IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 81368/2016

In the matter between:

CORRUPTION WATCH	First Applicant
RIGHT2KNOW CAMPAIGN	Second Applicant

And

THE ARMS PROCUREMENT COMMISSION	First Respondent
WILLIE SERITI NO	Second Respondent
HENDRIK MMOLLI THEKISO MUSI NO	Third Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
PRESIDENT OF THE PUBLIC OF SOUTH AFRICA	Fifth Respondent
MINISTER OF DEFENCE	Sixth Respondent
MINISTER OF TRADE AND INDUSTRY	Seventh Respondent

Neutral citation: ***Corruption Watch and Another v The Arms Procurement Commission and Others***

Coram: Mlambo JP, Davis JP *et* Leeuw JP

Heard: 11 June 2019

Delivered: **21 August 2019**

Summary: Commission of enquiry – review of findings – power of a Court to review the findings of a Commissio of enquiry – *Peters v Davison* (New Zealand) - legitimate public interest in findings of a Commission being properly based in law – values of Constitution clearly applicable especially against arbitrariness (*Pharmaceuticals Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)) – Commissions exercise public power – their findings must be rationally connected to the power given for their purpose – objectives of Commissions to restore public confidence – principle of legality also applicable to Commissions' findings – Commission investigation must be conducted with an open and enquiring mind – Commissions failure to admit relevant evidence, to interrogate critical persons allegedly involved in corruption, to interrogate critical witnesses amount to failure to carry out the investigation required by its terms of refernce – Commission failed to conduct the task assigned to it through its terms of reference and the Constitution in line with the principle of legality

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JUDGMENT

THE COURT:

Introduction

[1] In 1997 a procurement process commenced to implement the Strategic Defence Procurement Package (SDPP), the finalisation of which took place in December 1999. Through the SDPP, the South African government acquired a number of weapons systems. From its inception the SDPP was engulfed in controversy arising from allegations, in the public domain and in the media, of corruption and other criminal conduct relating to the procurement process undertaken to acquire these various weapons systems. Already in 1999 and again in 2002 there were requests from some Members of Parliament which were directed to President Thabo Mbeki to appoint a Commission of Inquiry to determine the veracity of these allegations. Eventually on 24 October 2011, former President Zuma formally established a Commission of Inquiry into allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (the Commission), the first respondent. Its terms of reference were as follows:

'1. The Commission shall enquire into, make findings, report on, and make recommendations concerning the following, taking into consideration the Constitution, relevant legislation, policies and guidelines:

1.1.1 The rationale for the SDPP.

1.1.2 Whether the arms and equipment acquired in terms of the SDPP are underutilised or not utilised at all.

1.2 Whether the job opportunities anticipated to flow from the SDPP have materialised at all and:

1.2.1 if they have, the extent to which they have materialised; and

1.2.2 if they have not, the steps that ought to be taken to realise them.

1.3 Whether off-sets 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 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

1.4.1 Whether legal proceedings should be instituted against such persons, and the nature of such legal proceedings; and

1.4.2 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.

1.5 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.'[1]

[2] On 23 December 2015, the Commission delivered its final report. Its key findings are encapsulated in the following passages from its report:

'[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

[1] Terms of reference of the Commission of Inquiry into allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Packages issued in the *Government Gazette* of 4 Novemeber 2011 under notice No.34731.

conduct on their part were made, no evidence was found or presented before the Commission to substantiate the allegations.

[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.

[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.

[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 convictions. The Commission has carried out an intensive investigation, and other local foreign agencies have investigated the possible conduct of people who were involved in the SDPP. No evidence of criminal conduct on the part of any person was found.

[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.

[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… .

[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 suggest that the contracts concluded pursuant to the SDPP procurement process are tainted by fraud or corruption.

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

> [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.'[2]

[3] The applicants have approached this Court to review and set aside these findings, essentially on the basis that the Commission failed to carry out its constitutional and statutory function of investigating the allegations of fraud, corruption, impropriety or irregularity in the SDPP in the manner required by the law. For this reason, the applicants contend that the Commission failed to comply with the requirements of legality and rationality and are thus entitled to the relief they seek from this Court. In other words, the applicants contend that the findings that the SDPP was conducted by way of a fair and rational process cannot hold, given the procedural defects in the Commission's conduct of its inquiry.

Parties

[4] The first applicant is Corruption Watch NPC a non-profit company registered in accordance with the Company Laws of South Africa. The second applicant is the Right 2 Know Campaign**,** a voluntary association registered as a non-profit organisation. The first respondent is the Commission. The second respondent is

[2] Commission's final report issued in the *Government Gazette* of 24 June 2016 under notice No.40088 at Vol 3,Chapter 5, p893; p899; p900; p902; p908; p910; and p924.

Justice Willie Legoabe Seriti NO**,** who is cited in his capacity as the Chairperson of the Commission. The third respondent is former Judge President Hendrick Mmolli Thekiso Musi NO**,** who is cited in his capacity as a member of the Commission. 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. The fifth respondent is the President of the Republic of South Africa, who appointed the Commission. The sixth and seventh respondents are the Ministers of Defence and Trade and Industry respectively.

Legal Matrix

[5] Before dealing in detail with the case made out by applicants in justification for the relief they seek, it is necessary to establish whether this court has the power to review the findings of a judicial commission of inquiry. There is no reported judgment of a South African Court, nor in the African continent, dealing with this particular question; hence the need to examine significant comparative authority.

