallad med hänsyn till målets omfattning.

Enligt lag ska det betalas ränta på rättegångskostnaderna.

Domslut

1. Arbetsdomstolen avslår APM Terminals Gothenburg AB:s och Sveriges Hamnars yrkande om avvisning.

2. Arbetsdomstolen avslår Svenska Hamnarbetarförbundets talan.

3. Svenska Hamnarbetarförbundet ska, med häften till vardera, ersätta APM Terminals Gothenburg AB:s och Sveriges Hamnars rättegångskostnader med 618 434 kr, varav 550 000 kr avser ombudsarvode, med ränta enligt 6 § räntelagen på det förstnämnda beloppet från dagen för denna dom till dess betalning sker.

Ledamöter: Sören Öman, Peter Syrén, Folke K. Larsson, Karl Olof Stenqvist, Johanna Torstensson, Jörgen Andersson och Paul Lidehäll. Enhälligt.

Rättssekreterare: Peter Edin

HANDELSHÖGSKOLAN

Juriststudenter vid Handelshögskolan i Göteborg lär sig Street Law

Nyhet: 2018-04-12

Juridiska institutionens nya migrationsrättskurs startade med en workshop i Street Law. Kursen ligger på **Rättspraktikens plattform** och ger både teori samt praktik.

Street Law-metoden föddes i USA på 70-talet. Street Law betyder juridik för allmänheten. Grundaren professor Richard L. Roe från Georgetown Law School i Washington höll i workshopen för juriststudenterna på Rättspraktiken, vid Handelshögskolan, Göteborgs universitet.

Sveriges Radio P4 har intervjuat kursansvarig Matilda Arvidsson, professor Roe samt studenter. Lyssna på de två radiointervjuerna här.

AV: Christine Forssell

Artikeln publicerades först på: law.handels.gu.se

Street Law

(här i idéform utvecklat av professor Dennis Töllborg, HGU, starkt inspirerat av den sydafrikanska modellen)

Det är med lagen som det är med Gud – för att ha någon glädje av dem måste man veta vart man skall vända sig

1. Street Law är ett undervisningskoncept med ursprung i USA (sannolikt med koppling till critical legal studies-rörelsen inom amerikanska realismen), sedan några år tillbaka framgångsrikt implementerad i Sydafrika under ledning av den karismatiska professorn David McQuid-Mason (som i början av sjuttiotalet drog igång Law Clincis verksamheten) och nu under stark framväxt i det forna östeuropa. Kopplingen till befintliga och framväxande NGO är naturlig. Varje Street Law koncept bygger på varje lands/institutions/lärargrupps unika egenskaper, och är alltså inte identisk.

Det övergripande syftet är att ge annars resurssvaga (således även juridiskt svaga) grupper möjlighet att utnyttja de delar av rättssystemet som på den ideologiska nivån är utvecklat för att balansera de imperfektioner en parlamentarisk marknadsekonomi byggd på befordringar och belöningar genererar. Utryckt lite mindre tillspetsat är avsikten att tvinga universitet att mer aktivt agera för att generera förutsättningar för implementering av det regelverk regering och riksdag beslutat, nu med särskild inriktning på att skapa balans mellan annars ojämna parter.

Detta ställer särskilda krav på den grupp som leder programmet. Utöver de självklara krav på kompetens, fokusering och förmåga att entusiasmera som följer med varje lärarroll måste de också, inte minst för att själva kunna orka, genom praktisk handling med viss konsekvens visat sig vara lojala inte mot personer utan mot de värden som återfinns i de underliggande normativa strukturer varpå vår rättsordning bygger. Just detta är (inte bara för mig, tror jag, utan erfarenhetsmässigt) det mest avgörande kriteriet för möjligheterna till framgång.

2. Ett Street Law program motsvarar 40 universitetspoäng. I Sverige passar det bäst, med tanke på att 120 poäng normalt motsvarar en kandidatexamen och att ambitionen är att få en heterogen grupp studerande med olika ämnesbakgrund, att lägga kursblocket så att det i första hand riktar sig till fjärdeårsstudenter. Målgruppen bland studenter är inte bara

jurister, sociologer, personalvetare och andra samhällsvetare, utan också medicinare, psykologer och andra som har en utbildning som inriktar sig på människor och samhälle. Det finns två poänger med detta: dels behovet av att i den konkreta undervisningssituationen ha möjlighet att anta ett helhetsperspektiv, dels – i ett längre perspektiv – medverka till att generera nätverk mellan olika professioner som är på olika sätt berörda av den problematik som resurssvaga grupper tenderar att särskilt vara offer för. Ambitionen i varje enskild del av programmet är att fokusera på helhet, på samband, och avvisa atomisering, delar.

Antalet studerande kan inte överskrida 30. En större grupp omöjliggör den intensitet som krävs för framgångsrika undervisningstillfällen och för skapandet av livskraftiga nätverk. Möjligheten att skapa känslan av ”det gemensamma projektet”, ett centralt moment för att även på lång sikt kunna orka med ett så pass altruistiskt livsmål, måste (tyvärr) anses vara i det närmaste obefintlig med en större grupp. Större grupper skapar också svårigheter med att finna en tillräckligt skarp lärargrupp, och ökar risken för att lärarkollektivet bränner ut sig.

Programmet genomförs inom Universitetsutbildningen. Utan att anta egenskapen av centrumbildning bör det i viss mån vara fristående, för att, utan att upplevas som hotfull konkurrent, kunna locka studenter från så många olika ämnesgrenar som möjligt. Mot bakgrund av att initiativet kommer från juridiska institutionen och att kursen i stora delar tar sin utgångspunkt i rättsligt formulerade rättigheter och plikter kan (men måste inte) Handelshögskolan vara ett naturligt ställe att placera programmet inom. Både med tanke på programmets innehåll och dess geografiska placering bör man överväga om det går att koppla det kring försöken att inrätta en Torgny Segerstedt-professur vid Göteborgs Universitet.

Det är knappast troligt att programmet kan sjösättas tidigare än ett läsår efter det att full finansiering är säkrad. Medel finns inom universitet för genomförandet av ett sådant här program, men det är totalt orealistiskt att tänka sig att man inom universitetet kommer att ha den kraft som behövs för att orka genomföra den omdisponering av medel en sådan satsning kräver. Däremot är det troligt att universitetet *i samverkan med* näringsliv och offentliga myndigheter (skolan är, som framgår av nedan, här en avgörande samarbetspartner) är det funktionellt bästa organet att placera utbildningen inom.

3. Den omedelbara målgruppen är universitetsstudenter, hämtade från samhällsvetenskaperna och medicinarberget. Som framgår av skissen till programmet sträcker sig ambitionen emellertid långt därutöver. Hela den bärande idén med programmet är att universitet måste börja ta ett ansvar för

implementeringen av politiska beslut till stöd för resurssvaga grupper. Detta sker, inom ramen för programmet, genom den kontakt med framförallt ungdomar som de studerande har genom undervisning på grundskole- och gymnasienivå. Utöver spridandet av substantiell kunskap bör de också, som en central spinn-off effekt, kunna utgöra inspiration för dessa ungdomar till att själva skaffa sig fördjupade kunskaper för att hävda egna intressen, men också ge konkret kunskap dessa ungdomar kan ta med sig omfattande problem som deras föräldrageneration har att hantera. Starkt påverkad såväl av Monroe-modellen som av Montessori, är ambitionen att ge inspiration och såväl personellt som kunskapsmässigt underlag för fler fristående NGO (t ex Law Clinics) där man arbetar för att tillse att lagstiftning till stöd för resurssvaga implementeras. I sin förlängning – allt i dagens samhälle bygger på nätverk, betyg är som bekant endast ett ytfenomen – genereras nätverk mellan olika professioner och mellan olika samhällsklasser med det gemensamma målet att förverkliga innehållet i de politiska beslut som särskilt inriktas på att skapa balans i en maktstruktur som skapar demokratiskt oacceptabla imperfektioner. Det goda exemplets makt är, enligt min uppfattning, den enda fungerande pedagogiken här såväl som på andra områden.

4. Konkretiserat ser utbildningsprogrammet ut på följande sätt:

a) Det första halvåret består av ett antal laboratorier under ledning av lärare på universitetet. Dessa har det gemensamt att de är praktiska, att de är verklighetsanknutna och att de i stora delar bygger på rollspel. Varje laboratorium följs av att studenterna själva utvecklar en PM med anteckningar de skulle ha som underlag inför en undervisningstimme på samma tema inför grundskole- och/eller gymnasieelever. Denna PM presenteras för läraren på kursen, och diskuteras och revideras i samarbete med denne. På så sätt genomförs ett antal laboratorier över olika ämnesområden (mycket kasuistiska och kontextuellt nära såväl i tiden som geografiskt), och studenten bygger sin egen preliminära ”Street Law Pärm”. Parallellt med laboratorierna genomförs, företrädesvis på senare delen av terminen, ett antal rättegångsspel, nära kopplade till de laboratorier som man haft. Det är alltså fråga om ett slags ”learning by doing” där man, klart montessoriinspirerat, bygger sin egen pärm med allt från enkla mallar för olika ärenden och uppbyggnaden av en akt till utkast till föreläsningar för svår-flirtade grupper. Några laboratorier är återkommande för varje årskull, t ex hur man professionellt lägger upp en akt, misshandel inom familjen, arbetsrättsliga, familjerättsliga och hyresrättsliga problem, medan andra kan vara nära dagsaktuella händelser, t ex polismisshandel (t ex Osmo-fallet *i detalj)* och

”rättshaveristen” (här kan man t ex fortsätta på Osmo-fallet och problematisera bilden/påståendet om rättshaverister). Just nu skulle det t ex vara självklart att man hämtade mycket material från händelserna i Göteborg under sommaren, medan vi föregående år lika självklart skulle hämtat lika mycket material från den s k brandrättegången. Laboratorierna blandas hela tiden med föreläsningar, företrädesvis av praktiker, såsom advokatsekreterare, poliser, rättsmedicinare, psykologer, socialarbetare, politiker, lobbyister etc etc.

b) Efter det första halvåret, troligen höstterminen, består den följande fjärdedelen av 25 lektioner på grund- och/eller gymnasieskola. Undervisningen skall vara ordinarie- och schemalagd för eleverna. Studenternas undervisning följs av ordinarie lärare på skolan som rapporterar skriftligen hur undervisningen fungerat och hur studenten lyckats uppnå de uppställda målen. Studenten skall också själv löpande skriva en PM om en till två sidor efter varje undervisningstillfälle, där han/hon redovisar vad som förekommit. Tillsammans utgör detta ytterligare en bok studenten författat, att kunna användas av följande årskullar såväl som av lärare inom ordinarie grund- och gymnasieskola.

c) Den sista fjärdedelen av programmet består i att studenten, med utgångspunkt i ett äkta fall de i detalj följer, skall utveckla och genomföra ett rättegångsspel, inkluderande samtliga roller. (De bästa av dessa kan sedan användas i arbetet med nästa årskull).

