

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

CASE NO: 81368/16

In the matter between:

CORRUPTION WATCH

First Applicant

RIGHT2KNOW CAMPAIGN

Second Applicant

and

THE ARMS PROCUREMENT COMMISSION

First Respondent

WILLIE LEGOABE SERITI N O

Second Respondent

HENDRICK MMOLLI THEKISO MUSI N O

Third Respondent

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Fourth Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Fifth Respondent

THE MINISTER OF DEFENCE

Sixth Respondent

THE MINISTER OF TRADE AND INDUSTRY

Seventh Respondent

FILING SHEET: APPLICANTS' SUPPLEMENTARY FOUNDING AFFIDAVIT

**PRESENTED FOR SERVICE AND FILING: SUPPLEMENTARY FOUNDING
AFFIDAVIT OF DAVID LEWIS**

Dated at Johannesburg on 11TH day of October 2018



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TO:

**THE REGISTRAR
HIGH COURT
PRETORIA**

AND TO:

THE ARMS PROCUREMENT COMMISSION

First Respondent

WILLIE LEGOABE SERITI NO

Second Respondent

HENDRICK MMOLLI THEKISO MUSI NO

Third Respondent

C/O THE STATE ATTORNEY

316 SALU Building

Cnr Francis Baard and Thabo Sehume Street

PRETORIA

AND TO:

THE STATE ATTORNEY

Fourth to Seventh Respondents' Attorneys

316 SALU Building

Cnr Francis Baard and Thabo Sehume Street

PRETORIA

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INDEX TO SUPPLEMENTARY FOUNDING AFFIDAVIT, VOLUME 1

NUMBER	DOCUMENT	DATE	PAGE NUMBER
1	Supplementary Founding Affidavit	10/10/2018	469 - 534
2	Annexure HNM 1 - Email from S Dass to State Attorney	18/01/2017	535
3	Annexure HNM 2 - Letter from State Attorney to S Dass	03/02/2017	536 - 537

4	Annexure HNM 3 - Email from S Dass to State Attorney	20/02/2017	538
5	Annexure HNM 4 - Applicant's Notice in Terms of Rule 30A(1)	08/03/2017	539 – 541
6	Annexure HNM 5 - Letter from State Attorney to the Chief Registrar of the High Court	24/03/2017	542 – 543
7	Annexure HNM 6 - Letter from S Dass to State Attorney	05/04/2017	544
8	Annexure HNM 7 - Letter from S Dass to State Attorney	18/04/2017	545
9	Annexure HNM 8 - Index of Documents not Included in Rule 53 Record	18/04/2017	546 – 552
10	Annexure HNM 9 - Letter from State Attorney to S Dass	26/04/2017	553 – 554
11	Annexure HNM 10 - Applicant's Notice in Terms of Rule 30A(1)	02/06/2017	555 – 558
12	Annexure HNM 11 - Applicant's Notice of Set Down – Unopposed Motion Roll in Terms of Rule 30A(2)	15/08/2017	559 – 567

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SUPPLEMENTARY FOUNDING AFFIDAVIT

Handwritten signature/initials

Table of Contents

INTRODUCTION.....	3
ATTEMPTS TO GAIN ACCESS TO THE RECORD	4
SUMMARY OF THE RECORD PROVIDED	13
NO EVIDENCE TO CONTRADICT FOUNDING AFFIDAVIT.....	14
FAILURE TO INVESTIGATE OR RECORD EVIDENCE OF CORRUPTION IN RELATION TO THE LIGHT UTILITY HELICOPTER CONTRACT.....	14
THE COMMISSION'S FAILURE TO ACCESS DOCUMENTATION FROM THE SERIOUS FRAUD OFFICE AND FAILURE TO INVESTIGATE ALLEGATIONS RELATED TO MR THABO MBEKI AND MS STELLA SIGCAU	20
THE COMMISSION'S FAILURE TO INVESTIGATE ALLEGATIONS IN RELATION TO MR SETH PHALATSE AND MR SIPHO ZIKODE	33
THE COMMISSION'S FAILURE TO ACCESS DOCUMENTATION AND INFORMATION FROM SWEDISH AUTHORITIES.....	38
FAILURE TO ADMIT THE DRAFT AUDITOR-GENERAL'S REPORT: FURTHER COMPOUNDING FACTORS.....	42
THE COMMISSION'S DILATORY APPROACH TO REQUESTING DOCUMENTATION FROM GERMAN AUTHORITIES	45
THE ATTITUDE OF EVIDENCE LEADERS REGARDING THE FUNCTION OF THE COMMISSION	51
FAILURE TO INVESTIGATE MATTERS REGARDING JULEKHA MAHOMED	54
FAILURE TO INVESTIGATE ALLEGATIONS MADE BY MR AJAY SOOKLAL	59

I, the undersigned

DAVID LEWIS

do hereby make oath and state that:

INTRODUCTION

1. I am the Executive Director of Corruption Watch.
2. I am duly authorised to depose to this affidavit on behalf of Corruption Watch, the first applicant.
3. The facts deposed to herein are within my personal knowledge unless stated to the contrary or otherwise appears from the context and are to the best of my belief true and correct.
4. The applicants in this matter seek, *inter alia* an order reviewing and setting aside the Report of the Arms Commission, also known as the Seriti Commission ('the Report').
5. The application was issued on 17 October 2016, and served on: the first respondent on 17 October 2016; second and third respondents on 20 October 2016; and the fourth to seventh respondents on 21 October 2016.
6. The application is opposed by the fourth, fifth, sixth and seventh respondents, who are represented by the state attorney.
7. In the remainder of this affidavit, I shall first address, in some detail, the difficulties the applicants have experienced in obtaining the record in this matter. Thereafter, I shall



address the applicants' grounds of review as supplemented. I do so in the order as appears in the table of contents to this affidavit.