[6] In New Zealand, the case of *Peters v Davison* [1999] 2 NZLR 164 (CA) turned on the power of a Court to review a judicial commission. In this case, the Court accepted that reports of a commission do no more than state opinions, conclusions and recommendations which are not binding. However, the Court went on to say: 'There has been no suggestion that the Commission is empowered to make erroneous decisions on questions of law during the course of its inquiry.'[3] The Court referred to, amongst others, an earlier judgment in *Fay, Richwhite and Co Ltd v Davidson* [1995] 1 NZLR 517 (CA) at 524 where Cooke P said 'There is no doubt that

[3] *Peters v Davison* at 19/38.

if in his ruling the Commission had fallen into a material error of law, or had laid down a procedure transgressing the principles of natural justice, or had reached a decision not open to a reasonable tribunal, a judicial review remedy would be viable.'[4]

[7] On this basis, the Court in *Peters v Davison* went on to hold that a report of a commission could be reviewed on two grounds, that it had exceeded its terms of reference and that it had breached the principles of natural justice.[5] It then went on to consider whether commission reports could in principle and in terms of the public interest be reviewed, for what it referred to as, [on the basis of] an error of law. The Court noted that the significance in finding that error of law was also a ground for review lay in 'the importance of showing the integrity of the essential findings of a report in its answers to the terms of reference'[6]. This means that there is 'a legitimate public interest in those findings being properly based in law if the purposes of the report are to be achieved'.

[8] In support of this conclusion the court held:

> 'To hold that the public interest may require judicial review of the report of the Commissions of Inquiry (their special nature notwithstanding) upon certain of the grounds of judicial review, but then to hold that the Court is never able outside those grounds to intervene for material error of law, an established ground of judicial review, is not in our view sound in principle or justifiable in the public interest. It does not recognise the importance of commissions of Inquiry in our constitutional governmental system. It does not recognise the practical utility that a declaration of error of law may have.'[7]

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[4] Id.
[5] *Peters v Davison* at 33/38.
[6] Id at 20/38.
[7] Id at 24/38.

[9] In *Canada (Attorney General) v Canada Commission of Inquiry on the Blood System in Canada* [1997] 3 SCR 440 the Supreme Court of Canada distinguished between commissions of inquiry dealing with policy matters and commissions where the investigation could lead to a criminal prosecution, albeit that the commission's findings were not binding. The Court found that there was an obligation of a commission of inquiry to comply with a standard of procedural law of fairness in the manner in which its proceedings were conducted.[8] It followed that a commission's findings would be challenged if it was seen to be acting beyond its terms of reference, breached principles of procedural fairness or, if a commission was perceived to be biased against certain witnesses. See also *Keating v Morris and others*; *Leck v Morris and others* [2005] Queensland Supreme Court 243 at paragraphs 36 and 158.

[10] In our view, the principles set out in these judgements are applicable to the South African legal system sourced as it is in the values of our Constitution. As Chaskalson P (as he then was) said in *Pharmaceuticals Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85:

> 'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with the requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'

[8] *Canada (Attorney General) v Canada Commission of Inquiry on the Blood System in Canada* [1997] 3 SCR 440 at para 57.

[11] In *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 49 the Constitutional Court emphasised that 'it is by now axiomatic that the exercise of public power must comply with the Constitution which is the supreme law and the doctrine of equality which is part of the rule of law'.

[12] It might be argued, as the Canadian Supreme Court observed in Canada (*AG) v Canada Commission of Inquiry on the Blood System, supra*, that the findings of a commission of inquiry are simply findings of fact or statements of opinion reached by a commission at the end of the inquiry and that no legal consequences can be attached to the recommendations of a commission, in that its findings are not enforceable and cannot bind Courts which might consider the same subject matter.

[13] However this observation was qualified by the same Court in *Canada (Attorney General) v Canada Commission of Inquiry on the Blood System* that this cannot mean that the proceedings of a commission of inquiry can breach the principles of natural justice, procedural fairness or be conducted in a manner which exhibits bias.[9]

[14] Similarly, In re *Pergamon Press Ltd* [1971] 1 Ch 388 (CA) at 399 Lord Denning held that the proceedings conducted by two inspectors appointed by the Board of Trade to investigate certain share dealings were not judicial proceedings nor even *quasi judicial* proceedings in that they decided nothing and determined nothing, but 'their report may lead to … consequences. I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other

[9] *Id* at para 55.

bodies, even though they are nor judicial nor *quasi judicial* but only administrative.' See also Allan Manson and David Mullan *Commissions of Inquiry: Praise or Reappraise?* (eds) (2003), chapters 5, 11 and 14.

[15] While a Court must not fail to take account of the purpose of a commission of inquiry and hence the wide discretion given to Commissioners to investigate within the scope of their given terms of reference and to make findings and recommendations that they deem meet, the purpose of a commission, namely to restore public confidence in the situation which is investigated and hence in the process of government, dictates that it must operate within the framework of the principles of legality.

[16] Although a judicial commission of inquiry is entirely a different legal body from that of the Public Protector, the following *dictum* of Nugent JA in *Public Protector v Mail and Guardian* 2011 (4) SA (420) SCA at para 21 would appear to be equally applicable in that it reveals the legal confines within which a commission is enjoined to investigate a defined set of issues:

> 'But I think there is nonetheless at least one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind – which is that the investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all.'