5. Problem. Vi kan redan på detta stadium, byggt på erfarenhet, identifiera åtminstone tre centrala problem. Det första, och svåraste, är att inom universitet få möjlighet att genomföra ett program med denna inriktning. Det handlar då inte i första hand om finansieringsproblem – omfördelning av medel – utan ligger mer på ett djupare plan, där universitetet – liksom stora delar av det offentliga – förefaller vara mer intresserad av assimilation än integration. I ett land som varit så homogent så länge förefaller varje alternativ som bygger på respekt för att göra något på ett annat sätt, särskilt om det sker utanför offentlig kontroll, intuitivt upplevas som hotfullt. Ett andra problem av nästan samma dignitet är att finna en kärna av lärare som uppfyller de krav som formulerats ovan. Detta problem gäller dock inte såvitt avser utomstående praktiker, där vi har ett ypperligt kontaktnät och har stor förtröstan inför möjlighet att finna de allra bästa. Ett tredje problem är, naturligtvis, finansieringen. Programmet måste, av skäl som angivits ovan, räkna med att behöva 100 % utomstående finansiering, undantaget tillgången till lokaler. Detta är dock knappast ett oöverstigligt problem på lite längre sikt – jag hyser stora förhoppningar om stöd från näringslivet, och i det läget svårt att se att kommun och andra offentliga myndigheter vågar stå

utanför. Icke desto mindre är det, naturligtvis, en omöjlighet att mer i detalj utveckla, än mindre genomföra – ja, ens få igång extern finansiering – programmet utan en inledande finansiering av personal som sammanhållande administrativ länk.

Dennis Töllborg (som förbehåller sig upphovsrätten)
professor

JURIDISKA INSTITUTIONEN

Juris hedersdoktorer vid Juridiska institutionen, Handelshögskolan

Asha Ramgobin, 2016

Asha Ramgobin är advokat och har drivit Human Rights Development Initiative (HRDI) med huvudkontor i Pretoria, Sydafrika sedan starten 2003. Med Asha Ramgobin i spetsen har HRDI startat 13 universitetsbaserade "Law Clinics" (rättspraktiker) i södra Afrika, bland annat i Zimbabwe, Mocambique och Rwanda. Hon har stor erfarenhet av att arbeta fram modeller för "clinical legal education", dvs hur man kan undervisa i juridik med praktiska inslag. Juridiska institutionen kom i kontakt med Asha Ramgobin 2002 och hon har varit en betydelsefull inspirationskälla för institutionens arbete och även delaktig i uppbyggnaden av Rättspraktiken.

Bernardita Núñez, 2016

Bernardita Núñez startade Sveriges första kvinnojour för kvinnor med utländsk härkomst år 2000. Idag är hon verksamhetsledare för Terrafem Sverige, en ideell organisation som arbetar för kvinnors och flickors rätt att leva utan mäns våld och dominans. Rättspraktiken har hämtat inspiration från Terrafems sätt att arbeta med juridisk rådgivning, rättsinformation och rättspolitiskt arbete och Terrafem var en av de första att ta emot studenter från Rättspraktiken. Genom Bernadita Núñezs arbete ökar juriststudenternas praktiska kunskap i frågor som bland annat rör kvinnors rättigheter, asylrätt och socialrätt.

Inger Johanne Sand, 2015

Inger Johanne Sand är Professor i Offentlig rätt vid Oslo Universitet. Sands forskning är mångfacetterad och rör sig inom stora delar av fältet offentlig rätt och berör till exempel områden som förvaltningsrätt, statsrätt, EU-rätt, miljörätt, rättssociologi och rättsteori.

Frans Pennings, 2014

Professor Frans Pennings forskar inom nationell och internationell socialförsäkringsrätt. Han rör sig även i gränslandet mellan arbetsrätt och socialförsäkringsrätt, där han ses som en av de ledande rättsvetenskapliga experterna. Bland huvudfrågorna finns hur konventioner från Internationella arbetsorganisationen ILO påverkar nationella system, EUs socialförsäkringsinstrument, nationell lagstiftning om arbetslöshet, funktionshinder och sjukersättningar, samt betydelsen av anställningsavtal. Frans Pennings är professor i arbetsrätt och socialförsäkringsrätt vid universitetet i Utrecht, Nederländerna.

Anne Orford, 2012

Anne Orford, professor i internationell rätt och ledare för the Insititute for International Law and the Humanities vid Melbourne Law School i Australien, forskar inom internationell rätt, mänskliga rättigheter och rättsteori. Hon har ett brett internationellt nätverk och har tjänstgjort i en mängd länder. Som innehavare av gästprofessuren till Torgny Segerstedts minne vid Göteborgs universitet, april 2011-februari 2012, har Anne Orford i hög grad bidragit till Handelshögskolans verksamhet bland annat genom att undervisa studenter, vägleda doktorander och initiera forskningsprojekt - samarbeten som nu fortsätter.

Petros C. Mavroidis, 2010

Professor Petros C. Mavroidis, född 1959, är en av världens ledande experter inom det rättsområde som på engelska brukar kallas ”international economic law”, det vill säga, den del av folkrätten som rör internationell handel, och som framförallt omfattar Världshandelsorganisationens (WTO) regelverk. Han är Edwin B. Parker Professor of Foreign and Comparative Law vid Columbia Law School, samt professor i EU-rätt och WTO-rätt vid University of Neuchâtel. Petros C. Mavroidis har bidragit stort till den rättsvetenskapliga forskningen om WTO. Som exempel kan nämnas att han har författat en av de ledande rättsliga kommentarerna till det världsomspännande varuhandelsavtalet GATT. Professor Mavroidis har genom samarbete med juridiska institutionen bidragit till att stärka ämnet WTO-rätt på grund-, fördjupnings-, och forskningsnivå. Institutionen har idag en mycket stark ställning i landet inom detta rättsområde.

Juha Karhu, 2009

Professor Juha Karhu har genom sin forskning påverkat det rättvetenskapliga tänkandet långt utanför det finska språkområdet. Med sitt omfattande och djupa kunnande i rättsvetenskapliga och rättsfilosofiska frågor och ett genuint intresse för forskningsseminarieverksamhet och forskarutbildning har han inspirerat många forskare i Norden. Juha Karhu har en förmåga att ställa saker på huvudet på ett sätt som kan vara omtumlande men som i det större perspektivet ändå ställer dem till rätta. Han är en återkommande gäst vid juridiska institutionen på Handelshögskolan vid Göteborgs universitet liksom vid Centre for Intellectual Property (CIP) vilket ger forskare och doktorander möjlighet att ta del av hans genuina omsorger om att förstå en forskningsansats utifrån författarens perspektiv.

Hans Blix, 2004

Hans Blix har under sitt långvariga engagemang inom IAEA och FN arbetat mot spridning av massförstörelsevapen och för gemensam säkerhet grundad på internationell rätt. Då han under Säkerhetsrådets behandling av situationen i Irak utsattes för starkt yttre tryck, kombinerade han civilkurage med en stark tilltro till den internationella rättsordningens möjligheter.
Hans Blix blev docent i folkrätt vid Stockholms universitet 1960 för att 1963 inleda en karriär vid UD. Under perioden 1978-79 var han utrikesminister och åren 1981 till 1997 Generaldirektör i IAEA. I januari 2000 utsågs Hans Blix till ordförande för UNMOVIC, FNs kommission för inspektion av Iraks efterlevnad av förpliktelser om avrustning av massförstörelsevapen.

Eberhard Eichenhofer, 2003

Eberhard Eichenhofer är professor i Sozialrecht und Bürgerliches Recht vid Friedrich-Schiller-Universität i Jena, Tyskland. Hans rättsvetenskaplig bas är mycket bred, med

tonvikt på nationell, internationell och EG-rättslig socialrätt. Han anses utan tvekan som en av Europas främsta experter på dessa områden.
Hans böcker Internationales Sozialrecht (1994) och Sozialrecht der Europäischen Union (2003) har tilldragit sig stort internationellt intresse. Professor Eichenhofer är även mycket litterärt och filosofiskt bevandrad och hans bok Franz Kafka und die Sozialversicherung är en spännande läsning.
Juridiska institutionen vid Handelshögskolan har haft nöjet att samarbeta med professor Eichenhofer inför flera konferenser anordnade av European Institute of Social Security (EISS), en organisation där professor Eichenhofer aktivt deltar. Han har besökt Juridiska institutionen ett antal gånger och deltagit i dess arbete som föreläsare, keynote speaker vid konferenser och som socialrättslig EG-expert. Genom sina akademiska meriter och sin pedagogiska förmåga kommer Eberhard Eichenhofer även i framtiden att stärka Handelshögskolan och Göteborgs universitet.

Hans Jacob Bull, 1998

Professor Hans Jacob Bulls forskning har främst rört sjötransportförsäkringsfrågor. Han har varit en både sammanhållande och ledande kraft inom den nordiska sjö- och transporträtten. Inte minst har
han haft stor betydelse för utvecklingen av detta forskningsområde vid Göteborgs universitet.

Ulf Gometz, 1997

Professor och revisor Ulf Gometz har medverkat i ett stort antal studier och författat åtskilliga artiklar. Hans vetenskapliga engagemang, i kombination med yrkesverksamheten som revisor, har medfört att han under ett antal år både undervisat och handlett doktorander vid den rättsvetenskapliga institutionen vid Göteborgs universitet.

Sydafrika, kostnader sammanfattningsvis i SEK (rand enligt SVT/Text valutakurser 3 mars 2018: 0,6960. Jag har tillämpat öresutjämning). Jag har inte tagit med kostnader för representation och gåvor.

HGU har bidragit med 100.000 kronor minus avdrag för det de kallar OH, dvs i praktiken 70.000 kronor. I förskott har i form av delbetalning av boende (21.100) samt flyg (10.343) utbetalts *(kursiverat)*, totalt 31.343. Resten har jag lagt ut, och har alltså en fordran på HGU om sammanlagt SEK 38.657. På förekommen anledning inlämnas rapporten om R2K för publicering som GRI-rapport när mitt utlägg inbetalts på mitt konto Handelsbanken 278 373 272.

1. Flyg		
a) Gb/CT t/r	*10.343*	
b) CT/Joburg t/r	1.410	
c) Flygändring Gb/CT t/r	2.528	
d) stödstrumpor	149	14.430
2. Resor övrigt		
a) t/fr flygplats samt CT m m, ej bil	1.717	
b) bil samt bensin	36.081	37.798
3. Visum och immigration		
a) Sverige	2.909	
b) Home Affairs	1.235	4.144
4. Boende		
a) Hout Bay 1	33.434	
b) Hout Bay 2	26.250	
c) Stellenbosch	*21.100*	
d) Joburg	2.826	83.610
5. Traktamente	32.462	32.462

6. Internet, telefon samt print	3.976	3.976
7. Övrigt		
a) friskvård	1.114	
b) särskild händelse 1	3.216	
c) särskild händelse 2	50.000	54.330
Summa total kostnad		230.300

Av dessa skall alltså HGU stå för 70.000, varav redan utbetalts 31.343, restar 38.657 plus att det är lite mer än 70.000 på kontot, så jag får avslutat HGU. Jag föreslår att HGU:s restande tas på bilen + bensin samt kostnaderna för flygändring, summa 38.609. Då har Handels stått för ca 1/3 av kostnaderna jag haft i mitt arbete, resten tar jag och Marja i enlighet med Handelshögskolans värdegrund och praxis.

