

THE ARMS PROCUREMENT COMMISSION

CLOSING SUBMISSIONS ADDRESSING TERM OF REFERENCE 1.2

INTRODUCTION:

1.

1.1 The substratum of these submissions heralds the last leg of the Arms Procurement Commission "the Commission" after leading of evidence.

1.2 The submissions address term of reference 1.2 annotated as:

1.2.1 Whether the arms and equipment acquired in terms of the Strategic Defence Procurement Package ("SDPP") are under-utilised or not utilised at all.

2.

THE APPROACH

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

2.2 The submissions will deal in turns with the following subjects:

2.2.1 Analysis of the evidence led in respect of South African Air Force witnesses "Air Force Witnesses";

- 2.2.2 Analysis of the evidence led in respect of South African Navy witnesses "Navy witnesses";
- 2.2.3 Analysis of the evidence of David Maynier, a member of the Parliamentary Portfolio Committee in defence and Military Veterans "Maynier".

3.

EVIDENCE THE COMMISSION HEARD REGARDING THE TERM OF REFERENCE 1.2 DEALING WITH UNDERUTILISATION OR NO UTILISATION AT ALL OF THE ARMS AND EQUIPMENT

3.1 **In respect of Airforce:**

The Commission heard the testimony of:

- (a) Brigadier General Johan William Bayne; and
- (b) Brigadier General Pieter Burger.

3.2 **In respect of Navy:**

The Commission heard the testimony of:

- (a) Rear Admiral Alan Graham Green;
- (b) Rear Admiral Robert William Higgs; and
- (c) Rear Admiral Phillip Schoultz.

3.3 The Commission also heard the testimony of David Maynier.

4.

FORMAT OF THE SUBMISSIONS

4.1 These submissions do not distill with the analysis of the testimony of the abovesaid witness in a particularised seriatim format. The submissions deal with the testimony of the witness depending on the topic dealt with at a particular stage of the submissions.

5.

ARMS AND EQUIPMENT PROCURED BY THE SOUTH AFRICAN NATIONAL DEFENCE FORCE AND THE EQUIVALENT VALUE THEREOF:

5.1 The South African National Defence Force procured the following equipment in respect of SDPP:

- 5.1.1 4 Corvettes totalling approximately R6 billion;
- 5.1.2 3 submarines totalling approximately R5,2 billion;
- 5.1.3 30 light utility helicopters (LUH Agusta) totalling approximately R2,2 billion;
- 5.1.4 4 Maritime helicopters totalling approximately R0.8 billion;
- 5.1.5 26 Advanced light fighter aircraft (ALFA GRIPEN) totalling approximately R4,8 billion;
- 5.1.6 24 Lead-in Fighter Trainer (LIFTA-Hawk) totalling approximately R10,9 billion.

6.

ALLEGATIONS OF UNDERUTILISATION OR NO UTILISATION AT ALL OF THE ARMS AND EQUIPMENT ACQUIRED IN TERMS OF SDPP

6.1 David Maynier informed the Commission that:

6.1.1 Advanced light fighter aircrafts are under-utilised by the South African Airforce.¹

6.1.2 Hawk Aircrafts are under-utilised by the South African Airforce.²

6.1.3 He ("David Maynier") was informed by the Minister of Defence and Military Veterans that the South African Airforce has placed 12 Gripen Fighter Aircraft in long term storage. These aircrafts are placed in storage as a planned activity in line with their utilisation and budget expenditure, patterns/flow of the South African Airforce.³

6.1.4 Hawk and Gripen Aircraft are under-utilised due to the lack of funding.⁴

6.1.5 If one applies the test of the former Chief of the South African Airforce, General Gagiano, viz, that Hawk Aircraft are required to fly 4 000 hours per year, one will see that the Hawk Aircrafts were under-utilised during 2008/2009 financial year because as they only managed to fly only 2 000 hours.⁵

¹ See: Record, p7879, lines 5 - 22

² See: Record, p7879, lines 20 - 24

³ See: Record, p7888, lines 14 - 21 and Annexure "DMI" attached to the statement of David Maynier, p22 of indexed and paginated papers

⁴ See: Record, p7885, lines 5 - 11

⁵ See: Record, p7884, lines 8 - 23 and p7885, lines 1 - 25

6.1.6 General Bayne did not apply the test of General Gagiano to determine whether Hawk Aircrafts are under-utilised or not⁶

7.