ATTEMPTS TO GAIN ACCESS TO THE RECORD

8. The second respondent was required to deliver the record of the proceedings in terms of Rule 53(1)(b) of the Uniform Rules of Court ('**the record**') within 30 days of service of the application on them (i.e. 28 November 2016).
9. The position in respect of the second and third respondents was made clear from the very outset as the state attorney informed the offices of our attorneys, Harris Nupen Molebatsi Inc ("**HNMI**"), that the second and third respondents had instructed him to advise the applicants that they are no longer on duty for the execution of any functions of the first respondent; they no longer had the record in their possession; and that the record had been archived by the Department of Justice and Constitutional Department.
10. This notwithstanding, as is apparent from what is set out below, there have been endless delays in respect of the delivery of the record. The process of obtaining the record can only be described as one marked by endless delays, obstructionism and a reluctance to co-operate in making all relevant information available.
11. In e-mail correspondence from HNMI dated 18 January 2017 (attached as '**HNMI1**'), HNMI confirmed the content of a telephonic conversation that had occurred between an attorney at HNMI at the time (Ms Dass) and the state attorney (Mr Chowe). In terms thereof, HNMI advised that:

11.1. The *dies* for the filing of the record had expired.

- 11.2. The state attorney had confirmed that he had instructed the Department of Justice to compile the record but, on account of the extent of the documentation, there had been a delay in doing so.
- 11.3. The state attorney had undertaken to consult with the appropriate person at the Department of Justice to determine whether the compilation of the record had been completed and/or compressed into electronic format.
- 11.4. The state attorney had advised that he hoped to have the record available at the end of January 2017 but that it was more likely to be made available in the first week of February 2017.
12. HNM subsequently agreed to an extension of time for the delivery of the record to 6 February 2017.
13. On 3 February 2017 the state attorney responded to HNM (attached as 'HNM2') in terms whereof he advised *inter alia*, as follows:
- 13.1. That since the last engagement with HNM, the state attorney had consulted with their clients and that due to the volume of the record it would not be possible to deliver the record in the first week of February 2017 as had been previously contemplated.
- 13.2. That the legal representatives of the parties should '*hold a meeting and agree on ways of getting the relevant parts of the record filed and/or where possible request the office of the Deputy Judge President of the Pretoria High Court to allocate a Judge to schedule the matter on a Case Management roll.*'

14. On 20 February 2017, HNM responded to the state attorney by email (attached as 'HNM3'). That email referred to:

14.1. The various undertakings that had been given to provide the record, all to no avail.

14.2. The applicants' only option as being to bring an application to compel.

15. On 9 March 2017, and as a result of the ongoing failure to provide the Record, the applicants delivered a notice in terms of Rule 30A(1) ('**the First Rule 30A Notice**'), attached hereto as 'HNM 4'. The First Rule 30A referred to the second respondent's failure to deliver the record (in hard copy and electronically), which included all letters, memoranda, reports, minutes and other material that served before the first, second and third respondents and upon which the findings of the first respondent were based, together with such reasons as the second and third respondents are required by law or desire to make or give.

16. The state attorney still failed to comply, and on 20 March 2017 HNM again wrote to Mr Chowe, placing him on terms to file the record.

17. On 24 March 2017 (attached as 'HNM5') the state attorney addressed correspondence to the Chief Registrar of the High Court advising, *inter alia*, that the record was simultaneously filed together with that correspondence.

18. On 5 April 2017, HNM wrote to the state attorney (attached as 'HNM6') advising that: (a) they were in the process of reviewing the record; (b) on a cursory inspection, it appeared to contain some omissions but that HNM would revert once the task of

reviewing the record had been complete; (c) that due to the volume, the applicants would not be able to supplement their founding affidavits in accordance with the timeframes prescribed in the Rules and that an indulgence was sought – HNM undertook to revert in due course with an anticipated date for filing.

19. On 18 April 2017 HNM addressed correspondence to the state attorney requesting, with reference to a concise list, all of the documents that had been omitted from the record; the letter also requested that these documents be filed forthwith. A copy of the letter is attached as 'HNM 7'. As is apparent from Annexure A to HNM 7, the list of documents that were omitted was extensive ("HNM 8").
20. The state attorney responded on 26 April 2017 (attached as 'HNM 9'), advising *inter alia* as follows:
 - 20.1. That the second and third respondents had instructed the state attorney to advise the applicants that they are no longer on duty for the execution of any functions of the Commission as they had both returned to sit in the SCA.
 - 20.2. That the second and third respondents do not have in their possession or under their control, any documents pertaining to the present application and that all of the documents which had been made available were archived by the Department of Justice and Constitutional Development.
21. This response necessitated a further Notice in terms of Rule 30A ('**the Second Rule 30A Notice**'), which is attached as 'HNM10'.