* Länsstyrelsen (dnr 206-18517-2010) gör en tillsyn, där man
påpekar att Rolf Wolff tilldelats medel när han samtidigt varit
närvarande i beslutande församling. "Styrelsens beslut den 12
mars 2009 och 11 mars 2010 om bidrag till Rolf Wolff blir
ogiltigt genom den jävssituation som uppstått genom att han
själv deltog i beslutet. Enligt 9 kap 3 § stiftelselagen ska tillsynsmyndigheten
ingripa om det kan antas att stiftelsens förvaltning
eller revisionen av stiftelsen inte utövas enligt stiftelseförordnandet
eller bestämmelserna i stiftelselagen. Länsstyrelsen,
som ser allvarligt på det inträffade, nöjer sig med att
erinra styrelsen om att i fortsättningen följa gällande regler för
förvaltningen av stiftelsen." Pengarna – 1 miljon kronor – krävs
aldrig tillbaka, länsstyrelsens beslut om ogiltigförklaring ignoreras.

Demokratisk och rättsstatlig mognad. R2K, Sydafrika och FIS, Sverige[1]

Av Dennis Töllborg, 2018.

Det här projektet har, liksom min forskning de senaste sex åren, varit möjligt att genomföra endast tack vare stöd från Torsten Söderbergs Stiftelse. Handelshögskolan har bidragit marginellt och motvilligt. Jag har under de fyra månader projektet genomförts, parallellt med bl.a. författandet av en(tre) böcker, bidragit med drygt 250.000 kronor till GRI:s ekonomi. Försök att få besked om vad dessa pengar använts till har misslyckats. I Sydafrika hade det varit möjligt. Och motsvarande agerande från universitetets sida i Sydafrika hade lett till rättsliga konsekvenser. Liksom Black 12.

1. Intro

Sydafrika skiljer sig dramatiskt från Sverige i åtminstone två olika avgörande avseenden; det är en betydligt starkare rättsstat, åtminstone på domstolsnivån, och det är en levande demokrati, ungefär som Hamnarbetarförbundet (med alla sina imperfektioner) jämfört med LO.[2] Vet man inte detta saknar man bildning, och kan man inte ta till sig detta älskar man sin navel. Då är man helt enkelt svensk.

Sydafrika är en starkare rättsstat genom världens mest progressiva demokratiska konstitution, ihärdigt implementerad och upprätthållen genom dess

[1] R2K är en akronym för Right To Know. FIS är en akronym för Forget It Stupido.

[2] Se bilagorna 6 & 7, jfr med bilaga 8, för konkretisering av en av de avgörande skillnaderna mellan Sverige och Sydafrika

konstitutionsdomstol och de domare som formaterar densamma. Det är en levande demokrati, så som bara en ung demokrati – med stöd i en stark tradition av kamp och backad av en stark konstitution med domare enbart lojala mot sitt professionsetos – faktiskt kan vara.

Afrika uppfann inte korruptionen.[3] Sydafrikas apartheid har varit instrumentellt centralt, paradoxalt kanske fr.a. p.g.a. sanktionspolitiken (som konsekvent kringgicks av samtliga fem permanenta stater i säkerhetsrådet), för framväxandet av den omfattande korruptionen i landet.[4] Men det handlar alltjämt om *low-level corruption* – därmed synlig, gripbar och uppenbart i konflikt med den officiella retoriken – och inte om den för demokrati och rättsstat så förödande *high-level/deep-level corruption*, som så framgångsrikt använts för stabilitetsbyggande, kanske särskilt i Sverige.[5] Sydafrika är alltjämt ett heterogent, oroligt, instabilt och dramatiskt land, fullt av motsägelser, makt men också motmakt, fasoner men också stil, fusk men också mod. Och det lider naturligtvis, som varje land, av sitt eget hyckleri. Men detta är transparent, utgör inte normalitet och möts av brett, altruistiskt och medvetet motstånd. En medvetenhet som gör att NGO:s som R2K självklart vägrar ta bistånd från organisationer som SIDA, väl medveten om vilka krav på anpassning det innebär och varför dessa krav ställs[6], medan t.ex. en organisation som jag själv medverkade till att skapa, och var både drivande i och vice ordförande för, HRDI, byggde ett behagligt liv för

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[3] Se Töllborg, *Ruinerna hävdar att byggnaden var vacker*

[4] Se van Vuuren, *Apartheid, Guns and Money*

[5] Se Töllborg. *Pams Plats.* För *ett* exempel på konkretisering, se bilaga 12

[6] Se för *en* konkretisering, Mosander, *Bland spioner, kommunister och vapenhandlare,* särskilt kapitel 1 och 16 om Jämtin, Freivalds och Zumas dåvarande hustru, senare kandidat som ANC-ordförande och därmed presumtiv president

två människor på andra människors ryggar. Och där en av dessa självklart blev hedersdoktor på HGU för denna insats, efter stalinisering av organisationens historia och assimilering av den svenska modellen.[7] Ja, "Det är (alltjämt) märkvärdigt hur många människor, som få tunghäfta, när något allvarligt står på spel."[8]

Det är säkert så att många, särskilt i Sverige, inte delar denna verklighetsbeskrivning, om inte annat så av självbevarelsedrift eller ångest över sin egen ryggradslöshet. De har fel, och de gör fel. Skam över dessa, heder till de som håller rättsstaten levande och demokratin vital i Sydafrika.

Här kommer den korta rapporten om R2K, en organisation som motsvarar vad som var normalitet i Sverige och västvärlden för ett sekel sedan. Ni kanske inte gillar den. Jag bryr mig inte. Vetenskap är trots allt inte en popularitetssport eller en modegenre.

2. R2K

31 augusti 2010 presenterades Kampanjen Right2Know (R2K) i St Georges kyrka i Kapstaden. Den föddes utifrån motståndet till ett förslag om inskränkt yttrande- och informationsfrihet i en ny lagstiftning, POSIB (ung. lag om skydd av statliga uppgifter), populärt kallad "Secrecy Bill". Lagförslaget hade introducerats för parlamentet ett par månader tidigare, juli 2010, som en modifiering av en tidigare (2008) version som fått återkallas då denna närmast varit en blåkopia av apartheidtidens sekretesslag. Alltjämt, 2018, har Sydafrika kvar den gamla apartheidlagstiftningen på detta område, och

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[7] Se bilagorna 9 och 10 för konkretisering av värdesystemets parasiter och ren stöld

[8] Torgny Segerstedt, *Idag-spalten* 8 september 1934

lagstiftningen är således i starkt behov av förnyelse, men en förnyelse som är konstitutionsenlig. Lagförslaget antogs visserligen så småningom, trots motstånd, av det ANC-dominerade parlamentet, men Zuma vågade aldrig kontrasignera det (ett krav för promulgation i Sydafrika). Det stod nämligen tidigt klart att i samma ögonblick som presidenten skulle genomtrumfa lagförslaget skulle parlamentets och presidentens beslut underställas Konstitutionsdomstolen, och samtliga juridiska bedömare – däribland presidentens egna rådgivare – hade klart för sig att domstolen med största sannolikhet skulle ogiltigförklara lagen.

> Detta är en reell möjlighet i Sydafrika – ett motsvarande initiativ i Sverige skulle, som bekant, inte bara avvisas så som en rättslig omöjlighet, det skulle därtill mötas av breda leenden och hånskratt, och för alltid desavouera den klagandes framtid.

Den nya propositionen var mer eller mindre densamma som 2008 års version – lagstiftningen skulle utvidga myndigheternas möjlighet att sekretessbelägga information och stadgade höga straff för integritetsbärare (vanligen kallade whistle-blowers), aktivister och journalister som offentliggjorde sekretessbelagd information.

En heterogen samling aktivister såg det som centralt att bekämpa lagförslaget, som presenterats i kölvattnet av Zuma's övertagande av presidentskapet och ANC:s allt svagare förankring hos befolkningen.

Kampanjen Right To Know, R2K, grundades till stöd för den nya konstitution revolutionen skapat – världens i

särklass mest demokratiska grundlag, åtminstone såvitt avser rättslig kraft, tack vare Konstitutionsdomstolen och dess ledamöter – med en inverterad variant av hemlighetsmakeriets klassiska need-to-know-princip som tema och namn. I detta tidiga skede var det viktigaste strategiska syftet att sprida kunskap om lagförslaget och dess konsekvenser, och hoppas att detta skulle utlösa motstånd – ideologikritik, om man så vill.

Gruppen enades om ett gemensamt uttalande; "Stoppa förslaget till ny sekretesslag. Sanningen måste få berättas", och kampanjens tema spreds över landet med uppmaning till nationell samling[9]:

"En lyhörd och ansvarig demokrati som kan infria de grundläggande behoven hos vårt folk måste byggas på öppenhet och fritt informationsflöde. Det sydafrikanska folkets kamp hotas därför av förslaget till ny sekretesslagstiftning. Vi har inga problem med att förstå att apartheiderans sekretesslagstiftning måste avskaffas, och ersättas med en ny lagstiftning, till skydd för demokratin. Det förslag som nu skall framläggas för parlamentet för dess godkännande är dock allt för likt apartheidtidens regler. Skyddet för integritetsbärare, s.k. whistleblowers, varpå demokratins praktik vilar, undergrävs totalt och tillgången till information om myndigheternas praktik stryps. Sammantaget innebär lagförslaget ett så fundamentalt angrepp på

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[9] 2 augusti 2010. På grund av bristen på formaliserade R2K-strukturer och nätverk i detta tidiga skede, spreds budskapet huvudsakligen över internet och till olika nätverk, fackföreningar och andra etablerade NGO:s i landet, organisationer och sektorer inom civilsamhället (inklusive fackföreningen/arbetarrörelsen). "Uttalandet" antogs senare som "grundförklaringen" av R2K-kampanjen när den officiellt lanserades den 31 augusti 2010.

offentlighetsprincipen och yttrandefriheten att det står i strid med konstitutionen."[10]

Uttalandet fortsatte att lista en serie specifika "bekymmer" med propositionen. Lagförslaget skulle komma att "skapa ett samhälle av hemligheter" eftersom:

- Inte bara statliga myndigheter utan även offentligägda företag (som motsvarigheter till SJ, Vattenfall et cetera) och enskilda kommuner gavs rätten att klassificera allmänna handlingar som hemliga.[11]
- Under åberopande av "skydd för rikets säkerhet" överläts åt enskilda tjänstemän att diskretionärt avgöra vad som skulle sekretessbeläggas.
- Affärsuppgörelser och annan kommersiell information kan sekretessbeläggas, vilket gör det mycket svårt att hålla företag och regering ansvarig för ineffektivitet och korruption.
- Den som läcker information som är på detta sätt sekretessbelagd kan åtalas, oberoende av om denne är offentliganställd eller ej.
- Spridande av information som ännu inte är sekretessbelagd kan också komma att bestraffas. Osäkerheten om vad som är tillåtet och vad som är

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[10] Samtliga översättningar är gjorde av författaren
[11] I Sydafrika (och världen över, dock naturligtvis inte i Sverige) är det vetenskapliga begreppet för den typ av *high-level,* eller *deep-level, corruption* som kommit att bli NPM:s och den samtida "privatiseringsvågens" mest utmärkande drag *State Capture.* Begreppet, obekant i Sverige med dess nya former av "kollegialitet" och vetenskapligt konsultande som i Göteborgs s.k. Granskningskommission, har sitt ursprung i en rapport från Världsbanken och formats ur det faktum att "privatisering" är en ny form av oegentlighet – poängen med denna nya typ av transfereringar av skattemedel till de priviligierade är ju att det i allt väsentligt alltjämt handlar om offentligt *finansierad* verksamhet. *State Capture* är därför ett synnerligen välfunnet begrepp, naturligtvis obekant bland svenska statsvetare, ekonomer och jurister, präglade som de är av självbevarelsedrift och ryggradslös antiintellektualism. Latour...suck!

förbjudet leder till en chilling-effect och självcensur. Yttrandefriheten beskärs allvarligt.
• Whistleblowers och journalister kan dömas till längre fängelsestraff för brott mot lagen än de tjänstemän som döljer, cover-up eller ljuger om de riktiga förhållandena, jfr. *detournement de pouvoir*.
• Underrättelse- och säkerhetstjänstklustret i landet undandras varje form av offentlig granskning.