CRITISISM BY THE PUBLIC INASFAR AS UTILISATION OF THE THREE SUBMARINES AND SOME OF THE FRIGATES IS CONCERNED

7.1 Criticism has been levelled by the public pertinent to the non-utilisation of the three submarines procured by the Navy. The selfsame criticism has also been raised before the Portfolio Committee on Defence.⁷ **Consideration of the public criticism by the Commission will assist the Commission to determine particularly whether the three submarines are under-utilised or not utilised?** The criticism is underscored by the following points:

7.1.1 The Navy does not utilise the three submarines because they require repairs after being fitted with the wrong engines. These engines were supposed to be fitted into Frigates not submarines. The repairs will cost the South African Navy a huge amount of money.⁸

7.1.2 The three submarines are inoperable and kept at the dockyard.⁹

7.1.3 One of the submarines, ie, SOS Manthatisi has been utilised less than the other two submarines.¹⁰

⁶ See: Record, p7885, lines 21 – 25 and p7886, lines 8 – 15

⁷ See: Record, p57, lines 10 – 25

⁸ See: Record, p152, lines 15 - 20

⁹ See: Record, p485, lines 16 – 20 and p570, lines 1 - 6

¹⁰ See: Record, p570, lines 17 – 25

- 7.1.4 Submarines are inoperable because of the mechanical fault relating to faulty batteries fitted into them.¹¹
- 7.1.5 One of the frigates, ie, Amatola is not utilised because it has been fitted with a defective engine.¹²
- 7.1.6 The non-utilisation of Frigates and submarines is due to the lack of funding.

8.

WHAT DOES UTILISATION MEAN IN THE CONTEXT OF GOVERNMENT NOTICE

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- 8.1 The Commission of Inquiry has been appointed in terms of section 84(2) (f) of the Constitution of the Republic of South Africa Act 108 of 1996 "*the Constitution*".
- 8.2 The meaning of utilisation is at the centre of quandary. The meaning has to be grappled within a responsible manner lest it becomes crippling. This is so as so often parties at the centre of the quandary cannot see the solution. It is like holding the book too close to the face thereby not making out the words.
- 8.3 The principles governing statutory interpretation have to be applied when interpreting the word utilisation in the context of term of reference 1.2 .

¹¹ See: Record, p610, lines 20 – 25 and p611, lines 10 – 25

¹² See: Record, p611 - 613

8.4 The starting point in the interpretive exercise is the so-called “golden rule”.

8.5 The Constitutional Court has expressed the rule as follows:

“A cardinal rule in the construction of any legislation is that the intention of the legislature must be sought in the words employed in the legislation”.

See: Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009(1) SA 337 (CC) at para 58.

8.6 The rule requires adherence to the plain text of a piece of legislation, unless doing so would subvert the intention of the legislature or lead to absurdity. **(See: Hanekom v Builders Market Klersdorp (Pty) Ltd 2007 (3) SA 95 (SCA) Malindi v Commercial Union).**

8.7 This “rule” has been expressed as the entitlement to depart from the clear part of a statute or regulations only where it would otherwise lead “to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account”.**(See: Venter v R 1907 TS 910 at 915, quoted in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006(2) SA 311 (CC) at para 232).**

8.8 The Supreme Court of Appeal (“SCA”) has explained the notion of “absurdity” in this context:

“The effect of this formulation is that the court does not impose its notion of what is absurd on the legislation’s judgment as to what is fitting, but uses absurdity as a means of divining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend”. (See: **Poswa v Member of the Executive Council for Economic Affairs, Environmental and Tourism, Eastern Cape 2001 (3) SA 582 (SCA) at para 11**), page 586.

