

focus on providing documentation that was not included or referred to in the Murphy affidavit.

91. The email proposed a solution to the problem posed by the broadness of the Commission's affidavit, which effectively amounted to the SFO offering to help sharpen and focus the Commission's 10 December application. Mr Emson wrote as follows:

"For many of your requests it would be incredibly difficult simply to provide a bundle of documents: there may be thousands if not hundreds of thousands of digitally stored documents, so we need to narrow down the searches. Accordingly for many of your requests (eg. Your request relating to "Adv Fana Hlongwane") we propose liaising with you (through Gary Murphy) to agree specific search terms based on linked key words which are most likely to lead to relevant information coming to light. That is the only practicable way to deal with the breadth of some of your requests.

Once we have narrowed down the scope of your request, with reference to Gary Murphy's affidavit and the efficient use of search terms, we will be in a position to decide what might be relevant and whether we are able to provide relevant documents to you. Our domestic law places a number of obstacles in our way as to what we can disclose, and what we need to do before disclosure (eg, seek the views of the persons from whom the information was obtained) and in some cases we may also have to liaise with other Government departments."

92. This makes clear that the SFO held 'thousands if not hundreds of thousands' of digital documents related to the South African leg of its investigation. It is equally clear that the SFO did not submit or refer to 'thousands if not hundreds of thousands' of documents as part of the Murphy affidavit.
93. There is no further record of any contact between the Commission and the SFO until the January 2014 meeting. It is thus apparent that the Commission failed to take advantage

of the SFO's offer to conduct keyword based searches and to assist in drawing up a focused request for information.

94. The statement attributed to Mr Murphy – that the Murphy affidavit presented the totality of the SFO's information relevant to the Commission – must be read in this light. It appears from Mr Emson's letter of 14 December 2012 that Mr Murphy was primed to assist the Commission to search through 'thousands if not hundreds of thousands' of digitally stored documents, the vast majority of which did not form part of the Murphy affidavit or its annexures. Mr Murphy would thus have been aware that his own affidavit did not present all the information that the SFO had at its disposal. In the circumstances, I submit that it is implausible that Mr Murphy would have made the statement attributed to him in the meeting of January 2014.

95. The totality of the correspondence between the Commission and the SFO shows that the SFO made good faith offers as to how it would share with the Commission, information relevant to its mandate. The Commission did not take up these offers.

96. In light of the above, I submit that the Commission must have known that the statement attributed to Murphy was not correct. The Commission made mention of documents and information that emanated from the SFO, but that were not included in the Murphy affidavit, in its request to the SFO on 10 December 2012, signed by the Chairperson of the Commission. The Commission was presented with documents by witnesses to the Commission that plainly emanated from the SFO but were not referred to in the Murphy affidavit.

97. The Commission was aware of serious allegations regarding Mr Thabo Mbeki and Ms Stella Sigcau, but made no attempt to investigate these allegations in any meaningful way. It was silent on both allegations in its Report.

THE COMMISSION'S FAILURE TO INVESTIGATE ALLEGATIONS IN RELATION TO MR SETH PHALATSE AND MR SIPHO ZIKODE

98. I have received, through a confidential source, a memorandum that emanates from the Commission. This document was not disclosed in the record. In the circumstances, I am forced to rely on the copy at my disposal.
99. The memorandum [Annexure SA11] is titled 'Allocation of Specific Tasks to Members of the Internal Legal Team'. It is printed on the Commission's stationery. The Chairperson is identified as the author at the end of the memorandum. It is undated, but its content indicates that it was most likely authored in the first half of 2013.
100. The memorandum set out the role of the Commission's Internal Legal Team, which was responsible for collating documents and preparing preliminary reports related to specific topics. Section 3 sets out the 'specific allegations' that formed 'the issues that will be assigned to internal legal team members for examination.' At paragraph 3.2.2, numerous allegations are listed in relation to BAE. I focus here only on one of these allegations, which was described as follows:

"DSO investigator received information from a consultant that Seth Phalatse and Hendrik Jaap Grimbek, both shareholders in Global Eagle Strategic Empowerment Alliance Systems The subsidiary of this company, Global Eagle Medical Corporation (GEMCO) receives funding from BAE. It is alleged that Phalatse and Grimbek negotiated with one Siphon Zikode of the Department of Trade and Industries under promise of a bribe in the form of a share in the

company (the Durban branch of GEMCO) to increase the value of the credits to be given to BAE to the value of \$350m and that BAE allowed this deal to go ahead as a result of Phalatse's relationship with the former President Mbeki and various ministers."

101. As described above, the SFO appear to have been in possession of documentation showing that Mr Mbeki had an 'intimate dinner' with a number of BAE executives in 1998, at which Mr Phalatse was also present.
102. Evidence presented to the Commission indicates that certain aspects of the allegation above were supported by documents from the Department of Trade and Industry (DTI). I refer here to the notes of Adv Skinner, whose provenance and content I referred to in paragraph 529 of the founding affidavit.
103. Adv Skinner's notes show that Seth Phalatse was the Chairman of GEMCO and that GEMCO received a \$20m investment from BAE as part of its offset programme. BAE was the sole investor in the anticipated project.
104. Correspondence reproduced in Adv Skinner's notes shows that the number of investment credits to be awarded to the project was a contentious issue. On 1 July 2004, a meeting of the DTI team overseeing and approving offset programmes addressed the matter. The minutes note that BAE/SAAB requested that they be given a multiplier of 10 with regard to their investment credit. At the time, BAE/SAAB were intending to invest \$35m. A multiplier of 10 would thus give an investment credit of \$350m – what BAE/SAAB were, in the end, granted. The justification given by BAE in this regard was important: they argued that they should be granted a multiplier of 10 because they had invested 100% of the total funding in the project, even though they usually only provided a 10% investment in their offset programmes. Simply, BAE/SAAB believed that they should receive ten