R2K fokuserade på lagförslagets konsekvenser såvitt avsåg möjligheterna till ett fritt informationsutbyte och möjligheten att för framtiden utkräva ansvar. Som särskilt allvarligt framhöll man att ett genomtrumfande av förslaget skulle medföra bl.a. att

• Tjänstemän inte behöver ange skäl för att de valt att sekretessbelägga informationen (jfr. Handelshögskolans och GRI:s ledning vid arbetet med *Black 12*).
• Statsrådet med ansvar för intelligence skulle få obegränsad makt att själv avgöra vilken information som skall hållas hemlig och vilken information medborgarna skall få ta del av, samtidigt som det saknades ett oberoende kontrollorgan med uppgift att förhindra att information sekretessbeläggs även när det föreligger ett stort allmänintresse att få ta del av informationen.
• Så snart information var sekretessbelagd skulle även läckage av information av stort allmänintresse kriminaliseras. Den föreslagna straffskalan var för Sydafrika ovanligt hård med straff på upp till 25 års fängelse. Även integritetsbärare och journalister, d.v.s. människor som läckte sekretessbelagd information drivna av sitt professionsetos, skulle kunna straffas, trots att de agerat i enlighet det samhälleliga ansvar konstitutionen och den sydafrikanska revolutionen påbjöd.

Uttalandet avslutades med påpekandet att även landets valda representanter är bundna av de konstitutionella värdena, och att dessa förutsätter en ansvarig, öppen och responsiv regering som garanterar yttrandefrihet och allmänna handlingars offentlighet. Varje förslag till sekretesslagstiftning måste därför fylla sju kriterier, ett inför kampanjen noga utarbetat "frihetstest", för att vara konstitutionsenlig. Dessa är

1. Sekretess kan bara gälla inom säkerhetssektorn, såsom polis, försvars- och underrättelseorganisationer.
2. Sekretess kan bara gälla för tydligt definierade nationella säkerhetsfrågor. Varje sekretessbeläggning måste motiveras av ansvarig tjänsteman.
3. Kommersiell information kan (således) inte sekretessbeläggas, enbart med hänvisning till kommersiella intressen – allmänintresset, särskilt i privatiseringsvågen efter NPM:s genomslag, tar över profitintresset. *(State Capture).*
4. Det måste finnas relevanta kontrollorgan, dessa skall vara oberoende, stå i allmänhetens tjänst och allmänheten skall ha full insyn i dessa kontrollorgans arbete.
5. Integritetsbärare, s.k. whistle-blowers, skall inte kunna bestraffas. Däremot skall obefogad sekretessbeläggning kriminaliseras, jfr. *detournement de pouvoir.*
6. Kontrollorganen måste utses av parlamentet, inte av presidenten, regeringen eller det statsråd under vilket verksamheten sorterar. Kontrollorgan skall ha självständig och slutlig makt att avgöra vad som får sekretessbeläggas och vad om inte får omfattas av sekretess.

7. Varje lagstiftning på området måste innehålla ventiler för informationsläckage som sker i allmänhetens intresse, även av sekretessbelagd information. Sådan kunskapsspridning, i allmänhetens intresse, får inte vara kriminaliserad.

Utskicket blev en fullständig taktisk och strategisk framgång, och fungerade som en katalysator för det som mindre än en månad senare, den 31 augusti 2010, skulle bli den formella lanseringen av R2K-kampanjen. Tre provinsiellt baserade aktivistgrupper bildades omgående – i Västra Kap-provinsen (Kapstaden), i Gauteng (Johannesburg) och i Kwa-Zulu Natal (Durban) – och hundratals olika NGO:s och tusentals individer anslöt sig till uttalandet. De flesta av de centrala mediaorganisationerna och politiska partierna (med undantag för det statsbärande ANC) hakade på.

ANC påverkades direkt. Deras representanter i parlamentet uppmanades redan i september att skjuta upp omröstningen om den nya sekretesslagen. R2K hade då bara existerat i knappt två månader. Än idag (april 2018) har lagstiftningen inte promulgerats av presidenten, och även inom ANC har allt starkare krafter börjat kräva att det, senare i omarbetad form, av parlamentet antagna lagförslaget kastas i papperskorgen och radikalt omarbetas. Detta är dock knappast troligt med Ramaphosa som ny president, med dennes bakgrund och mot bakgrund av det nya kabinett han utsett.[12]

2.1. R2K utnyttjade det momentum man hamnat i, och fortsatte mobilisera. 21-27 oktober genomförde man en

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[12] Se R2K Februari 27: *Statement on President Cyril Ramaphosa's new cabinet,* samt Mail & Guardian på samma tema

första veckolång aktionsvecka över hela landet, fokuserad på protester mot den föreslagna lagen. I Kapstaden deltog mer än 3.500 människor i en demonstration som gick till parlamentsbyggnaden, och parallellt genomfördes demonstrationer och visades filmer i Johannesburg och Durban, allt fokuserande på förslaget till ny sekretesslagstiftning.

Protestveckan fick stor medial uppmärksamhet och en rad R2K-aktivister intervjuades i såväl lokal- som riksmedia. Sociala media utnyttjades flitigt. I slutet av året var R2K landets ledande röst i kritiken av förslaget till ny sekretesslag. En stor del i framgången var det konsekventa fasthållandet vid det sju punkter långa frihetstest man skapat (se ovan), och som varje förslag och varje argument konsekvent kom att prövas mot.

Styrkta av sina snabba framgångar, med över 400 organisationer och 30 000 individer som medlemmar inom tre månader, höll man sitt första nationella möte i Kapstaden den 2 februari 2011, och formaliserade organisationen. Mer än 50 delegater från var och en av de tre etablerade provinsiella grupperna i Kapstaden, Johannesburg och Durban, plus nykomlingar från Östra Kap, antog en uppsättning *R2K Principles* och formulerade ett utkast till konstitution för organisationen. Här beslöts och beskrevs kampanjens vision och dess uppdrag, samtidigt som man byggde en gemensam plattform för organisation och fortsatt handling:[13]

Vision

[13] Se Right2Know Nationellt toppmöte 2-3 februari 2011. Detta och de flesta andra viktiga dokumenten i kampanjen kan nås på http://www.r2k.org.za

Vi strävar mot att skapa ett land och en värld där alla har rätt till kunskap. En förutsättning därför är fri tillgång till information och frihet att sprida denna information. En levande, öppen demokrati, med ansvarsutkrävande, kräver lyhördhet för att kunna leverera social, ekonomisk och miljömässig rättvisa. Endast i ett sådant samhälle är människan fri, och kan leva i värdighet och rättvisa.

Uppgift

- Att driva kampanjer för lagar, policyer och praxis som konsekvent försvarar rätten till fri tillgång till information, och därmed evidensbaserad kunskap;
- Att driva kampanjer för ett fritt och pluralistiskt medielandskap;
- Att driva kampanjer till stöd för lokalsamhällenas rätt att få tillgång till information som regeringen och privata aktörer annars ensamma har kontroll över; samt
- Att driva kampanjer till stöd för integritetsbärare, s.k. whistle-blowers, som är så avgörande nödvändiga i varje levande demokrati.

Principer

1. Tillgång till information: Alla har lika rätt att få tillgång till information. Denna rätt har ett självständigt värde och är avgörande för många andra demokratiska rättigheter. Rätten att få tillgång till information måste försvaras och promotas i lag, praxis och politik på sätt som stadgas i bl.a. vår konstitution, artikel 32.
2. Fritt flöde av information: Alla människor har lika rätt till yttrandefrihet. Denna rätt har ett självständigt värde och är avgörande för många andra demokratiska rättigheter. Yttrandefriheten måste

försvaras och promotas i lag, praxis och politik på sätt som stadgas i bl.a. vår konstitution, artikel 16.
3. Fri och heterogen media: Medierna har rättigheter *och motsvarande skyldigheter*[14] att få tillgång till och sprida information, skall göra detta självständigt och i enlighet med sitt professionsetos, utan favoriseringar och utan att behöva känna rädsla. Dessa rättigheter och skyldigheter är avgörande för allmänhetens utövande av många andra demokratiska rättigheter. Medias frihet måste försvaras och promotas i lag, praxis och politik på sätt som stadgas i bl.a. vår konstitution, artikel 16. Men media måste också mångfaldigas, så att alla, även de maktlösa, har en röst.
4. Ansvar och öppenhet: Den transparens informations- och yttrandefrihet skapar tvingar fram ansvar för de som fått makt, makt för att genomföra sitt uppdrag att realisera politisk, social, ekonomisk och miljömässig rättvisa.
5. Informerade medborgare stärker demokratin: Rätt och möjlighet till information genererar kunskap och en demokratisk mognad med ett myndigt folk som aktivt vågar

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[14] Jfr. Sverige och den pågående kampanjen mot Hamnarbetarförbundet, där näringsliv, politik och LO/Metall förenas i sin kamp för försvarande av etablerad position, med desinformation via sociala media och propagandaorganisationer och med stöd från såväl myndigheter (medlingsinstitutet) som domstol och regering. Se som exempel påståendet att Hamnarbetarförbundet vägrade sluta avtal, bilaga 6 a och b med svar till Medlingsinstitutet samt AD:s dom 2018:9 där Sveriges Hamnar fälls för förhandlingsvägran, sedan Hamnarbetarförbundet begärt förhandlingar om ett riksavtal (Förhandlingsplikten är lagreglerad sedan 90 år tillbaka i den s.k. Förenings- och Förhandlingsrättlagen, numera en del av MBL), ett av de två centrala ben den svenska arbetsrättsliga modellen vilar på. I Sydafrika hade Medlingsinstitutets rapport upphävts av Konstitutionsdomstolen, och åtal aktualiserats inte bara mot Medlingsinstitutet utan även mot arbetsdomstolens ledamöter. Se också Handelshögskolans nya värdegrund, och hur de agerar i praktiken. Den offentliga lögnen är dock inte sanktionerad i Sverige, d.v.s. den demokratiska mognaden i Sverige placerar oss bland bananrepubliker och innefattar att vi närmast är att betrakta som en feodal demokrati. Äckligt är ett ord som ligger nära till hands för den bildade, liksom för den som drivs av sitt professionsetos – jfr. för en konkretisering Sara Stendahl och Torgny Segerstedtstiftelsen, hedersdoktoratet till Asha Ramgobin samt stölden av StreetLaw-programmet (bilagorna 9 a & b samt 10).