22. There was no response to the Second Rule 30A Notice and nor were any of the outstanding documents provided.
23. As such, on 22 August 2017, the applicants were left with no option but to set the matter down in terms of Rule 30A (2); it was subsequently enrolled on the unopposed roll for 27 November 2017. A copy of the Rule 30A (2) application is attached hereto as 'HNM 11'.
24. Notwithstanding the set down, the respondents' silence continued. It was only on 13 November 2017 that HNM received a letter from the State Attorney, attached hereto as 'HNM 12'. In that letter, the state attorney explained, in some detail the reasons for not having been able to provide the complete record. Despite numerous telephone conversations with the State Attorney emphasising the need for the record to be provided on an urgent basis, this was the first correspondence that HNM had received from the respondents since the delivery of the hard drive on 24 March 2017.
25. On 15 November 2017, HNM responded to the state attorney's letter (attached as 'HNM 13'), impressing on the state attorney to ensure that there are not any further delays and that the record is filed as a matter of urgency.
26. On 27 November 2017, at a hearing of the application to compel, the state attorney served the respondent's answering affidavit in which it was stated that they intended to comply with their duty to produce the record, and that the case should be put on case management. The parties ultimately agreed to postpone the application *sine die* and approach the Deputy Judge President to allocate a Judge to schedule the matter on a case management roll. The respondent's answering affidavit and the state attorney's letter



addressed to the Deputy Judge President are attached as 'HNM 14' and 'HNM 15' respectively.

27. HNM addressed a letter to the state attorney, dated 4 December 2017, marked as 'HNM 16', requesting access to the following documents which were provided to the first respondent by SAAB and referred to in Volume 1 of the Report; Chapter 2, section D(1), namely:
 - 27.1. SAAB's internal investigation into the 'SANIP issue', with supporting documents provided to the Commission by SAAB;
 - 27.2. all agreements entered into between SAAB and SANCO and/or NUMSA;
 - 27.3. minutes of meetings between SAAB and SANCO and/or NUMSA;
 - 27.4. all agreements entered into between SAAB and third parties relevant to the SDPP;
 - 27.5. all correspondence between the Commission and SAAB; and
 - 27.6. any submission or witness statement by SAAB to the Commission.
28. Having received no response to the above correspondence, HNM had a telephone conversation on 12 March 2018 with Mr. Isaac Chowe from the state attorney, wherein the latter confirmed that he had located the documents requested in the Rule 30A(1) Notice, which formed part of the record of the Seriti Commission.



29. After this telephonic discussion, and in line with the numerous previous requests as outlined above, the applicants were granted access to inspect the record on 23 March 2018 at the offices of the state attorney. The letter granting such access is attached hereto as 'HNM 17'.
30. Following the applicant's inspection of the documents, HNM wrote a letter to the state attorney on 5 April 2018, a copy of which is attached as 'HNM18'. That letter recorded, *inter alia*, the following:
- 30.1. That the documents set aside by the state attorney for the inspection did not match the record requested; and
- 30.2. That as a result, the state attorney agreed to allow the applicants the opportunity to inspect the record of the Commission and extract the documents requested in the Rule 30A Notice over an extended period of time.
31. Notwithstanding the previous undertakings on behalf of the respondents and as recorded in the letter from HNM dated 5 April 2018, in correspondence from the state attorney dated 6 April 2018 (attached as 'HNM19'), a different stance is adopted. That letter requested that HNM stipulate which documents were missing and stated that all requested documents should be collected before scheduling another date for inspection.
32. In response thereto, HNM sent correspondence to the state attorney on the same date (6 April 2018), marked as 'HNM 20', which emphasised that the respondents are obliged to produce, and the applicants are entitled to inspect, the whole of the record of the Commission, and requested that they provide suitable dates and times for the applicants to attend to the inspection of the record. It was emphasised that the record is not restricted

to the documents in the Rule 30A Notice, particularly given that the Commission, on its own version had acknowledged that the Record consists of many documents that are not listed in the Rule 30A Notice. A date for inspection was requested.

33. Again, no response was received to that letter despite requests made to the state attorney to respond as is apparent from 'HNM 21'.
34. On 4 May 2018, Ms Molebatsi (the attorney from HNM) had a telephone discussion with Mr Chowe from the state attorney, during which Mr Chowe committed to granting the applicants access to the full record. HNM confirmed the undertaking in an email, a copy of which is attached hereto as 'HNM 22'.
35. On 7 May 2018, the state attorney wrote to HNM (attached as 'HNM23') advising *inter alia* as follows:
 - 35.1. That almost two thirds of the work in identifying the documents contained in the Rule 30A Notice had been completed and that the process was underway in marking the documents and finalising the remainder of the requested documents; and
 - 35.2. A copy of the state attorney's letter dated 6 April 2018 was attached given that HNM had stated that it had not received the documents.
36. On 8 May 2018, HNM requested that the process of identifying the documents be completed by 22 May 2018, to allow for the inspection of the entire record. The letter also made it clear that the applicants would need unlimited access to the record which

would be for a period of up to two weeks during which they could adequately peruse the documents. A copy of this letter is attached as 'HNM24'.