- times the number of credits because they were investing ten times as much as they usually would in percentage terms.
105. The DTI team resolved on 1 July 2004 to reject BAE's request. Instead, the DTI proposed that they be granted \$90 million in offsets credits.
 106. On 10 September 2004, Mr Phalatse wrote to Dr Alistair Ruiters, the director general of the DTI. Mr Phalatse urged that 'a credit multiplier be granted in acknowledgment of the significant level of support which falls outside their normal investment criteria.' He stated that 'your urgent support is required to approve the credit award to BAE Systems and facilitate the capture of this world-beating technology and project for South Africa.'
 107. At some time between September 2004 and December 2005 (Adv Skinner's note is not specific), BAE Systems revised their original business plan submitted to the DTI. The business plan was 'scaled down' as a result of which BAE reduced its projected investment from \$35m to \$20m.
 108. On 1 December 2005, the DTI wrote to Bernard Collier, the General Manager of SAAB. The letter informed SAAB that the DTI had decided to grant BAE Systems the requested \$350m investment credit. This decision was particularly important in that it had the effect of ensuring that BAE Systems met its 'first milestone requirements' according to the NIP schedule agreed to by BAE Systems. The NIP agreements between the South African government and BAE/SAAB stated that BAE/SAAB may be liable for penalties or warnings should they fail to meet their 'milestone' requirements.
 109. The decision to grant the \$350m investment credit is strange in light of the fact that BAE/SAAB had reduced their investment from \$35m to \$20m. Previously, BAE/SAAB



had argued that they should be granted a multiplier of ten, which would have produced investment credits of \$350m, based on the logic that this investment was ten times as much as the percentage (10%) that they usually invested. It is thus unclear why, after reducing their investment to \$20m, BAE/SAAB were still granted the \$350m investment credit, a multiplier of 17.5 – a multiplier nearly double what BAE had initially requested even though the project was considerably smaller in scope.

110. Of course, this does not prove corruption. But having regard to Mr Phalatse's role in Global Eagle, and the eventual investment credit they were granted, this is a matter which required rigorous investigation. A reasonable person would want to investigate the decision to grant BAE/SAAB this generous investment multiplier, especially in light of the corruption allegations against Mr Phalatse and Mr Zikode, and the SFO's statement that Mr Phalatse, Mr Mbeki and BAE executives had an 'intimate dinner' in 1998.
111. Further, media articles show that Mr Phalatse was a non-executive director of Armscor during the life of the SDPP selection process. He was Chairperson of Armscor for a brief period in 2001. Mr Phalatse was forced to resign that position after it was alleged that he had accepted a \$20,000 bribe (which he subsequently returned) while serving at the Strategic Fuel Fund. He remained a director of Armscor until at least 2004. It is common cause that Armscor and its representatives were deeply involved in the SDPP process.
112. Mr Phalatse's wife, Lorato Phalatse, was a Deputy Director General in the Office of the Presidency during Mr Mbeki's presidency. She was appointed to the board of Denel in 2004.
113. I submit that, in addition to the allegation that was noted in the Commission's memorandum, a reasonable individual would query the appropriateness of Mr Phalatse

meeting with BAE executives in 1998, and receiving benefits via BAE's offset programme, during and after he served as a director of Armscor. A reasonable person would want to enquire whether he was conflicted in his roles. A reasonable person would want to establish whether BAE hoped to secure some undue benefit from him during his tenure on the Armscor Board, and made arrangements to reward him through an investment in a company he chaired.

114. There is nothing in the record to suggest that the Commission made any meaningful effort to investigate this matter. Mr Phalatse was not called to give evidence to the Commission. He was not mentioned at any stage during the oral hearings of the Commission. The allegation is not mentioned in the Commission's final report.

115. Mr Zikode did appear before the Commission. His testimony was substantive, and took place over the course of three days (28 and 31 January 2014, and 4 February 2014). At no stage during his testimony was he asked a question about Mr Phalatse, or asked about the GEMCO project and the manner in which offset credits were awarded. The allegation described above was not put to him in any form.

116. As discussed in the founding affidavit, BAE Systems made a submission to the Commission, which was read into the record on the last day of the Commission's oral hearings. BAE's submission was silent on Mr Phalatse and Mr Zikode. BAE's representative was not asked a single question during the oral hearings related to Mr Phalatse, Mr Zikode or the GEMCO project. Indeed, BAE's representative was not asked a single question by the Commissioners on any topic falling within the Commission's terms of reference.

117. The Commission made no attempt to raise Mr Mbeki's relationship with Mr Phalatse during Mr Mbeki's appearance before the Commission.

118. I submit that the Commission failed to meaningfully investigate a serious allegation of which it was plainly aware.

THE COMMISSION'S FAILURE TO ACCESS DOCUMENTATION AND INFORMATION FROM SWEDISH AUTHORITIES

119. At paragraphs 85 to 90 in Section B(2), Chapter 2 of Volume One of its Report, the Commission set out its attempts to gather information from authorities in Sweden. The following was stated:

"[85] Shortly after its inception and while reviewing information in the public domain, the Commission found reports that Mr Christer van der Kwast, the Director of the NACU in Sweden, launched an investigation into whether there had been corruption in BAE and SAAB's joint marketing of the Gripen aircraft. It was further brought to the attention of the Commission that SAAB had commissioned a review of the contract and financial transactions of SANIP (Pty) Ltd and uncovered that money was paid from BAE Systems to SANIP. These payments, it was alleged, were transferred to a South African consultant shortly thereafter. The Commission also noted that information and evidence gathered during this investigation had been handed over to the NACU on SAAB's behalf.

[86] In May 2012, the Commission requested this information and evidence from the Swedish Prosecuting Authority. On 8 June 2012, it received a response from the Swedish Prosecuting Authority that its request for information and a meeting had been forwarded to Mr Gunnar Stetler, the new Director of the NACU.

[87] On 11 June 2012, Mr Stetler personally responded to the Commission on behalf of the NACU and the Swedish Prosecuting Authority. He informed the Commission that the investigation was confidential and that the Commission would require an MLA to access such information. He stressed that it is normally prosecutors, courts and similar authorities that are given access to information via an MLA. He was a little uncertain of the status of the Commission in this regard. He stated that they did not have much information about the South African deal in their files. Most of the investigation about this matter was conducted by the SFO in the UK and was handed over to the NACU with restrictions. To share that information with the Commission they would need permission from the SFO. He informed the Commission that SAAB had indicated that it would hand over the information relating to SANIP to the Commission.

[88] Subsequently, the Commission met with Mr Stetler in Stockholm, Sweden. Mr Stetler confirmed that the investigation was initiated by his predecessor, Mr van der Kwast, and that the focus at first was the Czech Republic and Hungary. Even though allegations of bribery relating to South Africa were also looked into, the investigation was structured in such a way that the SFO did the majority of the investigation and merely asked Sweden to assist. A minor investigation was done in Sweden and the SFO handed over the matter to them with restrictions. The Swedish investigation, including its South African leg, was closed in June 2009 and the SFO closed its investigation in 2010.