och förmår att försvara och fördjupa sina politiska, sociala, ekonomiska och miljömässiga rättigheter.
6. Evidensbaserad sanning, och därmed kvalitet i deltagande och i beslutsfattande, är beroende av rätten till information: Informationen skall vara tillförlitlig, verifierbar och representativ för de data från vilka den härleds, och rätten till information innefattar därför också en rätt att få tillgång till källdata. Information måste tillhandahållas transparent och vara lika tillgänglig för alla, oberoende av partsintressen.
7. Proaktiv spridning av information: Offentliga och privata organ måste sprida information proaktivt.
8. Jämställdhet: Alla människor, oavsett social status, klass, ras, kön, språk eller sexuell orientering har samma rätt till information.
9. Vi måste agera samlat, som ett kollektiv: Rätten till fri information, rätten att få veta, är avgörande för kampen för politisk, social, ekonomisk och miljömässig rättvisa och denna kamp kan bara nå framgång om vi driver den tillsammans.[15]
10. Solidaritet och kollegialitet: Vår kampanj tjänas bäst av att vi agerar samfällt och i solidaritet med likasinnade människor och organisationer, och det såväl lokalt som internationellt.

För R2K-aktivisterna var det tydligt att sekretesslagen var en symbol, en början på makthavares försök att skapa ytterligare hinder för det fria flödet av information. Det var därför viktigt att man slogs för *alla* människors rätt till fri information, inte bara journalisters eller en ekonomisk eller intellektuell elit. Det är en avgörande skillnad mot Sverige, med dess selfies,

[15] Jfr. åter LO samt den nya formen av "kollegialitet" inom "akademin". Sverige har blivit ett land befolkat av kärringar och lett av idioter, ostronlandet.

varumärkesskapande och förakt för bildning och människans *suum.*

Det beslöts att det första verksamhetsåret skulle präglas av tre huvudkampanjer[16]:

i. Stoppa förslaget till ny sekretesslag.
ii. Krav på rätt till fri information *nu.*
iii. Skydda medias frihet och arbeta för en pluralistisk media. Följ noga lagstiftningen och varje försök att påverka medias frihet. Arbeta parallellt för mer stöd till media som står fri från privata intressen.

Det tog alltså bara drygt sex månader från initiativet togs till att skapa en fullfjädrad nationell organisation. R2K hade fungerat som en katalysator, och nu gällde det att konsolidera, för att motverka tendenserna till att en allt mer sluten och maktfullkomlig ekonomisk och politisk elit skulle kunna gömma sig bakom ny lagstiftning och korrupt praxis.[17]

2.2. **Några centrala kampanjer**

2.2.1 Förslaget till ny sekretesslagstiftning

[16] Man lade snart till en fjärde kampanj, efter flera uppmärksammade repressalier mot whistle-blowers, t.o.m. i form av mord, nämligen Rättvisa åt whistle-blowers. Senare, 2012, skapade man särskilda instrument för att kunna länka whistle-blowers till olika organisationer och för att kunna generera juridiskt och ekonomiskt stöd åt dessa. I Sverige saknas som bekant whistleblowerskydd och varje form av substantiella initiativ till ett sådant, se Töllborg, *Whistle-Blowers, Informanter och Integritetsbärare.* Även Töllborg, *Älska din navel* samt *Pams Plats.*

[17] Jfr Töllborg, *Ruinerna hävdar att byggnaden var vacker*, bl.a. om Seritikommissionen men, för oss svenskar, kanske särskilt den *high/deep-level corruption* som stabiliteten i det svenska samhället bygger på, och vars förutsättning är ett indifferent folk och en intellektuell elit och akademi som fokuserar på selfies och eget varumärke

Under 2011 var propositionen till en ny sekretesslag strategiskt prioriterad av kampanjen. Ett antal parallella aktiviteter genomfördes: man bevakade alla utskottsförhör och parlamentsdebatter, skrev remiss och skickade skrivelser till beslutsfattare, genomförde regelbundna massmobiliseringar runt omkring i landet i form av demonstrationer, massmöten, vakor et cetera samt var hyperaktiva på sociala media och jobbade mot traditionell media. En rad workshops hölls, tillsammans med andra organisationer och tillsammans med akademin. Trycket tvingade till slut parlamentets "andra kammare", National Council of Provinces (NCOP), att hålla nationella utfrågningar om lagförslaget över hela landet, och ANC att aktivera medlemmar för att motverka den växande kritiken. Aktiviteterna gav resultat, förslaget reviderades gång på gång och utsatta deadline's för parlamentet att rösta om förslaget sköts upp gång på gång.

Den 22 november 2011 samlades parlamentet för att rösta om lagförslaget. Tusentals R2K-aktivister över hela landet genomförde protestaktioner på det som senare kommer att bli känt som "The Black Tuesday". Propositionen framlades nu för för parlamentet, och såsom föreskrivs i den sydafrikanska ordningen tillsattes därefter, när, som här, propositionen inte förkastas, ett utskott att granska lagstiftningsförslaget. Till skillnad från i Sverige har sydafrikanska medborgare möjlighet att aktivt följa utskottsarbetet momentant – Sydafrikas demokrati efter revolutionen har ännu inte "utvecklats" till svensk nivå.

Det gedigna arbete, och den landsomfattande aktivitet som R2K genomfört under året i alla dess olika former, både

under 20111 och sedan lagförslaget lagt fram till parlamentet för omröstning, mötte starkt gehör även hos andra organisationer och inom akademin. ANC blev allt mer isolerade. R2K och nu även andra organisationer skickade skrivelser till NCOP:s ad hoc utskott för sekretesslagen, bevakade varje utskottsmöte (vilket alltså är möjligt i Sydafrika) och fick t.o.m. själva göra muntliga presentationer inför detta ad hoc utskott. Parallellt genomförde man en intensiv lobby-kampanj mot enskilda parlamentsledamöter, för att förmå dem rösta för att utskottet skulle genomföra sådana förändringar i lagförslaget att det skulle uppfylla frihetstestets sju punkter. Man vände sig också till det internationella samfundet, såsom ambassadörer, utländska lagstiftare och ledamöter i internationella organ, allt för att öka trycket.[18] Sverige var naturligtvis helt ointresserat. SIDA, än mindre utrikesdepartementet, har inte ens övervägt att stödja en sådan här konkret kampanj, fri från korruption, vägrande att låta sig styras och i dagligt arbete fokuserande på att talk the walk. Vad som skedde och var möjligt i Sydafrika stämde så illa med den svenska självtillräckliga självbilden; här gav vi istället hedersdoktorat och medaljer åt ledare i korrupta projekt, finansierade via svenska skattepengar.[19]

Det sammanlagda resultatet av dessa aktiviteter kom till slut att påverka även inom ANC och särskilt dess ledamöter i NCOP:s ad hoc utskott – nu började även dessa visa en mer beredvillighet att ändra i lagförslaget.

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[18] Särskilt centralt var OGP, Open Government Partnership, som Sydafrika ratificerat och där organisationens medlemmar bekräftat principerna om öppenhet och ansvarsutkrävande som centrala demokratiska principer

[19] Se https://law.handels.gu.se/forskning/hedersdoktor, Asha Ramgobin. Se även Mosander om Kongo-Khinshasa och Jämtin/Freivalds kramande av Zuma och Face Technologies

Departementet för rikets säkerhet hade drivit en hård linje, men fick allt mindre gehör. Den centrala lagstiftningen för tillgång till både allmänna och privata handlingar, som går mycket längre än vår motsvarande svenska lagstiftning om allmänna handlingars offentlighet, PAIA (Promotion of Access to Information Act), och som antagits år 2000, måste beaktas och vid lagkonkurrens ha företräde för sekretesslagen, beslöt utskottet.[20] Propositionen reviderades i enlighet härmed, och det var naturligtvis en partiell seger för R2K.

I november 2012 var utskottet klart och återsände propositionen, efter en rad ändringsförslag, till parlamentet. Fortfarande klarade förslaget dock inte R2K:s frihetstest.

Tidigt 2013 var det dags för parlamentsdebatt och beslut, och i april 2013 antogs lagen av parlamentet. R2K gjorde då gällande att den av parlamentet antagna lagen är konstitutionsvidrig: det handlar bl.a. om straffsatserna för whistle-blowers, reglerna om sekretessprövning samt att enskilda statliga tjänstemän genom lagen skulle få diskretionär rätt att besluta om sekretess.[21]

I Sydafrika räcker det inte med att parlamentet har antagit lagen. Presidenten skall också godkänna. R2K var naturligtvis medvetna, och förberedda, på detta. I Sydafrika är det också möjligt för medborgare och organisationer att angripa ett lagförslag eller en lag genom att initiera en rättslig prövning vid domstol, och det är precis vad R2K, tillsammans med flera av landets

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[20] En motsvarighet i Sverige skulle vara en revolution, som helt undergrävde den svenska modellen för stabilitet; belöningar och exkludering

[21] En fullständig lista och redovisning återfinns i R2K Seven Point Freedomtest, november 2012 - http://www.rek.org.za

ledande professorer i konstitutionell rätt och andra organisationer och jurister, förberett. Zuma vet om detta. Det är ingen hemlighet, och det är heller ingen hemlighet att Konstitutionsdomstolen inte väjer för att köra över såväl Zuma som parlamentet.