37. Once again, the state attorney failed to respond to this request despite a follow-up email from HNM as per annexure 'HNM 25'.
38. In light of the history and challenges in obtaining the record, HNM finally put the state attorney on terms regarding the record being made available, in a letter dated 31 May 2018. A copy of this letter is attached as 'HNM 26'. In terms thereof:
 - 38.1. HNM demanded that the state attorney make the record available for inspection by the applicants within 5 (five) days, failing which the Rule 53 supplementary answering affidavit would be filed; and
 - 38.2. Should the record not be made available, the supplementary answering affidavit would be filed.
39. The state attorney finally advised HNM that access would be granted to inspect the record on 15 June 2018. The state attorney provided the applicants with access to 19 (nineteen) files for inspection.
40. The documents that were provided to the applicants for the above inspection were only a fraction of those which had been requested and did not match the list of documents requested by the applicants. Furthermore, many of the documents provided by the state attorney were incomplete.
41. Consequently, on 17 July 2018, HNM directed correspondence to the state attorney, attached hereto as 'HNM 27'. That correspondence requested that the state attorney

make the entire record available for inspection by the applicants within 5 (five) days of receipt of the letter, so as to ensure that the correct files had been received. Concern was expressed that the files that were received during the inspection may not have been in accordance with what had been requested by the applicants,

42. Yet again, no response was received from the state attorney; this, despite subsequent correspondence seeking a response as is apparent from 'HNM28'.
43. Accordingly after close on eighteen months and endless letter writing and other attempts to persuade the respondents to comply with their obligation to file a proper record, all to little or no avail, the applicants have decided to proceed to file their supplementary founding affidavit on the basis of the record as has been made available to us.
44. We submit that in the light of this history and the provisions of the Rules, the respondents should not be permitted to introduce or rely on any document that does not form part of the record that was made available to us. This will be addressed in argument to the extent necessary.

SUMMARY OF THE RECORD PROVIDED

45. As stated, documents were made available to the applicants on three separate occasions. On 24 March 2017, a computer hard drive was delivered to the applicants. The hard drive contained material that was already in the public domain, and on which the founding affidavit was based. It appears that the sum total of this disclosure was to place on a hard drive what had already been published on the Commission's website.
46. On 15 June 2018, 8 (eight) lever arch files were provided by the state attorney.

47. On 27 June 2018, 19 (nineteen) lever arch files were provided to the applicants by the state attorney. The files that were provided did not appear to correspond with files that had been viewed, and copies of which had been requested. As stated, the state attorney has not responded to correspondence in this regard.
48. The 19 lever arch files contained information which is relevant to the failure of the Commission to conduct a meaningful investigation. I deal with this below.
49. I refer to all of these materials as '**the record**'.

NO EVIDENCE TO CONTRADICT FOUNDING AFFIDAVIT

50. In paragraphs 159 to 531 of the founding affidavit, I made detailed allegations with regard to the Commission's failure to undertake a proper and meaningful investigation into the Arms Deal. There is nothing in the record provided by the state attorney which shows those allegations to be incorrect.
51. To the contrary, the record provides further proof of the Commission's failure to carry out the task which it was instructed to perform.

FAILURE TO INVESTIGATE OR RECORD EVIDENCE OF CORRUPTION IN RELATION TO THE LIGHT UTILITY HELICOPTER CONTRACT

52. At paragraphs 192 to 211 of the founding affidavit, I set out the failure of the Commission to investigate allegations of corruption in relation to the Light Utility Helicopter (LUH) Contract.

53. I do not traverse this again. The Commission's most meaningful attempt to investigate these claims was to ask Bell Helicopters for information related to the allegations, and at a late stage, to visit the Bell offices in Texas for a meeting.
54. The record shows that the Commission's attempt to access information from Bell was half-hearted and dilatory. The Commission first contacted Bell Helicopters on 29 June 2012 through a letter to Mr John Garrison, the President and CEO of Bell Helicopters [Annexure SA 1]. The letter stated:

"There have been numerous allegations of corruption, fraud and irregularities in the awarding and conclusion of the aforementioned contracts. Some of the offences alleged to have been committed by people who were involved in this procurement process have been proven in court and the persons concerned have been convicted and sentenced by the courts. However, a number of issues remain unresolved hence the appointment of this Commission.

Our preliminary investigations have revealed that: Bell Helicopters was one of the bidders for the supply of the Light Utility Helicopter, but withdrew from the bidding process as it was not prepared to pay a bribe; a number of figures attached to the Bell Helicopter bid have indicated that not only were the figures manipulated in ensuring that Agusta emerged the preferred bidder but also that this was done by means of inducements offered by Agusta to connected political individuals, one such figure being George Trail III, Canada's diplomatic envoy to South Africa from 1980 to the early 1990.

We invite your company to indicate whether there is any truth in these allegations and provide us with any information relating to this procurement that your company might have and that you think could be useful to this Commission in discharging its mandate.

The Commission would also appreciate receiving your views on whether it would be permissible under Canadian law to provide us with information at your disposal without a formal request for mutual legal assistance.

If there are any other institutions and/or persons that in your view might be able to provide useful information to the Commission, kindly provide us with their names and contact details."

55. On 18 July 2012, Mr Garrison replied to the Commission [Annexure SA2]. He indicated a willingness to share information where possible, stating:

"Bell Helicopter can confirm it was one of the unsuccessful participants in the referenced Light Utility Helicopters acquisition program. Bell Helicopter Textron Inc. is headquartered in Ft. Worth, Texas, U.S.A., and is not subject to Canadian law with respect to complying with South Africa's request for information regarding the referenced procurement. If Bell Helicopter can be helpful, I assure you it will be happy to cooperate.