[89] In respect of the SANIP matter, Mr Stetler confirmed that he had received documentation from SAAB and that the Hawks had wanted to meet with him in October 2011. Mr Stetler indicated that he would need an MLA but added that he did not think the information he had would be of any value to the Commission. He stated that with regard to bribes, the investigation must be conducted in South Africa. He informed the Commission delegation that Messrs Feinstein, Holden and Crawford-Browne had attempted to get information from him. He further stated that it would be difficult to prove bribery as there was not enough evidence to prove guilt beyond reasonable doubt. He concluded by saying he did not feel the information he had would take the matter further.

[90] On the basis of this interaction, the Commission deemed it unnecessary to continue pursuing the matter."

120. From this it is apparent that the Commission's attempt to access information from Sweden consisted of a single meeting with Mr Stetler, and that the Commission concluded, based on Mr Stetler's comments, that there was no need to either engage with Swedish authorities or submit a request for access to documentation. On its face, this indicates that the Commission accepted Mr Stetler's version of events without satisfying itself that Mr Stetler had drawn the correct conclusions from the information at his disposal.

121. The record includes a minute of the meeting between the Commission and Mr Stetler, which took place on 31 August 2012 [Annexure SA12]. The minute shows that the Commission had no justifiable basis for concluding that Mr Stetler's version of events was reliable. The minute shows that, on at least two occasions, Mr Stetler indicated that he required questions to be submitted to him in writing so that he could answer them after referring to files in his possession.

122. With regard to SAAB's use of the South African company SANIP to make payments to consultants in South Africa, the minute noted the following exchange:

"Adv Mdumbe enquired whether the 2011 television broadcast revealed new information. Mr Stetler stated that as far as he was aware all the information was known to the investigation team, perhaps bank accounts but the "scheme" was the same. He had to reconstruct information from Van der Kwast and he has to consider Swedish law, and would require an MLA."

123. With regard to payments to South Africa other than payments made to Adv Hlongwane, the following exchange was recorded in the minute of the meeting:

“Judge Seriti asked if there was any mention of payments made to South Africa other than payments to Hlongwane. Mr Stetler required these questions in writing, as he needs to peruse the documentation in order to answer them properly. He tried to place the South African information in one file but it was not always easy to split the information as there were overlaps. He stressed that most of the information is with the SFO, as the Swedish investigation was a satellite investigation.”

124. With regards to the prospect of a successful Mutual Legal Assistance request being submitted by the Commission, the following exchange was recorded:

“Judge Seriti enquired how long it would take if we sent an MLA. Mr Stetler stated that they are very efficient and would try their best and according to general statistics it would take a month from the date of receiving the MLA. Adv Mdumbe asked who we should send the MLA to and Mr Stetier indicated that the Foreign Department was the correct institution.”

125. Considering the ease and speed with which an MLA could be effected, and the fact that Mr Stetler had already indicated that he would require further time to study documents to answer questions (some of which would require an MLA in any event), it is inexplicable that the Commission made no attempt to submit such an MLA to Mr Stetler and/or the relevant Swedish authorities.

126. It appears, from the minute, that Mr Stetler formed the opinion that the Commission would submit written questions for him to answer, in addition to an MLA. On this basis, he deferred answering at least one question until such point. This is reflected in the following exchange:

“Mr Stetler stated that he would answer some of our written questions before the MLA process, he would just have to check the information.

Adv Mdumbe asked who in the joint venture determined the price of the Gripen and whether they had focused on the price during their investigation. Mr Stetler presumed it was a matter of negotiation but we could include that question in our written questions.”

127. The Commission failed to submit such questions, when it was clear that Mr Stetler required further time to study documents at his disposal. The Commission opted not to pursue any further contact with Mr Stetler, even though the minute shows that it had been agreed that further written questions would be submitted, and that an MLA would, at the least, be contemplated. The Commission chose not to pursue an obvious line of inquiry, and thus failed to conduct a full and meaningful investigation in this regard.

128. The minute shows that the Commission could not have reasonably believed that Mr Stetler knew the full content of the information held by Swedish authorities. Mr Stetler had indicated throughout that he required written questions and additional time to familiarise himself with the documents in his possession. The Commission adopted an attitude of indifference and wilful ignorance in failing to satisfy itself of the relevance (or lack thereof) of documents in the possession of Swedish authorities by simply relying on what was said by an individual who had already stated that he lacked full knowledge on the subject.

FAILURE TO ADMIT THE DRAFT AUDITOR-GENERAL’S REPORT: FURTHER COMPOUNDING FACTORS

129. At paragraphs 147 to 158 of the founding affidavit, I set out the findings in draft versions of the Auditor-General’s Report into the SDPP. The findings in the draft versions differed

substantially from those included in the Joint Investigation Report, and pointed to major procurement irregularities across all of the major SDPP contracts. The draft Auditor-General’s report was of particular importance to the Commission’s task in that it formed the evidentiary basis of the large majority of allegations regarding procurement irregularities made by critic witnesses.

130. At paragraphs 306 to 314 of the founding affidavit, I referred to the Commission’s failure to admit into evidence draft reports of the Auditor-General’s investigation into the SDPP. I draw particular attention to paragraphs 308 to 309, where I set out Adv Snyman’s attempt to introduce the draft Auditor-General’s report into the record. During the exchange the Chairperson stated that he was not sure which of the draft reports was the final draft version, on which basis he refused to admit the draft report.

131. The record shows that, in fact, the Commission had already been informed of, and supplied with, the final version of the draft Auditor-General Report. Moreover, the Commission had been given permission by the Auditor-General to supply the draft report to witnesses who wished to rely on it, subject to taking an oath of secrecy that would prevent the disclosure of information threatening to South Africa’s national security.

132. This information was recorded in correspondence to Judge Seriti from Mr Terence Nombembe on 16 May 2013 [Annexure SA13]. Mr Nombembe was the Auditor-General at the time of the letter. This correspondence was sent prior to the attempts described above to admit the draft Auditor-General’s report into evidence. Mr Nombembe wrote:

“Disclosure of classified information to witnesses

Handwritten initials/signature

The above matter and your request of 10 April 2013 concerning the disclosure of classified information to witnesses have reference.

Towards the end of 2012, the Auditor-General of South Africa (AGSA) provided the Arms Procurement Commission (the Commission) with electronic copies of the preliminary reports compiled by the AGSA, the Public Protector and the National Prosecuting Authority.

We recognise that witnesses who will soon testify in the Commission hearings may need access to these reports. I hereby authorise the Commission to provide copies of the preliminary report compiled by the AGSA to witnesses, provided that each witness take the oath attached hereto as Annexure A and that such disclosure is duly recorded in the official records of the Commission.

Once written consent is obtained from the Public Protector and the National Director of Public Prosecutions, the Commission may provide copies to witnesses of the preliminary reports compiled by these two bodies. Note should be taken that the disclosure of these preliminary reports must similarly be recorded in the records of the Commission and each witness must take the oath envisaged in Annexure A."