The applicant's case and submissions

[17] It is important at this stage to make the following observations: this review was not opposed by any of the respondents nor any party for that matter. In particular, fifth respondent chose to abide the decision of this Court. The fifth respondent

appointed senior counsel to present argument, not in opposition of the relief sought by the applicants, but merely 'to assist this Court to arrive at a correct decision'. Significantly, neither the second nor the third respondents, the two members of the Commission, opposed the relief sought nor did they seek to admit any affidavit into evidence that might have sought to gainsay the applicants version. For this reason, this Court is bound to accept the facts set out in the founding affidavit and to base its application of its review powers on these facts. Further, the basis of the review concerns whether the Commission's proceedings complied with the principles of legality; hence this judgment is not concerned with the legality or otherwise of any of the components of the procurement process leading to the conclusion of the SDPP but only with the manner in which the Commission conducted its proceedings and arrived at its findings. The merits of the SDPP fall completely outside this judgment. Additionally this judgement is not concerned with the veracity or otherwise of the allegations made against any person.

[18] The applicants case is essentially the following: the Commission failed to gather relevant material, to properly consider and investigate matters raised in this regard, failed to admit evidence which was highly material to its inquiry and which was in its possession, failed to seek and allow information or material evidence from key witnesses and failed to test the evidence of witnesses who appeared before it by putting questions to them with the required open and enquiring mind.

[19] Mr Budlender, who appeared together with Ms Pillay and Ms Khoza on behalf of the applicants, raised a range of arguments in support of his essential submission, that the Commission had failed to carry out the task assigned to it under the

Constitution and within the framework of the principles of legality. For purposes of this judgment, we will concentrate on those instances which were highlighted by the applicants in support of the relief they sought from this Court.

[20] Mr Budlender submitted that there were 'remarkable' failures to test the evidence of crucial witnesses.

Mr Shaik

[21] Mr Shamim "Chippy" Shaik, Chief of Acquisitions for the Department of Defence, was a central figure in the entire SDPP process. A number of allegations of wrongdoing were made against Mr Shaik including:

21.1 He solicited a $3 million bribe from a member of the German Frigid Consortium (GFC). This bribe request was recorded in a memorandum compiled by Mr Christoph Hoennings, a GFC executive. A further memorandum made available to the Commission indicated that this amount had been paid. This memorandum formed part of a set of documents emanating from the findings of a German Police report which contained the memorandum of Mr Hoennings of 03 August 1998. The English translation of this memorandum reads as follows:

> 'The last trip (27-30.07.19980 was suggested by C Shaik, 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 assessed 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 Shaik, whereby he asked to reserve the aforesaid amount for following prices negotiations, to which he agreed.'

21.2 Mention was also made that Mr Shaik instructed representatives of Bell Helicopters to enter into a business relationship with Futuristic Business Solution, a company jointly owned by relatives of the then Defence Minister Joe Modise as well as a Mr Ian Pearce, of whom German Police documents suggest had acted as 'an intermediary for Mr Shaik in eliciting funds from another of the SDPP contracts, that is for Corvettes Acquisitions. This time the payment having been made allegedly by Thyssen Krupp. This allegation was also contained in the draft Auditor General Report of 18 October 2001:

> '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 service that it would have been contracted to supply. The proposed arrangement with FBS entailed a management and administration fee of $125 000 per months 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.'

21.3 A further allegation is that Thompson – CSF, a French arms manufacturer was awarded a contract for the supply of combat systems to the SA Navy. It was alleged that Mr Shaik had instructed Thompson – CSF to ensure that the South African company through which it operated, African

Defence Systems (Pty) Limited, a sub-contractor which eventually won the contract to supply information management systems for the combat suites for the Corvettes ships that were acquired pursuant to the SDPP, should be jointly owned by Thompson – CSF and Nkobi Holdings which was owned by the brother of Mr Shaik, namely Mr Schabir Shaik. There was evidence which suggested that Thompson – CSF were convinced of the need to include Nkobi Holdings as a shareholder in African Development Systems after the direct intervention of both former President Jacob Zuma and Mr Chippy Shaik.

[22] In Mr Budlender's view, all of these allegations were sufficiently serious to require thorough investigation and careful questioning from the Commission. In his evidence in chief Mr Shaik was silent regarding any allegations of corruption made against him. When he was examined by the evidence leader Advocate Sello, none of the documents, to which reference has been made and which supported allegations of corruption were put to Mr Shaik. Advocate Sello asked no more than extremely generalised questions. The relevant section from this exchange is illustrative:

'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 such 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.'

[23] The problem of a failure to investigate, argued Mr Budlender, was compounded thereafter when the chairperson of the Commission, the second respondent, put a few questions to Mr Shaik, the significance of which are reflected in the following passages:

'CHAIRPERSON: Mr Shaik besides what Advocate Sello has dealt with is there any out of the bidders that would 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 bribe 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 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 have 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 France 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.'

[24] Following this question a final set of questions were put by the third respondent:

'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 these 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 allegations. Whereas if you have not responded on those allegations they still remain. They have not been challenged and they may be repealed in the future. Do you not think it might be advisable that you deal with those allegations and respondent 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 singly issue. There is an issue about the Navy do not need boats. The Navy needs petrol … [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 discussion 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: It is 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 these books so I cannot comment on all of books but the allegations are untrue.