8.9 Despite the fact that the “golden rule” is repeatedly referred to as the starting point of all interpretation, there is an “emerging trend in statutory construction to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous”. (See : **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) at para 90**).

8.10 This requires that words in a legislative enactment “should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can

arrive at the true intention of the Legislature". (See: **University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A) 914 D-E; Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA) para 12 (concurring judgment) approved in Bato Star (supra) at para 90).**

8.11 The Constitutional Court has described the rule as a "further canon of statutory interpretation that the ordinary meaning of the words in a statute must be determined in the context of the statute (including its purpose) read in its entirety". (See: **Wary (supra) at para 61).**

8.12 It is a well-known presumption of statutory interpretation that Acts of Parliament do not contain purposeless provisions:

8.12.1 In **Case and Curtis v Minister of Safety and Security, 1996 (3) SA 617 (CC)**, Mokgoro K remarked as follows: "*we must read the text [of the statutory provision in question] as a whole, assigning a meaning to every word and phrase, and not permitting any portion of the text to be rendered redundant*". See: **Case and Curtis (supra) at para 57.** Although these remarks were

made in a minority judgment, there is nothing in the majority's judgment which contradicts this approach. See also Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party 1998(4) SA 1157 (CC) at para 52 in which a unanimous Constitutional Court expressly approved this approach to statutory interpretation.

8.12.2 In Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd, 1993(4) SA 110 (A) at 116F-G. the Appellate Division (as it then was) said the following:

"If the implication is that the word 'actually' is mere surplusage and can be ignored, that would be contrary to the firmly established rule of statutory construction that a meaning must be given to every word. See Steyn *Die Uitleg van Wette* 5th ed at 17-19. *In Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 Kotze JA said at 436

that to regard words occurring in a section as having been inserted per incuriam is contrary to that well-approved canon of construction:

“A statute”, says Cockburn CJ, “should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void of insignificant.” The Queen v Bishop of Oxford (4 QBD at 261). To hold certain words occurring in a section of an Act of Parliament as insensible, and as having been inserted through advertence or error, is only permissible as a last resort. It is, in the language of Erle CJ: “the ultima ratio, when an absurdity would follow from giving effect to the words as they stand.” R v St John (2 B and S 706), of the Queen’s Bench.’

See also Craies on Statute Law 7th ed at 103-4:

“It is a good general rule in Jurisprudence,” said the Judicial Committee in Ditcher v Denison, “that one who reads a legal document whether public or private, should not be prompt to ascribe – reason, impute – to its language tautology of superfluity, and should be rather at the outset inclined to suppose every word

intended to have some effect or be of some use.” And this is as justly and even Cowper –Essex v Acton L B: “The added of statute never should in interpretation be added to or subtracted from, without almost a necessity”.

8.13 The remarks of Cockburn CJ, approved in the passage above, were also approved by the Appellate Division in **Cornelissen v Universal Caravan Sales (Pty) Ltd 1971 (3) SA 158 (A)** at 174E.

8.14 In a recent judgment, Wallis JA summed up the law on statutory interpretation in a comprehensive way which renders it unnecessary to discuss other cases in any detail:

“The present state of the law can be expressed as follows:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, purpose of which it is directed

and the material known to those responsible for its production. Where more than one meaning is possible its possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation, in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".

See : Natal Joint Municipal Pension Fund v N Endumemi Municipality 2012 (4) SA 593 (SCA) at para 19.

8.15 It must, of course, be accepted that section 39(2) of the Constitution requires courts to interpret legislation, including regulations, in the light of the spirit, purport and objects of the Bill of Rights. That requirement is trite, as far as it goes. The method of interpretation envisaged by section 39(2) is applicable where it would lead to a plausible interpretation of the relevant legislation.