- 133. The preliminary report referred to above was the same as the final draft Auditor-General's report, despite the difference in nomenclature.
- 134. The Commission was provided with the preliminary report of the AGSA into the SDPP. The Chairperson's ruling that it was not possible to know which report constituted the final draft was therefore incorrect, as the Commission had already been provided with the final draft of the AGSA report.
- 135. The Commission made no attempt to make the preliminary reports supplied by Mr Nombembe available to any of the critic witnesses subject to those witnesses signing an oath of secrecy. This aggravates and compounds the Commission's unfounded

unwillingness to admit the draft version of the Auditor-General's report when this was attempted by Adv Snyman. It is not clear why the Commission failed to make the preliminary versions of the Auditor-General's report available to witnesses as per Mr Nombebe's letter. Whatever the reason, I submit that the failure of the Commission to make this offer known to witnesses was inexcusable, and would have materially prejudiced the rights of witnesses (in particular critic witnesses) wishing to rely on the draft Auditor-General's report in their evidence.

THE COMMISSION'S DILATORY APPROACH TO REQUESTING DOCUMENTATION FROM GERMAN AUTHORITIES

136. At paragraph 251 of the founding affidavit, I noted that the Commission failed to gather or acquire a single document from any overseas jurisdiction. At paragraph 253, I set out how the failure to access information from Germany effectively terminated the Commission's attempts to investigate serious allegations of corruption in relation to the German Frigate Consortium and the German Submarine Consortium. At paragraph 255, I suggested that the blame for failure to access information from Germany could not be laid at the Commission's door. This suggestion was made in light of paragraphs 105 to 115 of Section B(6) of Chapter Two of Volume One of the Commission's Report, which set out how the Commission submitted a Mutual Legal Assistance request that went unanswered.

137. I accepted this version of events in the founding affidavit, as I had no evidence to the contrary. However, the record shows that this suggestion was incorrect. In fact, the Commission must bear at least partial, if not full, responsibility for the failure of the MLA request. Moreover, it appears that the version of events given in the Commission's Report

noted above omitted material facts that would have placed the Commission's conduct in a different light.

138. Paragraphs 105 to 112 of Section B(6) of Chapter Two of Volume One of the Commission's Report set out the engagement between the Commission and German authorities. For brevity's sake, I refer only to two salient facts; first, that the Commission submitted an MLA request on 13 July 2012 to the German Federal Office in Bonn, and that upon being asked for certain clarifications, the Commission submitted additional information to the same office on 23 November 2012. The record supports this version of events.
139. It appears that German authorities went silent, and the MLA was not executed. There is nothing in the record to suggest that the Commission made any attempt to enquire as to the status of the MLA request, or to establish the means by which it could be expedited.
140. The record shows that the Commission's next correspondence took place only on 8 May 2014. This correspondence was not included in the record, but its contents appear from a Note Verbale sent by the German Foreign Office in Berlin to the Embassy of South Africa in Berlin on 2 September 2014 [**Annexure SA14**]. The Note Verbale confirms that a 'request for legal assistance of the Arms Procurement Commission' was 'forwarded by means of Note Verbale No. 43/2014 of 8 May 2014.' This request is also referred to in a declaration submitted by the Commission to German authorities dated 19 March 2015 and signed by the Commission's Adv Mdumbe [**Annexure SA15**]. Adv Mdumbe refers in the opening paragraph of the declaration to 'the Arms Procurement Commission request for legal assistance which was forwarded by means of Note Verbale 43/2014 of 8 May 2014.'

141. The record does not explain why the Commission submitted this MLA through diplomatic channels, after the delivery of the original MLA to the German Federal Office in Bonn in July 2012. It may be that the Commission was informed, at some time between November 2012 and May 2014, that it needed to submit the MLA request through the traditional diplomatic channels. The effect is that the Commission thus only submitted an MLA request in May 2014, nearly 2 years after its original abortive July 2012 request, and far into the life of the Commission.
142. The Commission's report is inexplicably silent on the submission of the second Mutual Legal Assistance request in May 2014. The Commission's report, however states at paragraph 114 of Section B(6) of Chapter Two of Volume One that in September 2014, the Commission received a Note Verbale in September 2014 from German authorities requesting further information from the Commission such that it could execute the MLA. I return to this Note Verbale shortly.
143. The manner in which this is addressed in the Commission's Report, omitting the 8 May 2014 Note Verbale, suggests that German authorities were dilatory in not responding to the July 2012 MLA, and that the September 2014 Note Verbale related to the Commission's July 2012 MLA request. The Commission's Report creates the impression that the Commission was hamstrung by delays on the part of German authorities, who only saw fit to respond to the July 2012 MLA with a request for further information in September 2014. That is however clearly incorrect.
144. The Commission states that it received the Note Verbale of 2 September 2014 on 30 September 2014. The Note Verbale required that the Commission submit additional information to German authorities. In particular, it was noted that:

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“The release of items is inter alia only permissible if a seizure order from the authority in charge of the requesting state is submitted or if a declaration of this authority states that the conditions of the seizure are adhered to if the items are located in the requesting state. This is stipulated in § 66 of the German law on international legal assistance in criminal matters.

The Foreign Office requests that such a seizure order or a relevant declaration be added to the request for legal assistance if it aims at the surrender of items.”

145. The Commission states at Paragraph 114 of Section B(6) of Volume One of its Report that this query was answered by the Commission by means of a declaration submitted by the Commission on 19 March 2015.
146. The record includes a copy of this declaration. It set out, briefly, the legal basis upon which the Commission was established, and its rights of search and seizure. The content of the declaration is not complex. There is no good reason for the Commission should have taken five and half months to make the declaration. This does not suggest that the Commission was particularly keen to obtain the information it had requested.
147. This impression is reinforced by a second Note Verbale submitted on February 2015 by the German Foreign Office to the Commission via the Embassy of the Republic of South Africa in Berlin [Annexure SA16]. Email correspondence in the record indicates that this Note Verbale was delivered to the Commission’s Adv Mdumbe by email on 17 March 2015 [Annexure SA17]. The purpose of this Note Verbale was to remind the Commission of its need to submit additional documentation as per the 2 September Note Verbale:

“The Foreign Office is honoured to inform the Embassy of the Republic of South Africa, under reference to the request for legal assistance of the Arms

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Procurement Commission that was forwarded with Note Verbale no. 43/2014 of 8 May 2014 and its Note Verbale of 2 September 2014, to point out again that further documents are required to settle the requested actions of legal assistance.