CHAIRPERSON: So the allegations are untrue. Thank you.'

[25] Mr Budlender therefore submitted that, in relation to Mr Shaik, and the multiple allegations of corruption involving him, only the most general questions were put, all

of which did no more than to provide Mr Shaik with an opportunity to make a general denial. Mr Budlender further submitted that the third respondent's questioning appeared designed only to provide Mr Shaik and the Commission with a blanket reason for not directly addressing the specifics of any of these allegations. These exchanges between the Commission and a critical witness are, in our view, illustrative of a failure to investigate with any rigor or diligence.

Advocate Fana Hlongwane

[26] Advocate Hlongwane was also a very important witness. He had been accused of corruption relating to the conclusion of certain SDPP contracts. He had been the subject of two related investigations by the Scorpions and the Asset Forfeiture unit. It was alleged that he had been a 'middle man' in the SDPP process and, on the basis of the evidence before this Court, was implicated in a wide range of alleged cases of corruption. According to an affidavit deposed to by Mr Gary Murphy, an investigator employed by the British Serious Fraud Office (SFO), a party which had been involved in the SDPP, being BAE Systems, had made use of "overt and covert advisors" to facilitate its participation in the SDPP. Covert advisors were alleged to have entered into contracts and were repaid by way of an offshore entity, Red Diamond, which was controlled by BAE Systems.

[27] According to Mr Gary Murphy's affidavit, Advocate Hlongwane had entered into both "overt and covert" arrangements with BAE systems to receive funds in relation to the Hawk and Gripen aircraft contract concluded through the SDPP. The "overt" arrangements comprised of consulting agreements two of which were between Hlongwane Consulting and BAE Systems on 09 September 2003 and

another between Hlongwane Consulting and SANIP, a BAE controlled South African entity, which commenced on 1 August 2003. The allegation is that Hlongwane Consulting received over £10 million by way of the first consultancy agreement between September 2003 and January 2007 and over R 51 m by way of a second consultancy. Mr Murphy concluded his report thus: 'BAE have not provided the SFO with any written report to justify the size of these payments.'

[28] According to the SFO, further payments were also made to Advocate Hlongwane, being approximately R 60 m by way of Arstow Commercial Corporation, a company registered in the British Virgin Islands and controlled by one Alexander Roberts. Arstow received approximate £15 m from Red Diamond and had then paid over £5 m to Advocate Hlongwane.

[29] The affidavit of Mr Murphy concluded thus:

> '55. I believe that the varied ways in which Fana Hlongwane has received payment 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.
>
> 56. 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.'

[30] These allegations were supported by a further affidavit deposed to by a Senior Special Investigator, Advocate Johan du Plooy, employed by the Directorate of Special Operations (DSO) in support of an application for search warrants in terms of Section 29(5) and 29(6) of the National Prosecuting Authority Act,[10] against Advocate Hlongwane and Mr John Bredenkamp. In this affidavit the following allegations are made:

> '148. In the light of the witness and documentary evidence that has been obtained thus far by the SFO and DSO, I am of the opinion that there exists a reasonable suspicion that specified offences have been or are being committed, or that attempts have been made or are being made to commit the following specified offences namely:
>
> i) Racketeering in contravention of Section 2 of the Prevention of Organised Crime Act, No. 121 of 1998;
>
> ii) Corruption in contravention of Section 1 of the Corruption Act, No. 94 of 1992 and section 3 of the Prtevention and Combating of Corrupt Activities Act, No. 12 of 2004;
>
> iii) Money laundering in contravention of section 4 of the Prevention of Organised Crime Act, No. 121 of 1998; and
>
> iv) Fraud…
>
> 155. There is at the 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 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…

[10] Act no 32 of 1998.

156. According to bank records and interviews conducted by the SFO Fana Hlongwane and/or Hlongwane Consulting and/or Ngwane Aerospace received the following amounts of money between 1999 tyo 2001 (covert) and 2003 to 2007 (overt) respectively:

i) Through Arstow (covert) via Alex Roberts - £ 5 million (R60 million);

ii) Red Diamond to CIC (covert) - $200 000 (R1 400 000) and £290 000 (R 500 000);

iii) Through SANIP (overt) – R51 million;

iv) Directly (overt) from BAE - £19 million (R120 million)…

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 employeed 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 Hlongwana and/or Hlongwane Consulting and/or Ngwane Aerospace and/or Trevor Wilmans.

161. I believe that the varied 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 in all monies directly.'

[31] Further evidence, which implicated Advocate Hlongwane, emanated from the National Prosecuting Authority. This evidence was sourced in proceedings regarding the seizure of funds controlled by Advocate Fana Hlongwane, in Lichtenstein. Following this action, an affidavit was deposed to by Advocate Downer SC, pursuant to an application that had been made to the High Court for a preservation order in respect of these funds in Lichtenstein:

'7. 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…

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 be left out of account.

204.2 Advocate Hlongwane was Minister 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 on January 1999, i.e. at a time when Advocate Hlongwane was still Minister 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 Advocate 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 Advocvate 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%.'

[32] In his oral testimony to the Commission, Advocate Hlongwane was asked only a single question regarding these allegations to which he responded in broad generality without referring to any specific document, allegation or evidence. The

Commission itself failed to put one question to him and he was neither re-examined nor cross examined. He was not confronted with any of the evidence to which we have made reference, all of which was available to the Commission.