I have asked Sherry Houchin, Bell's Deputy General Counsel for International and Commercial Business, to investigate further to determine if Bell may have any relevant records or employees who may have knowledge with regard to this specific procurement. Please be aware, however, that most likely Bell has not retained any records relating to this procurement, given that it occurred more than 13 years ago. Ms Houchin can be reached at: shouchmffin@bh.com, phone 001-817-280-6190."

56. The Chairperson responded to Mr Garrison the following day, saying only 'we acknowledge receipt of your letter dated 18 July 2012' and 'we look forward to hearing from you in due course.' [Annexure SA3]

57. The record shows that this was the last time the Commission made any attempt to access information from Bell Helicopters until September 2014, late in the life of the Commission, when it requested for a meeting in person.
58. In light of the seriousness of the allegations, and the openness of Mr Garrison's response to a request for information, it is inexplicable that the Commission failed to contact Bell Helicopters to follow up on the original inquiries for a period of over two years between July 2012 and September 2014. This dilatory attitude indicates that the Commission had no real interest in conducting a full and meaningful investigation into the LUH contract.
59. This failure of the Commission to pursue information from Bell diligently was compounded by the fact that the Commission made no attempt to follow up on, investigate, or report on important information that was given to it during its meeting with Bell Helicopters in October 2014. This meeting and its outcome are referred to at Paragraph 104 of Section 5.2 of Volume 1 of the Commission's final Report, which stated:

"As no information was forthcoming and its duration was drawing to a close, the Commission arranged a meeting with representatives of Bell Helicopters 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."

60. The record shows that this is not an accurate record of the meeting. Significant and relevant information that gave credence to allegations of corruption was excluded without any reason.

61. The record includes an undated and unsigned summary of a meeting held with regard to the LUH contract [Annexure SA4]. The content of the summary suggests that the meeting included Judge Seriti and representatives of Bell Helicopters. This unsigned note was included in the record contiguous with other correspondence between the Commission and Bell Helicopters. The main interlocutor appears to be a man named Rob (alternatively Mr Rob), whose full name is not disclosed. This may have been Robert Hastings Jr, who has served as the Executive Vice President, Chief Communications Officer and Chief of Staff of Bell Helicopters since May 2010. I submit that the content of the document shows that it was made by a member of the Seriti Commission team.
62. The content of the meeting was summarised as follows:

"Rob gives us a little bit of background

Judge seriti thanks the team for seeing us. He gives the team background about his and judge musi experience.

There are allegations by people who were not happy with the procurement: that Bell helicopter pulled out of the process after it refused to pay a bribe. It refused to acquire services of a company that would lobby on its behalf. That it was misled about the offsets. (refer to the letter from Mdumbe). The commission has to determine whether there was any corruption. Witnesses could not substantiate these allegations.

Bell is supportive of the efforts (mr rob). Has changed its compliance programmes to ensure that no such things happen. Could not find record that bell withdrew. Bell submitted the bid but was not selected. No services of the company were used. Bell was introduced by Shaik to FBS. A meeting was held and bell was required to make advanced payment and a monthly fee once a contract was identified. Bell rejected the notion of making advanced payment.

A decision was taken not to engage the company in question, this need could be met internally.

Chippy role was to introduce FBS. They wanted a monthly fee for offset services. Bell didn't need any offsets services. The statement that appeared in the press was correct. Bell doesn't have to retain records beyond the bid. Commentary that bell was misled cannot be corroborated.

The commission has all the documents and the information bell has is consistent with what the information knows. No information relating to mr shaik's involvement in the whole process."

63. The summary of the meeting unfortunately does not record what statement Bell's representatives were referring to when it was recorded that 'the statement that appeared in the press was correct.' I submit that this comment was most likely made in relation to one of the two media sources identified at paragraphs 199 to 200 of the founding affidavit. Both media items quoted a Bell representative, Dane Pranke, who repeated the claim that Chippy Shaik had 'strongly suggested' that Bell use the services of FBS.
64. The summary thus shows that the Commission was informed by Bell Helicopters that certain aspects of the allegations made in relation to the LUH contract regarding the role of Chippy Shaik and FBS were credible and substantiated. It is therefore difficult to understand why the Commission stated in its final report that 'Bell Helicopters was not aware that any bribe had been requested of it', when it appears that Bell was indeed introduced to FBS by Chippy Shaik, that FBS asked Bell Helicopters to make an 'advanced payment' and a 'monthly fee' for offset services it did not require, and Bell appeared to verify the content of a media item where a Bell executive was quoted as saying that Chippy Shaik 'strongly suggested' that Bell make use of FBS.

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65. The record shows that the Commission did not act on the information given by Bell and its representatives in the meeting. The Commission appears to have made no attempt to investigate the substance of these claims further, for example by asking Bell Helicopters to make a submission to the Commission or sending a representative to appear before it. The Commission's final Report, moreover, makes no mention of the aspects of this meeting that showed that Bell had affirmed that Chippy Shaik had, at the very least, introduced Bell to FBS. Instead, the Commission only repeated that Bell did not withdraw from the bid, the only allegation the Commission appears to have meaningfully tested.
66. The facts and content of the meeting as recorded in the summary are materially different to the version produced in the Commission's final Report. It is not clear why this should be so. At the very least, the record indicates that the Commission provided an inaccurate and incorrect summary of a vital meeting in its Report, and failed to report on the full details of Bell's interaction with Chippy Shaik and FBS.