8.16 The interpretive exercise envisaged by section 39(2) is not carved out from the rest of the rules relating to interpretation. The ordinary rules of interpretation, encapsulated in the remark of Wallis JA referred to hereinabove, must be applied to determine the proper meaning of the provision. The process must take into account the requirement of section 39(2) of the Constitution, but not at the expense of what the provision is reasonably capable of meaning.

8.17 This was succinctly explained by Harms DP in **Minister of Safety and security v Sekhoto 2011 (5) SA 367 (SCA)** at para 15 as follows:

“There is a distinction between interpreting a legislation in a way which ‘promote[s] the spirit, purport and objects of the Bill of Rights’ and the process of reading words into or severing them from a statutory provision under s172(1)(b) following upon a declaration of constitutional invalidity under s172(1)(a).

... The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The second can only take place after the statutory provision, notwithstanding the application of all the legitimate interpretative aids, is found to be constitutionally invalid.”

8.18 As Lewis JA recently put it,

*“A collateral challenge in the guise of reading a word to mean something different is simply not legitimate (see in this regard **The Law Society of the Northern Provinces v Mahon**). It would be tantamount to usurping the role of the legislature. **South African Airways (Pty) Ltd v Aviation Union of South Africa 2011 (3) SA 148 (SCA) at para 28. Although the judgment was overturned on appeal, nothing said in the decision of the Constitutional Court contradicts these remarks made by Lewis JA. See **Law Society of the Northern Provinces v Mahon 2011, (2) SA (SCA)**”*** the case referred to by Lewis JA, at para 30.

8.19 From the foregoing, the Commission is exhorted to look at the evidence tendered before it together with the rules governing statutory interpretation to answer what meaning should be accorded to the word utilisation.

9.

THE MEANING OF UTILISATION IN THE CONTEXT OF EVIDENCE TENDERED BEFORE THE COMMISSION

9.1 It emanates from the evidence tendered before the Commission by

the officers of Navy and Airforce “officers” that the meaning of utilisation is construed differently by officers from the one understood by the public including critics. The critics and the public are lumped together as the public for the purpose of this aspect of the submissions. The public’s perception is that utilisation relates only to physical utilisation. Properly contextualised from the public’s perception, the word utilisation occurs when the Army utilizes the equipment for the purpose of combat during the war.

9.2 Rear Admiral Alan Green, one of the Navy witnesses testifying on behalf of the whole SANDF, informed the Commission that “utilisation of assets within the military context encapsulates the following:¹³

"34. The utilisation of assets is planned in terms of Government's ordered commitments and Ministerial priorities which in fact reflect the former. The Defence Value Chain guides the process in order to achieve the mandate and in doing so provides the collateral support to Government... The defence value chain starts with a strategic direction process guiding force development, force preparation and force employment. These processes are achieved by the underpinning force support. The utilisation of assets is covered in force development, inter alia by Operational

¹³ See: Statement of Rear Admiral Green, p10 of the paginated papers, parr 34 – 36

Testing and Evolution and the doctrine development. The force preparation is the mandate of the Service Chiefs to be able to provide the Chief of the South African National Defence Force with prepared and supported forces. The prepared and supported forces are provided to the Chief of Jointed Operations who employs the forces as directed by the Chief of the South African National Defence Force. Joint training to integrate the prepared forces is executed before deployments. From this understanding of the value chain one ought to understand that utilisation is focused to achieve an outcome through a number of outputs.