[33] Mr Budlender submitted that the Commission had failed to test this critical evidence of a most important witness against whom a series of detailed allegations of corruption had been made, all of which went to the heart of that which the Commission was enjoined to investigate fully and with an open mind.

The Debevoise and Plimpton report

[34] The Commission had come into possession of a report by the US law firm Debevoise and Plimpton (DP report) of April 2011 which had been compiled by DP for its client Ferrostaal. It was common cause that this report was in the public domain. Nonetheless, the Commission refused to admit it on the grounds that it was placed in the public domain~~'s~~ stealthily, without the consent of Ferrostaal and Ferrostaal had not waived its right of professional privilege.

[35] Ferrostaal was a company that formed part of the German Submarine Consortium which was awarded a contract to supply the South African Navy with three submarines in terms of the SDPP. The DP report contained a detailed investigation into the conduct of Ferrostaal in its various markets around the world. The particular focus of its report was on whether it had engaged in corruption or other wrongdoing in conducting its business. This investigation included its role in the SDPP.

[36] The Commission stated that the DP report was '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'. However, Mr Budlender submitted that the Commission did not explain how the report had been made available 'on a confidential basis' or how the Commission could accept the document on this basis, consider its contents, describe and address the contents in its Report while at the same time insisting that it not be admitted into evidence.

[37] In Mr Budlender's view, the approach of the Commission to the DP report was fundamentally flawed, when examined against established South African law regarding privilege. In this connection he referred to *SAA v BDFM Publishers* 2016 (2) SA 561 (GJ) where Sutherland J said the following with regard to the manner in which a client might invoke a negative right refusing to permit disclosure of documents prepared by his legal advisor by invoking 'the shield of privilege':

> 'The client may indeed restrain a legal advisor on the grounds of their relationship, and may also restrain a thief who takes a document evidencing confidential information on delictual grounds.
>
> But if the confidentiality is lost and the world comes to know the information, there is no remedy in law to restrain publication by strangers who learn of it. This is because what the law gives to the client is a 'privilege' to refuse to disclose, not a right to suppress publication if the confidentiality is breached. A client must take steps to secure the confidentiality and, if these steps prove ineffective, the quality or attribute of confidentiality in the legal advice is dissipated. The concept of legal advice privilege does not exist to secure confidentiality against misappropriation; it exists solely to legitimise a client in proceedings refusing to divulge the subject-matter of communications with a legal advisor, received in confidence. This vulnerability to loss of the confidentiality of the information over which a claim of privilege can and is made flows from the nature of the right itself.' (at paras 48-49)

[38] Mr Budlender submitted further that a reading of the report revealed that the conclusion of the Commission to the effect that, had the DP report been admitted, it would not materially have altered the findings of the Commission because its investigation and ultimately its findings had revealed no evidence of bribery, fraud or corruption in the SDPP was totally incorrect. In this connection, he referred to the contents of the report of which the following extract is of particular importance and is thus cited extensively:

> '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 its own 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 that there was no intent or expectation that they would provide the indicated services, and that 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 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 m invoice from Georgiadis was insufficient to justify such a large payment. The CEO peremptorily told the CFO that he was wrong and ordered that the payment be made. The CFO did not raise further objections or conduct additional checks…
>
> Through his companies Mallar Inc. and Alandis (Greece) S.A., Georgiadis was paid £16.5 m 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 $20 m "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.
>
> Tony Ellingford was 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 1990's, 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 the late 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 arranged 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 control organs or, indeed, a tax audit.'

[39] Mr Budlender submitted that, in the light of the contents of this report, and particularly the passages cited, it was inexplicable that the Commission had neither subpoenaed, interviewed nor questioned any of the individuals implicated in this report. It failed to seek from Ferrostaal or Debevoise and Plimpton any material that formed the evidentiary basis for this report. In particular, no effort was made to

investigate the basis of any of the serious and sustained allegations against Mr Georgiades and Mr Ellingford.

[40] Mr Ellingford had been appointed as a consultant to Ferrostaal specifically because he was perceived to have useful political connections. He had been appointed on the basis of a recommendation made by Mr Llewellyn Swan, who at the time was the CEO of ARMSCOR. The report also contained the view of one witness that Mr Geogiades was a key conduit to politicians and that both he and Mr Ellingford had been paid 'to provide political access'.

[41] The report said the following in relation to Mr Swan and his relationship to Ferrostaal:

> '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 contact 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 payments or promises of payment, but Swan's position was a significant red flag that Ferrostaal ignored.'

[42] The report thus concluded that Mr Swan's position and role were 'a significant red flag'. None of this was investigated by the Commission. The report was ignored on the basis of a manifestly incorrect reading of the law relating to privilege.

The draft Auditor General Reports

[43] The Auditor General initially produced draft reports on the SDPP. Unlike the final report, these reports pointed to major procurement irregularities across the entire SDPP process. The Commission considered that the draft reports were inadmissible although they contained material of significant importance which was not contained in the final report. According to Mr Budlender, these differences should have prompted questioning by the Commission as to why material which had been contained in the final draft report had been excluded from the final report.