> Jfr. t.e.x. Terry Crawford-Browns framtvingande av en ny kommission kring Arms Deal, en rättslig omöjlighet i Sverige.[22]

Konstitutionsdomstolen har, allt sedan den i början av sin existens underkände ett beslut av (dåvarande president) Mandela själv, med Mandelas nära vän och därtill dennes försvarsadvokat redan på sextiotalet Arthur Chaskalson[23] som ordförande i Konstitutionsdomstolen, den allra högsta respekt i hela landet. Inte minst efter det att Mandela, som fått sitt beslut underkänt, förklarat att Konstitutionsdomstolen dömt rätt, och han haft fel! Konstitutionsdomstolen kan inte avsätta presidenten eller parlamentsledamöter, men den kan både ogiltigförklara lagar som står i strid med

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[22] Se Töllborg, *Ruinerna hävdar att byggnaden var vacker*
[23] Det finns en märklig organisation, typisk kanske för just vår tid, som heter World Justice Forum, dit jag själv blivit inbjuden som en av få svenskar vid sidan av Hans Corell – glöm aldrig Sveriges främste symbol för hyckleri och ryggradslöshet som förutsättning för karriär; minns "I only obeyed order" som svar på varför han ljög inför Europadomstolen och regeringens belöning av denna lögn genom att göra honom till FN:s högste rättslige representant för mänskliga fri- och rättigheter, sådant sänder tydliga signaler till samtidens furirer. Vid organisationens möte i Barcelona utsåg organisationen *Arthur Chaskalson* till världsmästare i godhet inom juridiken. Organisationens ordförande förklarade att det var hans kamp för att man måste följa regler som gav honom hederspriset, och man såg hur denne värdige man hörde en kraftig förolämpning. Han reagerade genast och kraftfullt. "Jag hoppas verkligen inte att jag fått denna utmärkelse för att jag skulle anse att man måste följa regler. Jag trodde, tror och hoppas att det var för att jag konsekvent hållt fast vid att man som jurist måste vara lojal mot de värden, varpå reglerna bygger sin legitimitet." Det var något han, som jurist, och Mandela, som politiker, gav Sydafrika, och som de politiska efterföljarna inte levt upp till, men som Konstitutionsdomstolen vårdat och i handling fortsatt visa sig stå bakom. De är helt enkelt jurister alltjämt.

konstitutionen och tillsätta egna utredningar rörande allt, även korruptionsanklagelser både allmänt och som beträffande Zumas finansiering av sitt och sin familjs privata residens, Nkandla.[24]

> Det är t.o.m. möjligt för Konstitutionsdomstolen att besluta att t.ex. en offentlig utredning eller en särskild kommissions arbete, och slutsatser, såsom t.ex. den s.k. Seritikommissionen rörande Armsdeal, skall underkännas och förkastas, såsom varande konstitutionsvidrig genom att den de facto bara fungerat som ett white-wash-instrument och genomfört ett genuint dåligt arbete (jfr. den s.k. Granskningskommissionen i Göteborg och, såvitt avser Sverige nationellt, Säkerhetstjänstkommissionen). Varje sydafrikansk medborgare har möjlighet att hos Konstitutionsdomstolen anhängiggöra och föra en sådan talan, närmast alltså en slags konstitutionell fastställelsetalan.[25] Motsvarande möjligheter i Sverige, t.ex. beträffande den s.k. Säkerhetstjänstkommissionen eller Göteborgs famösa Granskningskommission, är alltså *naturligtvis* (!) uteslutna. Ett sådant försök skulle i Sverige antagligen inte bara medföra att den klagande, oberoende av argumentens evidens och deras styrka, blev kallad rättshaverist och konspirationsteoretiker; det är sannolikt att personens karriär, ja troligen hela dennes sociala liv, skulle tillintetgöras och möjligen skulle den klagande även omhändertas av män i vita rockar! Med tanke på att det är möjligt, och vanligt, i

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[24] Jfr. Armsdeal, se Töllborg, *Ruinerna hävdar att byggnaden var vacker*

[25] Se bilagorna 4 a&b

> Sydafrika, så säger detta faktum också något om den rättsstatliga och demokratiska mognaden i vårt land. Vi har helt enkelt valt en annan väg – kubikmeter med fjollevatten och tonvis med medaljer, hederbetygelser istället för heder.

Zuma vet alltså i detta läge att signerar han lagen kommer som ett brev på posten en rättslig prövning inför Konstitutionsdomstolen, en rättslig prövning som (a) han och därmed ANC mycket möjligt och rentav troligt kommer att förlora samt (b) att denna rättsliga prövning ger, liksom i Leander-fallet, R2K en scen för att genom media ytterligare massmobilisera. Zuma avvaktade därför, och lagen har faktiskt ännu inte trätt i kraft – Zuma har inte vågat promulgera den innan han nu slutligen tvingats avgå. Inom ANC har, med Zuma's allt minskande legitimitet, en majoritet nu vuxit fram för att lagen måste ändras. Frågan är nu mest hur processen skall kunna dras igång igen. Såvitt jag förstår kan den inte skickas tillbaka till parlamentet för revidering. Parallellt är Sydafrika i starkt behov av en reviderad sekretesslagstiftning – alltjämt gäller Intelligence Act från apartheidtiden, och den står i stora delar i konflikt med konstitutionen. Just nu verkar därför bl.a. underrättelsetjänsterna i ett legalt vaccum, vilket naturligtvis inte heller är lämpligt. Här kommer Ramaphosa att prövas; är han en Zuma eller en Mandela?[26]

2.2.2 National Key Point Act

Förslaget till ny sekretesslag var R2K:s grogrund, men inte deras mål. Målet omfattar, som framgår av deras

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[26] En i tiden näraliggande värdemätare är hur Ramaphosa agerar mot Fraser, se bilaga 5 a-c

princip-program, ökade möjligheter på alla plan och alla nivåer för landets samtliga medborgare att få tillgång till information.

Således har också annan lagsstiftning uppmärksammats. En av dessa är apartheiderans s.k. National Key Point Act (1980), som skapats för att hemlighålla information kring en rad strategiska byggnader och anläggningar och den verksamhet som bedrivs där. R2K uppmärksammade tidigt att ANC-regeringen istället för att avskaffa lagstiftningen utnyttjat samma apartheidlagstiftning för att för själva kunna för allmänheten undanhålla information.[27]

R2K begärde därför, vilket man kan göra i Sydafrika, återigen till skillnad från Sverige, att polisministern skulle redovisa vilka dessa "National Key Points" var, och lämna svar inom 30 dagar (man kan alltså t.o.m. stipulera tidsfrister inom vilka makthavaren skall svara, föreslå det i Sverige, den som vågar och samtidigt vill göra karriär). Polisministern vägrade ange dessa, varförR2K i oktober 2012 in en ansökan till domstol där man under åberopande av PAIA krävde svar.[28] R2K hade framgång i processen, och samtliga s.k. National Key Points blev offentliggjorda. Polisministern och departementet föreslog därefter att lagstiftningen skulle avskaffas och ersättas med en särskild lagstiftning om skyddsområden, Critical Infrastructure Act. R2K har ställt sig kritisk till förslaget till ny lag, som man

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[27] Under perioden 2017-2012 hade regimen Zuma, med stöd av lagen, ökat antalet sådana "national key points" med över 50%. Se Right2Know-kampanjen, "Secret Nation of Nations", Rapport, 17 februari 2013 - denna är tillgänglig på http://www.r2k.org.za/2013/02/17/secret-state-of-the-nation-report/
[28] Se första pressmeddelandet av Right2Know-kampanjen, "R2K kräver en allmän lista över de hemliga "National Key Points", 4 oktober 2012; och sedan påföljande pressmeddelande, "Polisdepartementet vägrar att släppa listan över National Key Points", 7 mars 2013 - båda kan nås på http://www.r2k/org/za

menar i centrala delar bara är en blåkopia av den gamla lagstiftningen. Här har man samarbetat med en rad centrala organisationer, däribland katolska kyrkan. Parlamentet har nu (2017) antagit lagstiftningen, och en ad hoc committee har skapats, och offentliga utfrågningar skall ske, enligt den sydafrikanska modellen, innan den går tillbaka till parlamentet för slutligt antagande i samma eller reviderad form och, möjligen, så småningom promulgerande av presidenten.

2.2.3. Spy Bill

En ny lagstiftning för underrättelseverksamheterna, av R2K kallad Spy Bill, kom 2012 att hamna på NCOP:s utskottsnivå, sedan den antagits av parlamentet. Lagförslaget centraliserar ytterligare makten över Sydafrikas säkerhetstjänster och ger ministern än mer makt, utöver att öka säkerhetsorganens rätt till telefonavlyssning, buggning, avlyssning av elektronisk utrustning et cetera, och innehåller inga regler om kontrollorgan. Lagförslaget är därmed centralt för R2K, även om och i samband därmed fr.a. kanske striden om ny Inspector General of Intelligence blev så mycket mer central.

Under 2014 kom sittande Inspector General of Intelligence att avgå, och skulle ersättas med en ny. Organisationen är det mest centrala kontrollorganet över landets säkerhetskluster, och enligt konstitutionen skall denne tillsättas av parlamentet med kvalificerad majoritet.[29]

[29] I Sverige utses motsvarigheten – närmast motsvarande är SIN, Säkerhets- och Integritetsskyddsnämnden – av regeringen, och dess förste ordförande blev Anders Eriksson, tidigare chef för Säkerhetspolisen. Inte ens i Stalins Sovjet hade motsvarigheten varit möjlig utan ett ramaskri, men i Sverige uppmärksammades detta bara av mig (och SÄPO, som hade mycket roligt åt mitt påpekande om Stalin).

ANC saknar numera sådan, och majoritetens förslag till ny Inspector General, Cecil Burgess, möttes av starkt motstånd från civilsamhället och övriga delar av parlamentet. Burgess och ANC vägrade vika sig, men det gjorde också övriga delar av parlamentet efter intensivt arbete av bl.a. R2K. Konsekvensen blev ett dödläge, kontrollorganet stod utan ledare, och säkerhetsklustret i praktiken utan kontroll och detta i över 18 månader! Till slut röstades Burgess ned i parlamentet, och processen för att finna en ny efterträdare kunde inledas, men gick också den i stå. Först efter det att R2K hotat med rättsliga åtgärder (möjligt i Sydafrika, uteslutet i Sverige) inleddes en ny rekryteringsprocess. R2K lyckades i denna tvinga fram såväl kandidaternas CV som säkerhetsställa en offentlig intervjuprocess. Det var en betydande och mycket viktig framgång, återigen fullständigt utan ens möjlighet till motsvarighet i Sverige.

R2K följde aktivt utskottets samtliga möten och kunde med hjälp av media och sociala media skapa stor uppmärksamhet kring frågan vem som skulle få denna viktiga post. I slutet av 2016, efter 18 månaders vakans, nominerade parlamentet UNISA:s Dr Setlhomamaru Dintwe till posten. Det var en viktig seger, som R2K inser nu måste följas upp genom att bevaka att den nya Inspector General fullföljer sitt viktiga uppdrag i handling. R2K har redan haft möten med den nye Inspector General, och det första intrycket är försiktigt positivt, med en ny chef som

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Något säger även detta både om den svenska grundlagen, den demokratiska mognaden och ambitionen att få ett fungerande svenskt säkerhetsskydd. Samtidigt skall sägas att SIN numera fungerar, med Romregistret som undantag, t.o.m. mycket bra, efter en mer än trettio år lång ensam kamp av författaren, där Leanderfallet varit symbolärendet, och min avhandling avgörande.

aktivt uppmanat R2K att förse denne med ärenden.[30] Det beslöts därför att under 2017 aktivt ställa ärenden under kontrollorganets prövning, och nogsamt bevaka att kontrollorganet behåller sitt oberoende och aktivt utövar kontroll över det sydafrikanska säkerhetsklustret.