- 35. Assets have to be utilised in a life cycle that ensures that the minimum number that are required for force employment are available in terms of being prepared as required by the relevant doctrine. The other assets will be in various stages of maintenance so that when one asset comes in for maintenance there is another ready to enter the force employment cycle. In order to ensure that the asset is ready for force employment it must have passed through the forced preparation cycle.*
- 36. This concept is known as life cycle management. Military offset life cycle management is an international best practice.*

37. *The force employment requirements which are determined by CSANDF dictate as to the number of assets that must be ready”.*

9.3 Rear Admiral Phillip Schoultz one of the Navy witnesses also confirmed the description given by Rear Admiral Green regarding the concept of utilisation of assets. Rear Admiral Phillip Schoultz defined utilisation of asset as follows:¹⁴

"18.the Frigates and submarines are managed within an Operational Cycle which provides for both operational availability / utilisation and maintenance periods. Broadly speaking the periods within the Operational Cycle are: Force preparation periods, which include the safety and readiness (SARC process), individual ship training and exercises and Navy unique multi-ship exercises; force employment periods, which includes the conduct of operations, other audit commitments and joint and multi-national exercises; self-maintenance periods, where the ship's company conducts routine maintenance as well as minor on board repairs, assisted-maintenance periods, where the ship's company is assisted by the fleet maintenance unit in conducting maintenance and repair activities; and docking and essential defects periods, where a ship or submarine docks and the

¹⁴ See: The statement of Rear Admiral Phillip Schoultz, p5, paragraph 18

dockyard carries out under water maintenance as well as repair of essential defects that cannot wait for the next refit. At the end of an Operating Cycle a vessel decommissions and is handed over to the Dockyard for a Refit on completion of which the vessel will once again enter the Operation Cycle. During a Refit major repairs engineering changes and half-life extensions / upgrades are normally carried out. Whereas a self-maintenance period could be as short as a week, a refit could be as long as two years. The SARC process is broken down into the following – SARC1 - 3 Habitability and safety (which takes about three weeks), SARC4: weapon, system, signatures (5 weeks), SARC5: Functional work up (5 weeks) and SARC6: Mission based training when required (6 weeks). The whole SARC process therefore takes about 19 weeks.

19.

20.the SA Navy is only responsible for force preparation, with the Chief of Joint Operations being responsible for the conduct of operations and the conduct of joint and multi-national exercises. In this regard it should be noted that the Department of Defence's annual business plan orders the number of vessels that the SA Navy is to maintain within the operational cycle and what their readiness levels are to be. This determination is both a function of requirement and the availability of funds".

10.

ANALYSIS OF EVIDENCE LED IN RESPECT OF VARIOUS WITNESSES

10.1 The evidence tendered in the Commission in respect of term of reference 1.2 is distilled with to assist the Commission to determine whether the equipment's procured by the South African National Defence Force are under-utilised or not utilised at all.

10.2 The submissions deal with the synopsis of evidence of the following witnesses:

AIRFORCE OFFICERS

Brigadier-General Pieter Daniël Burger:

10.2.1 The evidence of Brigadier-General Pieter Daniël Burger talked to the utilisation of the light utility helicopter (LUH Agusta). In brief, General Burger testified as follows:

10.2.1.1 He is the director of helicopter systems in the South African Airforce "Airforce" and responsible for the light utility helicopter systems "LUH" for the South African Airforce "Airforce".¹⁵

10.2.1.2 He was appointed to this position during

¹⁵ See: Record, p1276, lines 23 – 25

February 2013.¹⁶

10.2.1.3 The first delivery of light utility helicopters was during 2005 and the last delivery was during September 2009.¹⁷

10.2.1.4 The function of the LUH is divided into two roles, viz, primary role and secondary role. Considering the role that the LUH is to play in South Africa and the region as a whole, the majority of the utilisation of the helicopter is within the secondary role.¹⁸ The primary role of the LUH is to assist the South African National Defence to prepare itself in order to deter any external hostilities.¹⁹ The secondary role involves the following:

- (i) Supporting the Army during times of conflict;
- (ii) Participating in peace support / peace keeping / enforcement operations;
- (iii) Humanitarian role both day and night during peace time;
- (iv) Peace time roles include tasks such as rescues from inhospitable terrain and casualty evacuations in virtually all weather conditions.²⁰