[44] The Commission refused to admit the 'final' draft report on the basis that the second respondent was not sure whether the draft report made available to it was the final 'draft version' notwithstanding that the record showed that the Commission had been given the final version of the draft report and that the Auditor General had given permission to provide this report to witnesses, who wished to rely upon it on condition that they took an oath of secrecy for national security reasons. All of this information was contained in a letter of the Auditor General, Mr Terence Nonbembe, to the Commission on 16 May 2013. The upshot was that information contained in the final draft report and the reasons for the discrepancies between it and the final report were never examined by the Commission, notwithstanding that the draft report contained numerous allegations of corruption which were relevant to the Commission's remit.

Relevant records of criminal proceedings

[45] The Commission refused to take account of the record of the proceedings in *S v Schabir Shaik* (2005, case number: CC 27/04). It is difficult to divine precisely the reason as to why the Commission failed to consider this record and findings of the Court in the Schabir Shaik trial as well as the criminal proceedings brought against former President Zuma. See *S v Jacob Zuma, Thint Holdings (Southern Holdings) (Pty) Ltd and Thint (Pty) Ltd*. From the Commission's report, it appears that it concluded from an internal memorandum of 1 December 2008 from investigators at the DSO to Advocate Mpshe SC of the NPA, that the matters canvassed in the Schabir Shaik trial and the investigation and the criminal proceedings relating to Mr Zuma had nothing to do with SDPP.

[46] Mr Budlender submitted that the Commission had misconstrued this internal memorandum. In evidence before the Commission, Colonel du Plooy, an investigator into the SDPP from 2008, testified that this internal memorandum was not designed to suggest that the Shaik and Zuma cases had nothing to do with the SDPP but rather that in addition thereto they had dealt with matters which went beyond the SDPP.

[47] Comments made by the second respondent during the questioning of Colonel Du Plooy on 18 May 2015 provide some basis for an understanding of the approach that was adopted by the Commission:

> '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 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.**' (our emphasis)

[48] Mr Budlender submitted that this passage of evidence showed the extent to which the Commission misconceived the significance of the Shaik trial and misdirected itself in simply failing to investigate the content of the record in this case. He argued that the fact that the trial dealt with issues which occurred after the procurement contract was signed is hardly the point, in that, if bribes had been accepted by the relevant parties to ensure that no adverse consequences would follow from contracts that might have been illegally procured, these actions were manifestly relevant to the inquiry to be undertaken by the Commission.

[49] In short, argued Mr Budlender, Mr Schabir Shaik was found guilty of soliciting from Thompson – CSF a payment of R 500 000 per year for the benefit of former President Zuma until the payment of the first dividends owing to African Defence Systems. In return, former President Zuma would protect Thompson – CSF from investigations into the SDPP and support and promote its business interest in the country. These were, according to Mr Budlender, clearly issues which were central to the Commission's mandate but it inexplicably, indeed irrationally eschewed any interest in examining the trial record and its implications for its inquiry into the SDPP.

Evaluation

[50] It bears reemphasis that this case does not concern the merits of the SDPP, nor the veracity of any allegation of corruption or wrongdoing pursuant thereto. This Court is only required to determine whether the Commission, in undertaking its task, failed to comply with the requirements of legality and rationality which are the tests to be applied in respect of an application to review the Commission's findings. Again

we reitirate that the factual matrix set out by the applicants is uncontested and thus has to be taken as the factual basis upon which the decision to review and set aside the Commission's findings is predicated.

[51] To return to the law relating to the powers of this Court to review the Commission's findings, while no individual party's rights were detrimentally affected or determined detrimentally as a result of the findings of the Commission, the latter operated manifestly in the public interest. The Commission was granted extensive public powers through the Commissions Act 8 of 1947 in order to investigate and make recommendations on a matter of major public importance so as to bring finality to a controversy which had bedevilled South Africa almost from the dawn of democracy. A significant amount of R 137m of taxpayers' money was spent in order for the Commission to complete its mandate. In the exercise of its functions, the Commission had to act within the confines of legality. It could not, for example, perform its tasks by demonstrating bias, breach fundamental principles of fairness or commit significant errors of law such as refusing to admit evidence on manifestly incorrect legal grounds.

[52] As the Federal Court of Canada said, in *Chretien v Canada Ex-Commissioner of Inquiry into the Sponsorship programme and Advertising Activities* [2009] 2 FCR 417 at para 66, it is well established that the standard of review analysis does not apply to issues of procedural fairness, in that 'they are always reviewed as questions of law and, as such, the applicable standard of review is correctness. No deference is owed when determining the fairness of the decision makers' process. If the duty of fairness is breached, the decision in question must be set aside.' In *Chretien,* the

issue was whether the public inquiry Commissioner breached procedural fairness by demonstrating bias; 'procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an important decision-maker.' (para 67)

[53] In the present case, even on the basis of the limited set of examples contained in this Judgment, it is clear that the Commission failed to enquire fully and comprehensively into the issues which it was required to investigate on the basis of its terms of reference. This is evident from the failure to examine the DP report or the evidence which emerged from the Schabir Shaik trial which it refused to admit and thus consider evidence which was highly material to its inquiry. All this evidence was in its possession. The manner in which the evidence leaders and members of the Commission approached critical witnesses, particularly Mr Chippy Shaik and Advocate Hlongwane exhibited a complete failure to rigorously test the versions of these witnesses by putting questions to them with the required open and enquiring mind. Given the welter of allegations contained in material in the possession of the Commission against them, it failed to confront these witnesses with these serious allegations which were made against both in respect of corruption and wrongdoing.