The release of items is inter alia only permissible if a seizure order from the authority in charge of the requesting state is submitted or of a declaration of this authority states that the conditions of the seizure would be adhered to of the items were located in the requesting state. This is stipulated in § 66 of the German law on international legal assistance in criminal matters.

The Foreign Office requests that such a seizure order or a relevant declaration be added to the request for legal assistance if it aims at the surrender of items.”

148. The correspondence shows that the Commission submitted its declaration on 19 March 2015 only after it had received correspondence from Germany pointing out that a response was still required. The Commission adopted an inexplicably lackadaisical attitude. It is clear that a major obstacle to the Commission receiving documents from Germany was its failure to submit the requisite documentation in the correct format to German authorities, in particular a note setting out its powers of search and seizure, in its May 2014 MLA request.
149. Also relevant in this regard are the minutes in the record [**Annexure SA18**] of a meeting held on 25 June 2012 in Munich. The Commission was represented by Judge Seriti, Adv Mdumbe and Ms Painting. Officials from the Public Prosecutor’s Office in Munich who are indicated as attending include Dr Strotz (the Chief Public Prosecutor), Manfred Notzel (Head of the Prosecutors Office in Munich), Joachim Ettenhofer (senior prosecutor) and Florian Schlosser (referred to as ‘Mutual Legal Assistance’, suggesting that this was Schlosser’s area of expertise).

150. The minutes reflect that the Commission was informed of the need to submit an MLA, and was given guidance as to what would be needed to be included in such a submission.

The following exchange is recorded:

“They indicated that they would need an MLA before they could share any information with us and explained the MLA process to us. Adv Mdumbe asked what form the MLA should take and what specific requirements the Commission would be expected to comply with. It was stated that MLA would have to include facts, cases, specific documentation we required and a court decision or formal document that gave us authority to have access to documents that were obtained in a search and seizure [my emphasis]. They indicated that they were prepared to peruse the draft to ensure that no information was missing in advance via email or fax. Judge explained the difficulty with having to submit an MLA via the Department of Justice as we had received criticism for not distancing ourselves from them. Mr Ettenhofer indicated that he would provide us with the name and contact details of an official at the Federal Bureau of Justice who could give us advice on the process and requirements.”

151. The Commission was thus informed as early as July 2012 that it would need to submit proof that it had the authority to access ‘documents that were obtained in a search and seizure.’ This is precisely what the Commission did not submit in its MLA of May 2014, and precisely what the German Foreign Office requested in its Notes Verbale of September 2014 and February 2015. That the MLA remained unexecuted due to this oversight is inexplicable.

152. The record shows that on 25 June 2012, the day of the meeting between representatives of the Commission and the Munich Public Prosecutor, the senior prosecutor Joachim Ettenhofer sent an email to Ms Kate Painting [Annexure SA19]. In the email, Mr Ettenhofer provided Ms Painting with the name of the official at the Federal Office of Justice (Bianca Malguth-Hampel) who would be able to assist and advise the

Commission on the exact requirements for a successful MLA request. The record shows no attempt by the Commission to contact Bianca Malguth-Hampel for advice and assistance. If the Commission had done so, it would have been provided with the information necessary to submit all the documents needed for a fully compliant MLA request - which it failed to do at all until it submitted its March 2015 declaration.

153. The record shows that the Commission's failure to access documentation in Germany was due to its own failings. Its Report was (intentionally or unintentionally) misleading as to its attempts to access documentation in Germany. The Report created the impression that the Commission was unable to access documentation in Germany due to inexplicable delays on the part of German authorities to respond to or execute the July 2012 MLA request. The record shows that, in reality, it was the Commission's incompetence and inexplicably dilatory approach that lay at the heart of its failure to access documents in Germany. This is further evidence of its failure properly to carry out its mandate.

THE ATTITUDE OF EVIDENCE LEADERS REGARDING THE FUNCTION OF THE COMMISSION

154. The record shows that a meeting was held on 11 April 2013 involving the Commission's Evidence Leaders and internal legal team. The discussion is recorded in minutes in the record [**Annexure SA20**]. The minutes are marked 'draft', but there is no other version.
155. Those present at the meeting were in two groups. Under the heading 'Evidence Leaders', the following are recorded as in attendance: Adv Tayob Aboobaker SC, Adv Simon Lebala SC, Adv Moss Phaga SC, Adv Phumlani Ngobese, Adv Mahlape, Adv Tshepo Sibeko SC, Adv Carol Sibiya, Adv Barry Skinner SC, Ms Jacqueline Ramagaga, Adv Sibusiso Zondi. Under the heading 'Commission Staff' the following are recorded as in

attendance: Riena Charles, Keitumetse Mahlangu, Thabo Malatji, Mcebisi Mama, Fanyana Mdumbe, Lindiwe Mtimkulu, Ernest Nemusimbori, Mariam Sirkhotte. The meeting was chaired by Adv Aboobaker SC.

156. Section 8 of the minutes records a discussion of the progress of investigations undertaken by the Commission's internal legal team. During this discussion, the scope of the investigation was addressed, and the following exchange took place:

"Adv Aboobaker said that evidence leaders may also bring issues to the Commission for investigation.

Adv Sello posed the question whether an issue which has not been complained of and in respect of which no witness has come forward would be dealt with by the Commission. She was of the view that the Commission should not be restricted to the issues or allegations reported to the investigative bodies and the issues that have been brought formally by witnesses in the submissions made to the Commission.

Ms Charles indicated that the Commission has called upon all interested parties to make submissions to the Commission. These issues should have been dealt with in the submissions otherwise it would be difficult to enquire into. Adv Aboobaker concurred and said that the Commission is not an investigative body and that it would be difficult to follow up on issues that have not been formally raised. [my emphasis]

Adv Mdumbe added that if witnesses are to implicate a person that person must receive notice. If a person or entity is to be subpoenaed to produce documents to the Commission substantive information would be necessary to enable the Commission to make that decision. This would apply equally, for example, if it is suggested that the books of the ANC should be subpoenaed.

Adv Sello raised the question what would happen in instances where on the basis of the documents before the Commission a person or entity appears to be implicated. How will this be dealt with?

Adv Aboobaker suggested that if on the documents an allegation or implication is suggested maybe this should be investigated.

The general view of the meeting was that if an allegation made by a person is unsubstantiated it would be difficult to follow and to require that a person or entity be subpoenaed to submit documents.

Adv Aboobaker added that a balance should be drawn between the resources available and the issues that can be investigated.”