2.2.3. PAIA

Efter sitt nationella toppmöte 2011 började R2K alltså koncentrera sig på konsolidering – det var viktigt att bygga en rörelse för bred kamp för medborgarnas tillgång till information. Som en parafras på presidentens årliga tal om "The State of the Nation" beslutade man, med början 2013, att publicera en egen årlig rapport; "Secret State of the Nation". Som alla dokument och rapporter R2K producerar är de, naturligtvis, fria för gratis nedladdning. Redan i den första av de årliga rapporterna kunde man konstatera – ungefär som i Sverige, där mer än hälften av alla framställningar om att få ta del av allmänna handlingar avslås, utan stöd i sekretesslagstiftning (jfr. HGU, GRI och Black12) – att endast 32% av de framställningar om information som skett med stöd av PAIA beviljas, medan nästan två tredjedelar antingen ignoreras eller avslås.[31] Rapporterna är viktiga, de är evidensbaserade och gör allt fler medvetna om att ANC och regeringen driver landet från the walk of the

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[30] Vilket ger väldigt starka positiva signaler, påminnande mig om när EU:s förste ombudsman, Jacob Söderman, uttryckte samma önskemål till mig. Tyvärr hade Söderman avgått när frågan om VISA:s och Mastercards illegala förbud mot transaktioner till Wikileaks plötsligt infördes, och jag – ensam igen naturligtvis – klippte mina kort och förde frågan till hans efterträdare, sedan de svenska myndigheterna som förväntat "glömt" den befordringsplikt som följer med att samhället tillåtit företag oligopol. Det blev till sluts Islands Högsta Domstol som fick ta de avgörande besluten, när alla andra förskrämt tittade bort inför maktspelet av några av världens viktigaste, ekonomiska, aktörer.

[31] Se rapporten "Secret State of the Nation", 17 februari 2013. Rapporterna följs sedan årligen upp, med nya titlar som t.ex. State of the Nation Report: trends, patterns and problems in secrecy (2014)

talk mot den svenska modellen för stabilitet, talk the walk.

PAIA är en akronym för the Promotion of Access to Information Act. Lagen är oerhört central, från 2000, och saknar motsvarighet i Sverige. Det tog ganska lång tid, och jag var tvungen att först själv granska lagstiftningen, innan jag ens trodde att den existerade. Det centrala i lagstiftningen är att den avser att säkra att "everyone has the right of access to any information held by the State and to information held by another person that is required for the exercise or protection of any rights." Det uttalade syftet är att skapa ett öppet samhälle, där samhällets medborgare får ett rättsligt instrument för att framtvinga transparens, och därmed möjlighet till ansvarsutkrävande och således hålla demokratin levande. Den skiljer sig på flera avgörande sätt från den svenska lagstiftningen om allmänna handlingars offentlighet, fr.a. genom att den även omfattar privata associationer och genom att om man inte får adekvata svar på sin fråga inom stipulerad tid, max 30 dagar med möjlighet att undantagsvis och bara vid ett tillfälle förlängning med ytterligare 30 dagar, så kan domstol tvinga fram informationen.[32] Sedan är det med denna lag som med alla andra lagar och med Gud – om man inte känner till honom, vet man ju inte vart man skall vända sig. Detta är fundamentet i R2K, både som mål och medel. PAIA och Konstitutionsdomstolen är, enligt min uppfattning, de två viktigaste – och avgörande – *rättsliga* orsakerna till att Sydafrika ännu inte havererat, tillsammans med den tradition av kamp och den uppenbara ojämlikhet som gör att man har ett levande

[32] Jfr JO och JK:s hantering av informationen de fick rörande försöken att få fram information till Black 12, vilka signaler det och GRI:s agerande sände, och resultatet.

aktivistsamhälle, starkt präglat av lojalitet mot de värden som till slut knäckte apartheideran.

Under 2016 var R2K ordförande i ett nybildat nätverk, ATI Network (Access to Information Network), där man överenskommit att stödja varandra och dela erfarenheter av arbete som bedrivs och där PAIA är ett centralt arbetsinstrument. Nätverket presenterar årligen en evidensbaserad, d.v.s. vetenskaplig, granskning av myndigheter och företags respons på framställningar om information med stöd av PAIA. Tillsammans med bl.a. akademin arbetar R2K för att handlingar och dokument, som omfattas av PAIA, för framtiden skall fortlöpande göras tillgängliga på nätet, utan särskilda krav på framställningar. Det vore en demokratisk revolution, inte bara för staten utan för alla maktkonstellationer som omfattas av PAIA, tekniskt möjliggjord genom det kommunikativa paradigmskifte som internet 1998 kom att innebära.[33] "Need-to-know"-principen ersätts med en "Right-to-know"-princip, stärkt av att FN 2016 förklarat att tillgången till internet, och då menas inte bara i teknisk utan även ekonomisk mening, är en mänsklig rättighet. Det är många saker vi människor, fr.a. maktmänniskor, inte ens skulle kunna tänka oss att göra, om vi visste att agerandet skulle bli offentligt och möjliggöra ansvarsutkrävande. Och då tänker jag inte främst på petande i näsan, utan på samtliga Sveriges ledande potentaters inblandning i Armsdel, den största skammen i svensk utrikespolitisk historia sedan baltutlämningen.[34] Vår nuvarande statsminister, Lövdén, spelade där, liksom vid motsvarande scam med Brasilien och – på gång – Botswana, en instrumentell roll.

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[33] Se Töllborg, *Hegemoniska revolutioner*
[34] Se Töllborg, *Den viktigaste frågan*

2.3. Övrig aktivitet

R2K har varit och är aktiv på många olika områden, inte minst i samarrangemang och stöd. Ett centralt exempel är Marikana, Amadiba och Newcastle, till stöd för lokalbefolkningens kamp mot exploatering och mot polisens övervåld. Ett annat är Glebeland, där den ANC-stödjande polisen och ledningen förhöll sig passiva när en våg av politiska mord och misshandel pågick under flera års tid. Man har stött med information, med juridiskt stöd och med krav på ansvarsutkrävande. Samtidigt har SIDA-stödda HRDI, med deras hedersdoktorat och lismande för makten, varit helt passiva, trots att de stal och alltjämt bär mitt förslag som varumärke: *Mänskliga rättigheter handlar bara om vad du gör, inte om vad du säger eller skriver.* Hyckleriet skapade bara en sak; cynism. Kraven på insyn i den starkt sekretessbelagda upphandlingen med ryssarna om ny kärnkraftsuppbyggnad har drivits rättsligt, och med framgång (när detta skrivs har Ramaphosa precis förklarat att affären är avblåst). Nuclear-deal är den största sydafrikanska affären sedan katastrofen med Armsdeal, där Sverige spelade och spelat en aktiv roll i vad som kom att bli inledningen på en allt mer omfattande korruption inom det statsbärande partiet – Sveriges ansvar är där historiskt och kan aldrig kompenseras, effekterna har gått långt utöver den blåsning på närmare 100 miljarder rand som vi medverkade till, i våra krav på payback för att vi skulle få snurr på försäljningen av JAS Gripen. R2K har spelat en central roll här, och har f.n. ett omfattande ärende anhängiggjort i domstol där den s.k. Seritikommissionen skall förklaras ogiltig[35], en white-wash utredning av svensk modell, dock utan ens

[35] Se bilagorna 4a och 4b

tillstymmelse till den elegans som i vart fall brukar prägla svenskt utredningsväsende, när sekreteraren skall prövas inför att bli upptagen i den inre kretsen. Man har, som redan angivits, också givit ut en rad praktiskt inriktade handböcker, med fokus på yttrande-, demonstrations- och informationsfriheten, tagit strid mot RICA (en lagstiftning som ger rätt till övervakning av medborgarna, fr.a. genom IMSI-catchers och programmet Grabber), och fått stöd av FN-kommittén för mänskliga fri- och rättigheter i denna kamp, för fria dekoders när tv digitaliseras (framgång under perioden jag var här nere, de allra fattigaste får gratis dekoders!) och för sänkta kostnader för wi-fi, internet och mobiler, de viktigaste instrumenten för kommunikation bland befolkningen här nere. I bilaga 3 har jag lagt med ett exempel, men det bär för långt att i en sådan här kortare rapport, som ändå inte kommer att läsas, och där Handelshögskolan bara bidragit med marginellt ekonomiskt stöd, gå igenom allt arbete som man genomfört under den korta tid organisationen funnit. Den intresserade, om det nu finns några sådana i Sverige, kan besöka deras hemsida, http://www.r2k.org.za. Som exempel får det räcka med att lyfta fram att bara under 2016 organiserade man över 93 protester och offentliga möten, 32 utbildningar och deltog i över 63 evenemang som organiserades av syster-organisationer.[36]

Avslutningsvis skall därför bara lyftas fram två kampanjer, omöjliga i Sverige om än lika viktiga hos oss, där R2K spelat en avgörande roll för försvaret för konstitutionen och den sydafrikanska revolutionen, båda paradoxalt och ledsamt nog i strid med de medlemmar i ANC som fostrades av Sverige i Armsdeal, och lärt sig att

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[36] Se bilaga 2 med årsrapporten för 2017

korrumperas. De två kampanjerna är, dels arbetet för ett fritt, heterogent, av professionsetos styrt och oberoende media, dels det konsekventa och starka stödet till integritetsbärare, en starkt föraktad grupp i Sverige.

Media, d.v.s en fri och heterogen media och en journalistik som drivs av professionsetos och inte selfies och varumärkesbyggande, har alltid varit centralt i ett demokratiskt samhällsbygge. The Right2Communicate är en del i det arbetet som R2K tillsammans med medieorganisationer och akademin driver i Sydafrika.[37] En fri akademi, lojal endast mot värden och som vägrar behaga och förfalla till ren konsultverksamhet, kan bidra med forskning, kontext och fördjupning.

I förlängningen av 1998 års internetrevolution, och sociala medias frammarsch, har över världen rests krav på olika former av förbud och censur. Så även i Sydafrika. Här har föreslagits en slags mediedomstol, vartill klagande skulle kunna vända sig för att hindra publicering eller klaga på publicering. R2K har, tillsammans med medieorganisationer, tidigt tagit strid mot förslagen, som man underförstått menar skulle användas för att hindra kritik mot fr.a. Zuma och ANC. Samtidigt har man kritiserat den allt starkare kontroll över den statliga nyhetsverksamheten, särskilt den statliga tv:n SABC, som ANC genom sin utnämningspolitik tillskansat sig[38], och att privata media helt domineras av ett fåtal ägarkonstellationer. Statlig media måste garanteras oberoende, och statsmakten måste främja en

[37] Se Right2Know, "Media Freedom, Diversity and the Right2Know", november 2011. Detta är tillgängligt på http://www.r2k.org.za/wp-content/uploads/2012/12/R2K_MedFreeDiv_DisDoc2011.pdf

[38] Jfr. för svensk del t.ex. Kerstin Brunnberg och Lars-Olof Lampers, för att nämna två centrala MUST-intressenter inom svensk radio och tv

breddning av mångfalden, inte minst genom att uppmuntra och ekonomiskt stödja fri lokal media. Här har R2K, ofta tillsammans med media och akademin, arbetat aktivt inför utskottsbehandlingen, skrivit remiss-svar, deltagit i utfrågningar samt genomfört demonstrationer, upplysningskampanjer och aktivt verkat för att stödja lokala initiativ till kommunmedia med teknisk kunskapsspridning. Man har också tagit strid för fria dekoder, när tv digitaliseras. TV är en central informationskanal inte minst i Sydafrikas olika township och för de fattiga, och de har inte råd att köpa digitalboxar.