[54] The questions posed to these individuals in particular, were hardly the questions of an evidence leader seeking to test extremely serious allegations that went to the heart of the reason for the establishment of the Commission. Additionally, other than being influenced by the alleged lack of authenticity of the documents on which the allegations against Mr Shaik were based, the Commission seems to have been content to simply put the allegations to Mr Shaik and then to accept his denial

thereof. This is hardly an investigation whose objective is to get to the bottom of the allegations.

[55] It cannot be the *modus operandi* of an independent commission, determined to discharge its mandate, to ask peripheral questions to implicated witnesses and thus fail to test the veracity of the evidence in terms of documents, reports and records which were readily available to it.

[56] The Commission also accepted, without demur, the evidence of Mr Shaik regarding allegations of bribes made by Bell Helicopters, the alleged instruction to Thompson – CSF to ensure that African Defence Systems would be partially owned by Nkobi Holdings which, in turn, was owned by his brother Schabir Shaik.

[57] Advocate Hlongwane was treated even more generously in that no questions were put to him by the Commission, notwithstanding the damning SFO affidavit and the further affidavits from the DSO and NPA with regard to the search and seizure application of Advocate Hlongwane's premises and preservation order in respect of funds frozen in Liechtenstein. Advocate Hlongwane filed a statement with the Commission.

[58] The statement filed by Advocate Hlongwane with the Commission, contains general denials of any wrongdoing on his part or by any of his companies. In this statement, Advocate Hlongwane states –

> '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, 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…
> 7.1 I was never employed by the Government of the Republic 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 itys involvement as consultant to BAE is fully explained in the BAE submission to the Commission. My Companies' involvement was underpinned and supported by 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 then procurement process in order to influence such person relating to the award or conclusion of any of the contracts awarded and concluded in the SDPP.'

[59] An examination of Advocate Hlongwane's witness statement called for further investigation. For example, he stated that his relationship with BAE Systems began in 2003 by way of an agreement between Hlongwane Consulting and SANIP. This was contradicted by the SFO affidavit which claimed that the relationship began at least by late 1999. His witness statement made no mention of the second 'overt consultancy agreement in Hlongwane Consulting and BAE Systems of 09 September 2003 backdated to January 2002.

[60] It must be pointed out that nowhere in the statement does Advocate Hlongwane deal with BAE's web of companies with which he and his companies conducted their dealings as well as the payments detailed above that flowed into his companies' coffers. In addition nowhere does Advocate Hlongwane explain what services he and his companies rendered to BAE to justify the significant amounts of money that were channelled to his companies by BAE through its web of companies. The Commission did not enquire into these issues despite the damning allegations in the affidavits by Murphy, Du Plooy and Downer. Similar allegations are also

contained in the Auditor Generals draft report which the Commission paid no attention to whatsoever.

[61] There was no attempt to confront Advocate Hlongwane with that which had been alleged in the SFO affidavit, namely that Hlongwane Consulting had been paid more than £10m between September 2003 and January 2007 or how the agreement had been varied on 05 September 2005 'to allow for a US $8m *ex gratia* payment 'in full and final settlement for all additional work regarding Gripen Tranche 3'. The Hlongwane witness statement was equally silent on the approximately R 60 m transferred to him from Arstow Commercial.

[62] A commission which was intent on enquiring and thus determining the truth could not have accepted this witness statement without careful interrogation. However when Advocate Hlongwane testified, there was only one occasion on which he was probed with regard to matters outside of his witness statement. The evidence leader Advocate Mphaga asked Advocate Hlongwane about the joint submission which had been made by Messrs Andrew Feistein and Paul Holden, both of whom had written books about the SDPP.[11]

[63] Advocate Mphaga asked Advocate Hlongwane the following:

> '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

[11] Feinstein wrote After the Party (2007) and Holden wrote The Arms deal in your Pocket (2009) There was also a third book by Hennie van Vuuren co-authored with Holden called the Devil in the Detail: how the arms deal changed everything. (2011) None of these texts appear in these to have been examined carefully by the Commission, although each contains detailed footnotes supporting the allegations contained therein.

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 they were not [indistinct]. We will deal with the issue relating to the quantum once and for all.

ADV. HLONGWANE: We should 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 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~~y~~ way they doing. But the fundamental question to me is no evidence had been led about my influence or doing anything untoward. If no evidence had been led, again I say it with respect, I am here now, yes 1.5 does not apply to me, but if the issues is quantum, then my fellow consultants should be here with me, canvased by the same major.'

[64] Advocate Hlongwane was then permitted to ramble on about all manner of complaints about the motivations for the allegations against him which had little to do with the terms of reference of the Commission nor did he address any of the allegations levelled against him. The evidence leaders failed to ask any questions with regard to the specific pieces of the evidence which were available to the Commission, nor was one single question put to Advocate Hlongwane by members of the Commission. In short, there was a manifest failure to probe any of the manifold allegations against Advocate Hlongwane, notwithstanding the supporting evidence available to the Commission.

[65] The Commission accepted as common cause evidence that former President Thabo Mbeki, then deputy President of South Africa, had played no part in the awarding of sub-contracts to Thompson – CSF, despite evidence of an encrypted fax which implicated him in the awarding of the Thompson – CSF contract. In this connection there was evidence from Dr Richard Young, who had referred to oral evidence of Pierre Moyot during the Schabir Shaik trial, where the latter had testified that Thompson – CSF and African Defence Systems had actively sought political backing at the highest political levels. Dr Young referred to the encrypted fax where Moyot claimed that former President Mbeki had given his assurance that Thompson – CSF would be awarded the contract for the combat suite and its sensors. To this the second respondent said:

> '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 subsistence, I find that a bit strange.'