157. This exchange shows an approach to allegations of wrongdoing that prevented a meaningful investigation. In particular, it is notable that Adv Aboobaker, a senior evidence leader, could comment that ‘the Commission is not an investigative body and it would be difficult to follow up on issues that would be formally raised.’ The Commission was established to investigate and report on certain matters. It was given significant powers of compulsion. Yet the view appears to have been taken that the Commission should only investigate those matters arising from formal submissions to it. This attitude placed the burden of determining the scope of the investigation on those making submissions to the Commission, instead of the Commission itself.

158. The consensus view regarding ‘unsubstantiated allegations’ shows that the Commission’s evidence leaders and internal legal team unduly limited the scope of its investigation. The discussion implied that the evidence leaders and internal legal team were giving themselves the authority to determine the veracity of allegations. That was the function of the Commission.

159. Adv Aboobaker appears to have moderated his earlier position by commenting that *'if on the documents an allegation or implication is suggested maybe this should be investigated.'* I submit that if an allegation emerged from the documents before the Commission it had to be investigated.

FAILURE TO INVESTIGATE MATTERS REGARDING JULEKHA MAHOMED

160. At paragraph 105.5 of the founding affidavit I set out how Ferrostaal entered into a range of business deals with Chippy Shaik following the conclusion of the submarine contracts in 1999. One such deal included a joint-venture in a mine in Mozambique in which Ferrostaal invested \$1.5m. The directors of the joint-venture vehicle, Enable Mining, included Chippy Shaik, Julekha Mahomed, Yunis Shaik and Rafique Bagus. This indicates at the very least, a business association between Chippy Shaik and Julekha Mahomed.

161. Julekha Mahomed was also referred to in the Debevoise & Plimpton Report. I have set out at Paragraphs 257 to 278 of the founding affidavit how the Commission failed to meaningfully investigate the Debevoise & Plimpton Report. Page 66 of the Debevoise & Plimpton Report recorded the following regarding Julekha Mahomed and Chippy Shaik:

"Evidence suggests that Chippy may also have been behind a company called Illima Community Financial Services (Pty) Ltd. ("Illima"), a consultant that supposedly had "vast knowledge of the South African business environment." FERISA [Ferrostaal's South African subsidiary] paid Illima ZAR 1.8 million in 2005, supposedly in return for services relating to various offset companies and other joint ventures. But Illima's identity and purpose - and whether it performed any of the stated services - are unclear. Its directors were listed as Moses Mayekiso and Julekha Mahomed, both politically connected people

(Mayekiso was a leading trade unionist and Mahomed is Jacob Zuma's attorney). However, at a meeting at FERISA in 2006, Ferrostaal staff attacked the management for its ties to Illima and claimed that the engagement of Illima was solely a way to pay Chippy. Given the unavailability of key former employees, we have not been able to obtain any explanation of this issue.' "

162. It is well-known that Julekha Mahomed served as Jacob Zuma's legal representative until at least 2005. Her offices were raided as part of the DSO's investigation related to the prosecution of Jacob Zuma in relation, *inter alia*, to the Arms Deal.
163. At paragraph 103.4 of the founding affidavit, I set out how BAE Systems, via Red Diamond Trading, transferred £115 million to various agents for work on the South African Arms Deal. The recipients of these funds included companies controlled by John Arnold Bredenkamp.
164. At paragraph 472 I set out how the DSO applied for and obtained warrants to search the property of Adv Fana Hlongwane. The DSO application was supported by an affidavit submitted by the Serious Fraud Office [the 'Murphy affidavit' described above]. The Murphy affidavit was referred to numerous times during the proceedings of the Commission, and was submitted in the Joint Submission of Andrew Feinstein and Paul Holden to the Commission, and in the evidence bundle of Colonel Johan Du Plooy as JDP-SW13.
165. Paragraph 15(i) of the Murphy affidavit noted that BAE Systems had made use of Red Diamond to enter into a "covert" agreement with Kayswell Services, which was paid £40 million for services related to the SDPP. Kayswell was the single largest recipient of funds from Red Diamond. The same paragraph confirmed that Kayswell Services was

- 60% owned by John Arnold Bredenkamp; the remaining 40% shareholding was split between Julien Pelissier, Trevor Wilmans, Walter Hailwax and Rick Passaportis.
166. Paragraph 52 of the SFO affidavit set out the results of a Section 2(2) CJA 1987 interview conducted by the SFO with Mr Allan McDonald, a BAE employee who had worked on the Hawk and Gripen campaigns in South Africa. Mr McDonald recalled in the interview that Bredenkamp had suggested the need to identify 'key decision makers' with a view to 'financially incentivising' them with regards to BAE's offer in South Africa.
167. Paragraph 53 of the Murphy affidavit noted that Mr McDonald had received complaints from Richard Charter (who operated, through his companies, as both a covert and overt agent of BAE) that Mr Bredenkamp's team had been speaking to Chippy Shaik without the knowledge of the campaign team in South Africa. Mr McDonald recalled that Bredenkamp's team had told him 'we can get to Chippy Shaik' and that the Bredenkamp team were aware of the content of Chippy Shaik's diary.
168. The record shows that the Commission was in possession of a memorandum sent by the Financial Intelligence Unit of the Principality of Liechtenstein to the National Prosecutor of Liechtenstein [**Annexure SA21**] on 5 October 2006. The Financial Intelligence Unit had identified Kayswell Services AG, ACT Worldwide SA, Julien Pelissier, Trevor Wilmans and Walter Hailwax as suspects under money laundering offences related to the receipt of funds from Red Diamond. The memorandum recorded that £3.8 million had been paid into a Kayswell account by Red Diamond.
169. Page 4 of the memorandum recorded:

"PELISSIER Julien Charles Marius

For this account we were informed of receipts to the amount of app. USD 661'000.00 and outgoings to the amount of app. USD 2,2 million. Thereby the origins of app. USD 1,6 million are unknown.

(Annexures- Financial transactions Julien Charles Marius PELISSIER and Financial transactions Julien Charles Marius PELISSIER summarised).

The funds received come from KAYSWELL SERVICES LTD. The cash drain went to various persons and companies, inter alia to:

PELISSIER Julien app. USD 174 000.00

BREDENKAMP John Arnold app.' USD 266 000.00;

MAHOMED Julekha app. USD 258 000

MAITLAND AND CO. app. USD 850 000.00;

MEINTJES, VERMOOTEN AND VENNOT USD 195'000.00.

According to public sources one of the lawyers of the former South African Vice-President Jacob ZUMA, against whom criminal proceedings due to suspected corruption were held, is called Julekha MAHOMED (Annexure-Africa News dated 21/09/2006 regarding Julekha Mahomed). It is not possible to say whether the beneficiary of the abovementioned USD 258'000.00 is this lawyer."