2012 gjorde man några delsegrar, och lyckades bl.a. hindra ICASA (South Independent Independent Authority Authority Afrika) från att tillåta ytterligare kommersialisering av den statliga tv;n, och tvingade myndigheten till att, vid digitalisering, garantera icke-kommersiell tv åtminstone 40 % av sändningsutrymmet.

En lång och intensiv kamp har förts för en heterogen och självständig media.[39] En central del av mediekonsumtionen i Sydafrika är televisionen, fr.a. den statligt ägda SABC, som har ett antal kanaler, och för de flesta av de fattigare delarna av befolkningen de enda tillgängliga. Zumatrogna inom ANC har sett det som centralt att få

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[39] Som ett led i denna kamp har R2K fördjupat sitt samarbete med relevanta del av akademin, och också upprättat, tillsammans med jurister, en hot-line för demonstranter och organisatörer. Detta var en del av rätten att protestera (R2P). Hot-linen lanserades i oktober och fick redan inom några månader 58 samtal. Man har också genomfört två workshops om demonstrationsrätten, och stod också värd vid Center for Applied Legal Studies (CALS) symposium vid Wits University (University of the Witwatersrand, Johannesburg). Wits var värd för 2017 års internationella kongress för grävande journalistik, där jag var närvarande och några av oss från Sverige respektive Sydafrika sedan fördjupade ett arbete rörande SIDA, ANC:s kommande val och svensk-sydafrikansk korruption med svenska och sydafrikanska ministrar personligen inblandade

kontroll över SABC, och styra inte bara vad som får rapporteras om och hur, utan också vad som inte får rapporteras.

Antalet hot mot och trakasserier av journalister från polisen och underrättelsetjänsten har ökat, allt eftersom ANC blir allt mer pressat. Polisen förbjöd filmning av deras agerande, och sammanstötningar och våld i anledning av sådan filmning skedde allt oftare, särskilt i anslutning till studentprotester rörande nya avgifter på universiteten. I anledning därav tryckte R2K upp och gjorde allmänt tillgänglig en aktivistskrift rörande rätten till att filma polisen. Man deltog också i en offentlig debatt på temat i Khayelitsha. Här underströks särskilt den begränsning av medias oberoende och självständighet som följde av att polisen och det sydafrikanska säkerhetsklustret, inte minst genom RICA, eftersökte och attackerade journalisternas källor. Ett fall som blev allmänt känt var när en kriminalpolis olagligt, efter att ha fått tillstånd av domstol till avlyssning för vissa telefonnummer, men lurat domstolen genom att ange två andra abonnenter som ägare till numren, följt två journalister på Sunday Times. Det hela avslöjades, och polismannen blev faktiskt fälld (Sydafrika är inte Sverige).

Angreppen på media och journalister ökade under valåret 2016. Mindre radiostationer, som var kritiska mot ANC och storföretag, såsom t.ex. Madibeng FM i Brits, utsattes för hot och en chefredaktör Alide avskedades sedan tidningen publicerat en rapport om tidningens ägares affärsintressen och betydelsen därav i förhållande till behovet av oberoende media. Steven Motalae var en annan redaktör, som avskedades efter att väckt ägarnas ovilja.

Risken för en chilling-effect var inte bara överhängande, den var ett faktum.

Parallellt fortsatte krisen vid det statliga tv-bolaget SABC. Dess styrelseordförande Hlaudi Motsoeneng, med nära koppling till Zuma, tvingade bort andra styrelseledamöter som ville SABC skulle stå fritt gentemot det statsbärande partiet, och som reagerade mot att Hlaudi förbjöd rapportering om bl.a. polisvåld. Åtta journalister, varav något av Sydafrikas mer välkända och framstående avskedades, sedan de vägrat gå i Hlaudis ledband. R2K tog på sig en ledande roll i protesterna mot Hlaudi, stödde journalisterna och organiserade inte mindre än 16 protestaktioner vid SABCs kontor i Johannesburg, Durban, Kimberley, Cape Town och Mangaung,

I september genomförde man en stor demonstration mot SABCs allt större beroende av kommersiell annonsering, och krävde att SABCs ledning skulle garantera SABCs självständighet, både mot politiska partier och mot ekonomiska intressen. Motståndet mot Hlaudi Motsoeneng och de som stödde honom blev allt mer spritt och kompakt, och kulminerande till slut i tillsättningen av en parlamentarisk utredning. R2K var en av tre utomstående organisationer som interagerade mot utredningen, och tillsammans ställde man tre oavvisliga krav: Motsoeneng måste permanent avlägsnas från SABC, kommunikationsminister Faith Muthambi avgå och all interncensur på SABCs omedelbart upphöra. Kampanjen för ett SABC fritt från politiskt inflytande nådde under 2016 till slut framgång, och Hlaudi Motsoeneng fick avgå. Zuma genomförde också återigen en regeringsombildning (jfr. Göran Perssons taktik) och kommunikationsministern fick en annan portfölj.

3. Den offentliga diskursen präglas i det s.k. kunskapssamhället av ökad fördumning och ytlighet.[40] Charlataner som Latour har blivit husgud, och kommunikationsdirektörer, normkritik och varurmärkesskapande har ersatt ideologikritik, professionsetos och heder. Sanning är numera irrelevant. Fake news, sanningens relativisering och sociala (och vanliga) mediers, t.o.m. institutioners, fokusering på varumärke och selfies utgör nya hot mot kvalitén i informationsutbyte och kunskapsbaserade beslut, och därmed mot hela idén om den demokratiska staten. Mängden utdelade medaljer och antalet liter fjollevatten som dricks ökar exponentiellt mot kvalitetsförsämringen och den nya "akademins" beundran av vår tids ostron.

Samtidigt, och trots det nya dumhetssamhällets framväxt med den växande känsla av maktlöshet som sprids, finns motstånd även inom etablerade politiska partier i både USA och Storbritannien. Modiga journalister utmanar den politiska och ekonomiska eliten, med Panamapappren som ett av de senaste mest kända exemplen, båda i kölvattnet av Leanderfallet, Wikileaks och Snowden.

Mod, vid sidan av ett brinnande professionsetos, är numera tyvärr det mest utmärkande draget hos varje samhälles integritetsbärare. För R2K blev det tidigt centralt att stödja samhällets integritetsbärare, s.k. whistle-blowers, och göra det med olika medel. Vikten av att uppmärksamma integritetsbärare, ta deras avslöjanden på allvar och hylla dem kan inte nog framhållas, inte minst som central värdemätare på varje samhälles

[40] Se Wikipedias och universitetets nya, fascinerande naiva, samarbete

demokratiska och rättsstatliga mognad. R2K lyfter varje år fram, i sin årliga kalender, integritetsbärare i landet, nominerade av landets egna medborgare (jfr GHT och Årets Holme). Det är ett viktigt instrument, för att motverka framväxten av en kultur som den svenska, som med sina belöningar och exkluderingar som samhällelig metod för att skapa stabilitet är ett inverterat sätt att se på samma integritetsbärare. Rätt typiskt är, ur min egen erfarenhet, t.ex. den fullständiga tystnaden i svensk media kring Årets Holme, som årligen utdelas av GHT den 1 december till minne av Rosa Park; en utmärkelse som ofta uppmärksammas i utlandet, men som typiskt sett förbigås både med samhällelig och individuell tystnad i Sverige. Vår tids rädsla för kvalitet är en produkt av den svenska repressionen, kanske tydligast manifesterad i hur Sverige jämfört med R2K ser på integritetsbärare. Och denna rädsla, detta ostronliknande nya "ledarskap", urholkar akademins själ och gräver inte bara kollegialitetens grav, utan skapar förakt för medborgarnas försök att bibehålla en grad av demokratisk mognad.

Det är ledsamt med utvecklingen i Sydafrika efter det att Mandela lämnat makten till Thebo och så småningom Zuma. Några ljus i mörkret kan dock noteras;

#Feesmustfall-rörelsen har fortsatt att växa, trots en allt mer kraftfull repression. Ännu har man dock inte lyckats skapa en fungerande samlad organisation.

Oberoende medieplattformar som GroundUp och amaBhungane Centre for Investigative Journalism har fortsatt att växa. Tyvärr är de dock alltjämt otillgängliga för många p.g.a. avsaknaden av fungerande internet.

Fr.a. har parlamentet blivit mer robust, mer demokratiskt, sedan ANC tappat mark. Nu vågar ledamöterna allt oftare lyfta kritiska frågor och utkräva ansvar. De inre motsättningarna i det statsbärande partiet (som det mellan ordförandeskapet/presidenten och finansministeriet) har lett till – som alltid när elefanter slåss – en ökad tillgång till information och har exponerat motsättningar som gör att motkrafterna kan växa sig starkare. Framför allt är det positivt att rättsväsendet i huvudsak, med Konstitutionsdomstolen i spetsen, orkat stå emot och vårda sin självständighet, trots president Zuma:s ihärdiga försök att undergräva densamma. Och till slut föll Zuma, till skillnad från Per, Pam och Stefan. Något säger det om vår samtid i konungariket Sverige. För Sydafrikas del står nu närmast att se om Ramaphosa är en Zuma eller en Mandela. Sverige har betydligt längre väg att vandra. Men det kan också gå fort – skillnaden, och det som förenar, är bara 1.700 dokument. Ett knivöverfall sänder ett klart budskap, och det skrämmer. Men hindrar mig inte.

Bilagor

1. R2K Organogram
2. R2K Senaste National Report (2018, avser 2017)
3. Exempel på handbok, här hur tvinga fram öppenhet och ansvar hos lokala kommunen

4a. Stämning med begäran om att Seritikommissionens rapport annulleras

4b. Sydafrikas konstitution

5. a-c Om Detournement de Pouvoir från Underrättelseorganens chef, och vad som händer i Sydafrika till skillnad från Sverige
6. Om Medlingsinstitutet och den svenska lögnen

7. Om Sören Öhman och den svenska inkompetensen och flatheten. S.k. High-, eller deep-, level corruption och den inkompetens som är så starkt sammankopplad därmed
8. Om hur Sydafrika ser på domartillsättning och hur man förhindrar den svenska modellen
9. Street Law, skapat av DD för snart 20 år sedan, stoppas av juridiska institutionen och särskilt Sara Stendahl, nu stulet av samma personer
10. Asha Ramgobin, erbjöds och mottog muta från SIDA, vilket gjorde att jag lämnade den organisation jag varit med att skapa. Resultatet var att man retuscherade bort mig från foton och hela historieskrivningen. Samt att Sara Stendahl och Handelshögskolan gjorde Asha till hedersdoktor, sedan hon lurat miljontals kronor av svenska skattebetalare för att berika sig själv och sin pojkvän
11. Ekonomisk redovisning
12. Icke ekonomisk redovisning, trots länsstyrelsens underkännande och upphävande av beslut där Rolf Wolff tilldelat sig själv en miljon, ännu icke redovisad