[66] This passage reveals an approach which ran through the proceedings of the Commission, namely that second respondent, who was the Chairperson of the Commission, adopted the position that the evidence given by what were referred to as non critical witnesses were "known facts" and evidence given by critical witnesses, such as Dr Young, were merely theories. Manifestly, implicated witnesses would hardly suggest any wrongdoing which had been perpetrated by them. Their evidence had to be treated cautiously and subjected to rigorous scrutiny for that was effectively what the role of the Commission was intended to achieve in order to arrive at an

accurate set of findings. But it is evident in the record of the Commission, for example, of its approach to Mr Chippy Shaik and Advocate Hlongwane, when it came to implicated witnesses, the Commission became supine.

[67] Mr Budlender further submitted that the Commission failed to access information that was highly relevant to the work of the Commission. This was a reference to the Commission's refusal to initiate diplomatic processes to access information held by the German, Swiss, Swedish, the West Indies and Liberian authorities. This submission is based on uncontested allegations by the applicants who have demonstrated the relevance of the information held by these authorities. The failure of the Commission to access this information, relevant as it was to the issues it was enjoined to investigate, seriously hobbled its investigation. It is a failure that effectively deprived the Commission of the essence of the investigation it was established to undertake. Coupled with a myriad other issues that the Commission failed to enquire into, such as the allegations contained in the SFO documents, the settlement between BAE and the US Dept of State as well as the matters involving Ms Juleikha Mahomed, we are fortified in our view that the enquiry and investigation that the Commission was called upon to undertake never materialised.

[68] As Cora Hoexter Administrative Law in South Africa (2nd ed) at 418 has noted, the constitutional principle of legality operates as a much needed safety net for exercises of public power that do not amount to administrative action. Adapting the approach set out in *Albutt, supra,* the principle of legality and its underlying source, the rule of law, dictate that there must be a rational relationship between the exercise of a public power and the objectives for which it is exercised. In this case, the objects

were to investigate with an open mind in order to reveal the truth to the public on a matter of the utmost public importance, one, as we have indicated, which had bedevilled the constitutional democracy in this country since its dawn.

[69] Based on the uncontested evidence presented to this Court, the Commission failed manifestly to enquire into key issues as is to be expected of a reasonable Commission. It refused to admit critical reports such as, the DP Report, at best for it on the basis of a clearly inaccurate understanding of the law of privilege. It accepted facts as common cause when a reasonable commission would have probed the evidence in order to test the veracity of the evidence from what were referred to as non critical witnesses. It refused to examine the proceedings of the Schabir Shaik trial on the inexplicable basis that somehow the record of that trial was not relevant to the fundamental nature of the Commission's inquiry. At best for the Commission, it failed to appreciate that 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. Commissions are designed to allow an investigation which goes beyond what might be permitted in a Court.[12]

[70] We accept that Courts must be cautious before exercising a power of review over the proceedings of a commission. To exercise a review power in an overzealous fashion would be to subvert the flexible nature of a commission's choice of procedure and constrain many decisions that a commission must make along the way to its

[12] *Bongoza v Minister of Correctional Services and others* 2002 (6) SA 330 (TkH) at para 17

ultimate findings. However where the uncontested evidence reveals so manifest a set of errors of law, a clear failure to test evidence of key witnesses, a refusal to take account of documentary evidence which contained the most serious allegations which were relevant to its inquiry, the principle of legality dictates only one conclusion, that the findings of such a commission must be set aside.

Costs

[71] Mr Budlender submitted that as this application had been opposed by the fourth, fifth, sixth and seventh respondents albeit that they withdrew their opposition when the time came for them to file answering affidavits, justified an order of costs in favour of the applicants. He contended that the initial opposition from respondents was sufficient to justify such an award. In our view, an award of costs can be justified in this dispute until such time as the respondents withdrew their opposition to the relief sought.

[72] Accordingly the following order is made:

1. The findings of first respondent issued and published in a report released to the fifth respondent on 30 December 2015 and made available to the public on 21 April 2016 are hereby reviewed and set aside.
2. Fourth, fifth, sixth and seventh respondents are ordered to pay the costs of the applicants, including the costs of three counsel, which were incurred until the withdrawal by fourth to seventh respondents of their opposition to the application.

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MLAMBO JP

JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT

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DAVIS JP JUDGE PRESIDENT OF THE COMPETITION APPEAL COURT

_____

LEEUW JP

JUDGE PRESIDENT OF THE NORTH WEST DIVISION OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANTS: G. Budlender SC; K. Pillay & S. Khoza

INSTRUCTED BY: Harris Nupen & Molebatsi Inc.

FOR THE FIRST RESPONDENT:

INSTRUCTED BY: NO APPEARANCE

FOR THE SECOND RESPONDENT:

INSTRUCTED BY: NO APPEARANCE

FOR THE THIRD RESPONDENT:

INSTRUCTED BY: NO APPEARANCE

FOR THE FOURTH – SEVENTH RESPONDENTS : N. A Cassim SC;

INSTRUCTED BY: MR I CHOWE

State’s Attorney

PRETORIA