THE COMMISSION'S FAILURE TO ACCESS DOCUMENTATION FROM THE SERIOUS FRAUD OFFICE AND FAILURE TO INVESTIGATE ALLEGATIONS RELATED TO MR THABO MBEKI AND MS STELLA SIGCAU

67. At paragraphs 73 to 80 in Section B(1), Chapter 2 of Volume One of the Commission's Report, the Commission set out its engagement with the UK's Serious Fraud Office (SFO) regarding the possibility of acquiring documents emanating from the SFO's investigation into BAE. I highlight paragraph 80, at which it was said:

"The Commission again met with the SFO in London. At this meeting, the SFO informed the Commission that:



A number of letters of request were submitted to other jurisdictions and that a number of these were never complied with

The letter of request for assistance from the German authorities was executed but the SFO did not keep any of the documents that it found in the offices of Alandis and Mallar Inc, both of which are companies belonging to Mr Tony Georgiadis. It recommended that the Commission should liaise directly with the German Prosecutors Martin Fischer and Lioba Borowski of the Landeskriminalamt of Nordrhein Westfalen in this regard.

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.

The SFO did not conduct an investigation into the affairs of Merian Ltd.

During the investigation of BAE, the SFO never found any evidence of untoward payments to officials of the South African government.

The SFO has no information beyond what is contained in Mr Murphy's affidavit."

68. 'Mr Murphy's affidavit' refers to an affidavit by the SFO's Gary Murphy. This affidavit [the 'Murphy affidavit'] and its contents are described in part at paragraphs 472 to 479 of the founding affidavit. The Murphy affidavit was deposed to assist the DSO to apply for search warrants to enter the residential and business premises of Adv Fana Hlongwane, John Arnold Bredenkamp and Bredenkamp's associates. The Commission acknowledges at Paragraph 58 of Volume One of its Report that it received documents from the DSO in relation to the search and seizure applications, which would have

included the Murphy affidavit. The affidavit was also referred to numerous times during the Commission's oral hearings.

69. Although the Commission is not explicit in this regard, it appears that it chose not to pursue any further requests for documentation from the SFO following the meeting described in Paragraph 80 of the Report.
70. The disclosed record contains a copy of the minute of the meeting between the SFO and the Commission described above [Annexure SA5]. The minute states that the meeting took place on 10 January 2014. Those attending for the Commission were Judge Seriti and Adv Fanyana Mdumbe. The representatives of the SFO present were recorded as Mr Raymond Amson [actually Emson], Brenda White and Gary Murphy.
71. The meeting took place in January 2014. The immediately preceding correspondence between the Commission and the SFO was on 14 December 2012, when the SFO wrote to the Commission about a number of matters. I return to that correspondence below. I note here, though, that it appears that there was a full year between the December 2012 correspondence and the Commission's meeting with the SFO in January 2014. The Commission made no attempt to access any documentation from the SFO for over a year. I submit that this is not the approach one would expect of a Commission if it was committed to fully and energetically investigating matters under its remit.
72. The information upon which the Commission placed the most faith appears as the final paragraph of the minutes, in which the following is recorded:

"The SFO stated that during its investigation of BAE it never found any evidence of onward payments to officials of government. Gary Murphy emphasised that the SFO has no information beyond what is contained in his

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affidavit. He further stated if he is called to give evidence at the Commission public hearings, he would not be in a position to provide additional information. All that the SFO found is contained in his affidavit."

73. As I show below, the record demonstrates that the statement attributed to Mr Murphy – that the SFO had no information beyond that in the Murphy affidavit – was incorrect. The Commission, which had the documents in the record, must have known it to be incorrect. Yet it did not investigate the matter further.
74. It is possible that Mr Murphy never made such a statement, or that he was grossly misunderstood. In either event, whether he did or did not make this statement is, in the end immaterial, as the Commission would have failed in its duties to conduct a full and meaningful investigation by relying on a statement that it must have known to be incorrect.
75. The minute of the January 2014 meeting shows that the Commission and the SFO were traversing issues not raised in the Murphy affidavit. One of these was the relationship between Adv Fana Hlongwane and Ms Stella Sigcau, a member of the Ministerial Team overseeing the SDPP. Mr Murphy commented as follows with regards to Ms Sigcau:

"He further states that they went to South Africa to receive information confirming that Adv Hlongwane was an adviser to Ms Sigcau who was then Minister for Public Enterprises after his resignation as adviser to the Minister of Defence. He says whilst they were on their way to the office of the Minister, his South African counterpart, Mr Johan du Plooy received a call informing him that a decision has been made that they should not be given access to the file."

76. Ms Sigcau was not mentioned in the Murphy affidavit and there is no indication in that affidavit that the SFO suspected that Adv Hlongwane had served as an advisor to her. A

Handwritten signature/initials

reasonable person would have wanted to know why the SFO was pursuing information regarding Adv Hlongwane's relationship with Ms Sigcau in South Africa if the SFO did not have information in its possession that would speak to this relationship.

77. The record shows that on 10 December 2012, the Commission wrote to Mr Raymond Emson of the SFO requesting information on a range of topics [Annexure SA6]. This request for information was informed by the exchange of information between the SFO and DSO during the DSO's investigation, which had been handed to the Commission by the DSO. The request asked for information that the Commission knew or must have reasonably suspected was in the possession of the SFO, but which was not traversed in the Murphy affidavit. For brevity's sake, I do not list every such example of this, but highlight the most notable.