170. The record shows that the Commission was also in possession of the transaction list referred to above. This transaction list [Annexure SA22] recorded that \$258 000 had been paid to an account at UBS AG Kloten under the name Julekha Mahomed on 6 September 2002.

171. I submit that this information was of direct and material relevance to the Commission's mandate. If the Julekha Mahomed who received funds from Julien Pelissier was the

Handwritten initials/signature

attorney referred to above, it would provide clear evidence of funds being transferred from BAE's offshore system to its covert agents in the Brendenkamp organisation, and from there to an individual with professional links to Chippy Shaik and Jacob Zuma. Such a payment would have been particularly notable in light of the evidence of Mr McDonald to the SFO that Brendenkamp's team had told him of their ability to 'get' to Chippy Shaik.

172. There is no evidence in the record that the Commission made any attempt to investigate this matter. In this regard it is notable that:

172.1. There is no mention of Julekha Mahomed in the Report of the Commission.

172.2. The Commission did not call any member of the Brendenkamp organisation to appear before it;

172.3. The Commission did not call Julekha Mahomed to appear before it;

172.4. As set out in paragraphs 463 to 467 of the founding affidavit, Chippy Shaik was not meaningfully questioned by the Commissioners regarding numerous corruption allegations against him; certainly no questions were addressed to him regarding Julekha Mahomed; and

172.5. While the Commission met with authorities in Liechtenstein according to Volume One of the Commission's Report, it made no attempt to secure any information beyond that which had already been supplied to the NPA, and did not see fit to file a Mutual Legal Assistance Request with authorities in Liechtenstein;



- 172.6. There is no record that the Commission made any attempt to contact UBS to inquire as to the ownership of the account identified as belonging to Julekha Mahomed

FAILURE TO INVESTIGATE ALLEGATIONS MADE BY MR AJAY SOOKLAL

173. On 28 September 2014 the *Sunday Times* published an article titled 'EXPOSED: How Arms Dealer Bankrolled Zuma.' [Annexure SA23] The article repeated allegations made by Mr Ajay Sooklal. Mr Sooklal had been employed by Thales as a legal consultant. The *Sunday Times* reported that allegations were contained within a 1358 page transcript of Mr Sooklal's testimony during arbitration proceedings in which he claimed that Thales had failed to pay him fees he was due. It was stated that Mr Sooklal had been employed by Thales to, *inter alia*, protect their interests and those of Mr Zuma with regard to the criminal trial of Schabir Shaik and the anticipated criminal trials against Mr Zuma and the Thales' subsidiary Thint flowing from Shaik's conviction.

174. The article set out a number of allegations emanating from Mr Sooklal's testimony. They were summarised by the Sunday Times as follows:

"Zuma used the code words 'Eiffel Tower' to accept a R500 000-a-year bribe from Thales in return for political protection in the arms deal probe and to secure future business;

Thales gave former ANC treasurer Mendi Msimang €1-million (about R14-million at today's rates) in April 2006 to be paid from a secret Dubai account into an "ANC-aligned trust" shortly before the company was due to stand trial for corruption with Zuma;

Thales was asked to bankroll the ANC conference at Polokwane in 2007, where Zuma was elected party president, but did not do so;

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Thales furiously lobbied ANC officials including former President Thabo Mbeki, former justice minister Penuell Maduna, former secretary-general Kgalema Motlanthe and Msimang to be let off the hook, even enlisting the help of French president Jacques Chirac;

Thames bankrolled Zuma and Sooklal to fly around the world and meet witnesses who could help the ANC president in his forthcoming corruption trial, even when they were unrelated to Thales.”

175. There is no mention of Mr Sooklal or his allegations in any volume of the Commission’s final report. It appears that the Commission failed to conduct any material investigation into the allegations.
176. The record shows that Commission was made aware of the allegations in the transcripts which were reported in the *Sunday Times* and appeared to acknowledge their existence on a number of occasions.
177. On 29 September 2014 Mr David Maynier wrote to the Commission (for the attention of Adv Fanyana Mdumbe). [Annexure SA24] . Mr Maynier referred to the *Sunday Times* article and said ‘*it would seem that Mr Ajay Sooklal may have personnel [sic] knowledge of arms deal corruption and may be in a position to assist the Arms Procurement Commission. I would therefore like to confirm that you are aware of the allegations made by Mr Ajay Sooklal and that you will considering summoning him to give evidence before the Arms Procurement Commission.*’
178. Adv Mdumbe responded to Mr Maynier’s letter on the same day. He said ‘*the Commission will endeavour to obtain the transcript of the arbitration proceedings, peruse it and decide on the course of action to take.*’ [Annexure SA25]. He did not comment on the possibility of summoning Mr Sooklal to give evidence. The record does

not show any attempt at all by the Commission to investigate the matters raised by Mr Sooklal, or to obtain the transcripts.

179. The Commission was directed to the allegations by Dr Richard Young. At paragraph 429 of his witness statement, Dr Young avers that early cooperation between the Directorate of Special Operations and French authorities was fulsome and useful, but that this cooperation ended after the interventions ‘from the highest levels of the South African authorities.’ At paragraph 430, Young clarifies and supports this statement by noting that:

“ In this regard the evidence of Ajay Sooklal, in a very recent legal matter and who was intimately involved in the entire matter is particularly informative and specifically relevant to this commission. ’ ”

180. Mr Sooklal’s allegations were also traversed in Dr Young’s oral evidence. He was asked a number of questions about this by the Chairperson. The exchange appears at pages 9613 and 9614 of the transcript of the oral evidence, as follows:

“[DR YOUNG¹] I talk about above, with the involvement of previous the Minister of Justice Penuell Maduna and Adv Bulelani Ngcuka, et cetera, and Jean-Paul Perrier. A huge amount of information and material, relevant to that is very recently, being traversed in the evidence, under oath of Ajay Sooklal, who was, represented Thomson 10 for the relevant period, in a very legal matter. I know that it has been traversed, at least, in the newspaper. Although, anyway, so it is suffice to say that what is traversed in those documents are of extreme interest involved, if, if for any party, or any organisation that is interest in bribery and corruption, involving the Corvette combat suite.

¹ At page 9613 of the record, this paragraph is indicated as being spoken by Adv Sibeko. This is clearly erroneous based on the content of what was said and the formatting of the transcripts, which show that Adv Sibeko asked a follow up question based on the content of this paragraph.

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ADV SIBEKO: You did not, yourself, participate in this process.

CHAIRPERSON: I am sorry, just for interest there, Dr Young, have you seen these papers? Or have you just read the newspaper? Have you seen the actual papers, dealing with this matter? Or have you seen only the, the newspaper articles?

DR YOUNG: No. I have, I have read every single document, arising out of this legal matter.

CHAIRPERSON: Even the documents that are being at the, the arbitration. These are the documents that you are referring to, that you have read them.

DR YOUNG: Yes. I have, I was actually given, I have to be, I would have to be frank and what. I was given all of those, transcripts of that arbitration, by the Sunday Times, who wrote, who wrote the article, with a view of, you know, they, they got those documents and they wanted to write a story quite quickly, I think. This certainly, it was certainly within a week or two and they wanted some, if I may say, in 5 inverted commas, expert view on what that meant. So, I am, I have read every single line, out of those several hundred pages.

CHAIRPERSON: How many hundred of pages?

DR YOUNG: I think it is several hundred pages. They might be, even 10 getting close towards 1 000 pages. I, I certainly have advised the, the Commission, in my preparation, of the existence of that, that material. Because I think, that, okay, although it is arbitration proceedings and that is why I do not even, refer to them in any detail. Certainly, if, well, there are two aspects, I think, no, I supposed I will be accused of making a, a legal conclusion here. Yes. But, but I think, having read the transcripts of these proceedings, Adv Geoff Budlender quoted from the [indistinct] law is that once documents escape, or even stolen from their so-called owners, then client attorney privilege gets, gets lost or waived. That it, that is just what I read from the transcripts of these 20 proceedings. But, of course, there is another way of getting those documents



and you know, just getting the parties, the relevant parties to agree, to, to divulge in it to the Commission, which is an investigative body.”

181. Despite Dr Young indicating first-hand knowledge of the content of Mr Sooklal’s arbitration papers, he was not asked a single question by the Commissioners or his evidence leaders in this regard. The exchange shows that the Commission was aware of the allegations made by Mr Sooklal, and the forum in which they were aired. It made no attempt to obtain the transcript.
182. Mr Sooklal’s allegations were also referred to in the witness statement of Ms Christine Guerrier, albeit without referring to Mr Sooklal by name. Ms Guerrier testified before the Commission on behalf of Thales. At paragraph 43 of her witness statement, she states:

“I am also informed of press articles which provided salacious details of allegations by a former consultant to the Group. Needless to say, these related to a private and confidential arbitration process well outside the scope of this commission. Apart from noting the Thales Groups’ concern about untested and wild allegations being made in the media (and possibly to obtain a commercial advantage by the person making the allegations) I record that – in common with companies of the nature of Thales and its Group, all matters or allegations which extend beyond hearsay are properly considered and reasonably dealt with by the Group. Matters of conjecture, insult and pure hearsay do not warrant such consideration.”

183. Ms Guerrier did not address the substance of Mr Sooklal’s allegations. Mr Sooklal’s name was mentioned in Ms Guerrier’s cross-examination by Dr Richard Young. In her testimony at pages 10495 to 10497 of the Commission transcript, she testified that in 2004, she had met the Minister of Justice Mr Maduna and Mr Bulelani Ngcuka, during which an agreement was reached that Thint would no longer be indicted as a co-accused alongside Mr Schabir Shaik.

184. On 16 November 2016, Mr Sooklal instituted legal proceedings in the High Court against Mr Jacob Zuma, the Minister of Constitutional Development, the Commission, Thales South Africa, Thales S.A and the Minister of Defence and Military Veterans [**Annexure SA26**]. Mr Sooklal seeks to have the findings of the Commission set aside. In that application, he asserts that the Commission's findings were irredeemably tainted because the Commission was appointed by Mr Jacob Zuma, who was conflicted with regard to the Commission's Terms of Reference. He repeats many of the allegations which were reported by the Sunday Times in 2014. He makes one further allegation of relevance, namely that on 13 August 2012, he attended a meeting with Mr Zuma at Mr Zuma's official residence. He alleges that Mr Zuma asked him not to inform the Commission of the fact that 'the French' [presumably Thales and/or Thint] were paying me monies over the years up to 2009.'
185. At paragraph 116, Mr Sooklal states that he attempted to approach the Commission with evidence presented in his affidavit. He says that in December 2015, he sent an email to the Commission stating that he was willing to testify before the Commission, and that he did not receive a reply to his email.
186. On 22 July 2018, *City Press* reported that Mr Sooklal had deposed to a further affidavit that he had submitted to the NPA in anticipation of a new criminal proceedings against Mr Jacob Zuma [**Annexure SA27**]. It reported that Mr Sooklal alleged that Mr Jean Paul Perrier, a Thint executive, paid Mr Maduna €50 000 in cash during a meeting at the Radisson Hampshire hotel in London in 2005. Mr Sooklal claims he was present when the cash was handed over. The payment was made, he alleges, after Mr Maduna had asked him to convey to Mr Pierre Moynot (a Thales executive) that 'he wished to be



compensated for his services' with regard to securing the withdrawal of the original Thint indictment.

187. The allegations contained in the 2017 founding affidavit and 2018 *City Press* article were of course made public after the Commission had concluded its work.

188. I have no knowledge of whether the allegations made by Mr Sooklal are true. However, it is reasonable to expect that if the Commission had investigated this matter, they would have been repeated (including the later allegations), and the Commission would have been able to investigate them. The allegations were clearly relevant to the Commission's Terms of Reference. The record indicates that no attempt was made to test these allegations by the Commission:

188.1. Mr Sooklal was not called to give evidence before the Commission.

188.2. Mr Sooklal's offer to give evidence to the Commission (albeit at a late stage in the life of the Commission) was not taken up.

188.3. The record indicates that the Commission failed to seek a copy of the transcripts of the evidence of Mr Sooklal in the arbitration proceedings.

188.4. When the Commission was informed by Dr Young that he had familiarised himself with the allegations, the Commission made no attempt to ascertain their content from him, or ask him for the transcript.

188.5. Mr Sooklal's allegations were never put by the Commission to those implicated, including Mr Thabo Mbeki or Ms Christine Guerrier.

189. I submit that the Commission's failure to investigate this highly relevant matter at all is telling evidence of its failure to carry out its mandate.



DEPONENT

I certify that:

1. The deponent acknowledged to me that:
 - 1.1. He knows and understand the contents of this declaration;
 - 1.2. He has no objection to taking the prescribed oath;
 - 1.3. He considers the prescribed oath to be binding on her conscience.
2. The deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God";
3. The deponent signed this declaration in my presence at the address set out hereunder on this ^{10th}..... day of OCTOBER 2018.



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