78. At paragraph (b) of the December 2012 request, the Commission wrote:

" 'In her email date 27 September 2007, addressed to Senior Special Investigator Colonel Johan du Plooy, Ms Lydia Johnson [of the SFO] says the following in relation to Mr Seth Phalatse:

'We have evidence of an intimate meeting in 1998 between him, [Thabo] Mbeki and BAE executives. I've not come across him before, so if you have any information that would be great.'

We would be much obliged if you could provide us with copies of the evidence gathered by your office in relation to Adv Fana Hlongwane and Mr Seth Phalatse referred to by Mr Gary Murphy and Ms Lydia Jonson in their emails referred to in paragraphs (a) and (b) above. [emphasis in original]"

79. At paragraph (j) of the December 2012 request, the Commission indicated that Mr Gary Murphy had written an undated document titled 'Requested Assistance from the Scorpion

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[sic] in Relation to a Domestic/Parallel Investigation.’ In paragraph (k) of the December 2012 request, the Commission refers to the same document and asks for further information, stating:

“In relation to Dr Diliza Mji, Mr Gary Murphy stated, in the same document referred to above:

‘We understand that an individual, Diliza Mji was on the board of BAE Systems SA. We further believe that he was also a physician to Joe Modise. What is known to the Scorpions about Mji? What intelligence is available?’

We can confirm that Dr Diliza Mji is one of those people whose affairs and shareholding in South African entities controlled by BAE we are probing. We would therefore be grateful if you could provide us with any documentation you might have that relates to Dr Mji, in a document entitled ‘SPC 01: review of material obtained from BAE Systems under the 23rd section 2 notice dealing with the South African notice,’ which we assume emanates from your office, there is mention of meetings involving Dr Mji. It is also stated in this document that Messrs Richard Charter, Phalatse, Niall Irving, Dr Mji and former President Mbeki held a dinner. Were you able to establish from Messrs Irving and MacDonald what the purpose of this meeting was and where this meeting took place? We would appreciate it if you could provide us with evidence confirming that the meeting of 1998 referred to above indeed took place.’ [emphasis in original]”

80. Thabo Mbeki, Seth Phalatse and Diliza Mji are not mentioned in the Murphy affidavit or any of the annexes thereto. The dinner described above is not mentioned in the Murphy affidavit.
81. Richard Charter is discussed in the Murphy affidavit, which is briefly noted in paragraph 103.4 of the founding affidavit. The Murphy affidavit shows that Charter was the beneficial owner of both Huderfield Enterprises and Osprey Aerospace. The Murphy

affidavit further shows that Huderfield Enterprises entered a covert consultancy with BAE's Red Diamond and was paid approximately £26 million, including a one-off payment of \$4 million on the 2 December 1999, the day prior to the signing of the Hawk and Gripen contracts by the South African government. Charter was also paid via Osprey Aerospace, which had an overt consultancy with BAE Systems that the company did not disguise. Niall Irving was a BAE employee who was based in South Africa during the SDPP bidding phase and worked on the Hawk and Gripen campaigns.

82. I refer to Mr Phalatse later in this affidavit. I note here that he served as a non-executive director of Armscor during the SDPP selection process, and was Chairman of Armscor for a brief period in 2001. He was forced to resign his Chairmanship of Armscor in 2001 following allegations that he was embroiled in a corruption scandal at the Strategic Fuel Fund. Mr Phalatse would become the Chairperson of a company named GEMCO that in 2004 received \$20m in funding from BAE Systems as part of the BAE's offset programme.
83. The allegation that Mr Mbeki had an 'intimate dinner' with Messrs. Charter, Irving, Mji and Phalatse at some time in 1998 was very material to the work of the Commission. Mr Mbeki was the head of the Ministerial Subcommittee that was overseeing the selection process of the SDPP, and was appointed President of South Africa in 1999. The SDPP contracts were entered into with BAE Systems during his Presidency. A reasonable enquirer would want to know why Mr Mbeki was having an 'intimate dinner' with an overt and covert agent of BAE Systems, a director of BAE Systems South Africa, a BAE employee and an eventual beneficiary of BAE's offset programme, at the time he was overseeing the SDPP process.



84. Mr Mbeki was not asked about this dinner by the Commission during his appearance before it. Diliza Mji, Niall Irving and Seth Phalatse were not called to give evidence before the Commission (Charter could not be called as he is deceased). I submit that this shows that the Commission failed to conduct a meaningful investigation into this allegation, which compounds the Commission's failure to secure any documentation from the SFO on the basis of the January 2014 meeting.
85. Numerous witnesses provided the Commission with documents that emanated from the SFO but that were not included or referred to in the Murphy affidavit. Andrew Feinstein and Paul Holden informed the Commission that they had acquired a draft version of the Murphy affidavit, in their January 2013 Joint Submission to the Commission. This draft version included information that was subsequently removed from the Murphy affidavit relating to Ms Sigcau and Adv Hlongwane. The draft affidavit was provided to the Commission as Annex Y to the Joint Submission of Mr Feinstein and Mr Holden [Annexure SA7], which said:

"Earlier drafts of the affidavit submitted by the SFO, of which we are in possession (and relevant sections of which have been included amongst our annexes), included additional detail regarding the role of Arstow. The draft claimed that Arstow was explicitly used to make payments to both Fana Hlongwane and Stella Sigcau. Sigcau was a member of the Cabinet sub-Committee overseeing the Arms Deal. To quote from the affidavit:

'Arstow was incorporated in the British Virgin Isles on 16th September 1998, and was later dissolved and re-incorporated in Panama. According to the documentation received from BAE following service of a compulsory notice from the SFO, the personnel involved in Arstow are Alexander Roberts OBE (a UK national), Dr Hugh Thurston (a financial advisor based in Jersey) and Johannes Matt (a trust administrator based in Liechtenstein. In August 2007 the

SFO interviewed a senior BAE employee, Allan McDonald, who was the marketing manager responsible for the South African campaign until he left BAE in early 1999. Mr McDonald stated that Arstow was partly used by BAE to make commission payments to Fana Hlongwane, who had been special advisor to Joe Modise (Minister of Defence 1994 – 1999) and Stella Sigcau (Minister for Public Enterprises 1994-9 and Minister for Public Works 1999-2006) until some time in 1999.'

In 2009, one of the authors of this document (Paul Holden) was told by a senior member of the Serious Fraud Office that the SFO had conducted a wide-ranging investigation into claims that Stella Sigcau had received improper benefits from BAE. According to the investigator, the SFO had located significant evidence of benefits accruing to Stella Sigcau from BAE during the Arms Deal selection process and thereafter. The investigator claimed that Sigcau had received monies from BAE as well as benefits in kind. The benefits in kind included paying the school fees of Stella Sigcau's daughter at an exclusive English school, possibly based in London. The SFO had allegedly secured the audit trail indicating that the school fees were indeed paid by BAE. We have never seen such documents and cannot attest to their validity, but we are of the opinion that the investigator was a reliable source of information.

We thus urge the Commission to approach the SFO to access such documentation, if such documentation is still in the possession of the SFO."

86. Further information emanating from the SFO related to Ms Sigcau was included in the evidence of both Dr Richard Young and Colonel Johan Du Plooy, which largely substantiated Mr Holden's account above. I refer in particular to three documents that are attached to Colonel Du Plooy's witness statement as JDP49. All three of the documents plainly emanate from the SFO, as they are all prominently marked 'Serious Fraud Office.' In the interests of brevity, I focus on two documents.

87. The first document is a memorandum dated 4 September 1998 and signed by Mr McDonald, a BAE executive who worked on Hawk and Gripen deals in South Africa [Annexure SA8]. It is addressed to Terry Morgan and is written on British Aerospace stationery. Mr McDonald noted the following with regard to Ms Sigcau:

"There is one matter where I am going to need you and your team's professional help over the coming months. You will note from the information that I attach that the fact that we have got Hawk onto the final list is very much due to our friends in the country, rather than the quality of our ITP response. One friend who was, and remains, absolutely critical to our ultimate success for both Hawk and Gripen is Minister Stella Sigcau. You may recall she visited the UK recently and met with Peter Mandelson, and I interrupted my leave to host the visit.

She very privately asked for my support on a personal family matter. She has [a] very well educated daughter, who is 29 years of age, who has recently had the misfortune of experiencing an unhappy marriage arrangement. The Minister is a princess in the African culture, and even President Mandela pays regard to this fact in respect of Minister Sigcau. The breakdown of her daughter's marriage is causing her severe embarrassment. In the coming months, and after our success, she wants BAE, for two or three years, to provide a marketing job for her daughter in London. Such a job will have to pay sufficiently to provide a reasonable quality of life for the Minister's daughter and her two children. As you would expect, in view of the criticality of where we are in the decision making process and our fundamental reliance on the Minister's support, I gave all the right assurances to the Minister that we would very positively help address this personal family matter. To show sincerity I arranged for Niall Irving to meet with her daughter.

I have appraised Neils Peterson of this situation and asked him to ensure that in our South African budget we make provision for three years' support for the Minister's daughter. He has indicated the monies will be found to deliver this."

88. The second document is a fax message on Denel stationery to Mr Niels Peterson, a BAE executive and dated the 12th of October 1998 [Annexure SA9]. The fax message is signed by Portia Ndzamela, the daughter of Ms Sigcau, and reads:

"I would like to take this opportunity to thank you for the wonderful hospitality you gave to me whilst I was in London. The support services provided was outstanding and of the highest order.

Further, I would like to say that the discussions we had around the opportunities available to me within Lloyds Bank took place in a very relaxed and friendly manner, which allowed me to make decisions based on sound advice and good judgment.

I would also like to thank you for incorporating the position of my little girls into our discussions, and thus giving the comfort that they are not forgotten in the greater scheme of things."

89. The allegations against Ms Stella Sigcau are not addressed in the Commission's Report. The Commission did not ask BAE Systems to speak to the allegations, nor did they attempt to call Portia Ndlameza to appear before it. This reflects a further failure on the part of the Commission to investigate matters relevant to its Terms of Reference.
90. Returning to the Murphy affidavit: on 14 December 2012, Mr Emson emailed Adv Mdumbe of the Commission [Annexure SA10]. The email was sent in response to the letter of request sent by the Commission to the SFO on 10 December 2012, and was based on the feedback given to Mr Emson by two investigators, including Gary Murphy, regarding the Commission's request. The email explains that fulfilling the Commission's request would be time consuming. Mr Emson urged the Commission to revisit the Murphy affidavit so that the Commission could remove items from its request that were already covered by the Murphy affidavit. This plainly means that the SFO could then