¹⁶ See: Record, p1290, lines 3 - 5

¹⁷ See: Record, p1297, lines 15 – 16

¹⁸ See: The Statement of General Burger, p5, par 23

¹⁹ See: Record, p1297, line 20 – 25

²⁰ See: Record, p1298, lines 5 – 15 and p1306, lines 16 – 23 and p130, lines 8 – 14

(v) Providing assistance and services to Government Departments in accomplishing their tasks and/or missions. LUH provides the following services and assistance to the Government Departments:

- (a) supporting the South African Police Services in the maintenance of internal stability;
- (b) rescue missions in mountainous terrain, at sea and in disaster situations.²¹
- (c) supporting the South African Police Services in crime prevention operations in order to reduce the local crime rate;
- (d) supporting the Department of Foreign Affairs to support the National Foreign Policy;
- (e) assisting both local and foreign Government Departments in accomplishing their tasks and/or missions, such as supporting the maintenance of regional stability and the rendering of aid.

10.2.1.5 The LUH is also utilised in respect of border patrols.²²

10.2.1.6 The LUH managed to perform the following exercises and operations since 2005:

10.2.1.6.1 **Exercises:**²³

²¹ See: Record, p136, lines 16 – 23

- (a) Winter Solstice (an Airforce training exercise);
- (b) Young Eagle (a joined exercise with the Army);
- (c) Seboka (joined exercise with the Army);
- (d) Good Hope and Golphino (SADEC exercises); and
- (e) Shield (2010 World Cup preparations in different areas).

10.2.1.6.2 **Operations:**²⁴

- (a) Chariot (standing operation for fire fighting and floods internally). This operation took place in September and November 2010 in Rosendal area, during 8 January 2012 at Hoedspruit area and also during November 2012 in Kimberley.²⁵

²² See: Record, p1305, lines 15 - 24

²³ See: Record, pp1315 and 1316, Annexure "PB4" attached to the Statement of General Burger

²⁴ See: P1316 – 1322, Annexure "PB4" attached to the Statement of General Burger

²⁵ See: Record, p131, lines 11 – 20

- (b) Corona (Army Border protection). This operation was performed during 2010 to 2012.²⁶
- (c) Edelvalk (Supporting National Transport in Nature Conservation);
- (d) Horizon and Rhino (Anti-Rhino poaching);
- (e) Isipho (Assistance to the Presidency);
- (f) Kwele (The 2010 World Cup).

10.2.1.7 The LUHs have flown 18 000 hours since entering service in 2005. The hours flown are more than the hours the Airforce was expecting considering the fact that the initial plan was to fly 200 hours per airframe per year.²⁷

11.

Brigadier-General John William Bayne:

11.1 General Bayne's testimony talks to utilisation in respect of Lead In-Fighter Trainer (LIFT: Hawk) and Advanced Light Fighter Aircraft (ALFA: Gripen). General Bayne testified as follows:

- 11.1.1 He is the Director: Combat Systems of the South African Airforce. He is responsible for the Gripen and Hawk

²⁶ See: Record, p1318, lines 21 – 25

Systems.²⁸

11.1.2 The roles and capabilities of Hawk and Gripen are as follows:

11.1.2.1 Gripen:

- (a) In brief, Gripen is a supersonic, single-engine dual and single seat, multi-role combat aircraft, able to perform a defence, surface attack which includes both air to ground and air to sea attack and as well as surveillance which is both reconnaissance and electronic gathering of information in the same mission. It is globally inter-operable.²⁹
- (b) The Gripen has capabilities such as defensive and offensive defence features and equipment such as airborne radar, air to air missiles, helmet, mounted display (HMD), stand-off and precision guided munitions, non-guided munitions, cannon, civilians and targeting pods and anti-shiping missiles (fitting for). The South African version of the Gripen was the first to receive a helmet mounted display.³⁰

11.1.2.2 Hawk:

²⁷ See: Record, p1332, lines 15 – 25

²⁸ See: Record, p835, lines 4 – 11 and Statement of General Bayne, p1 of paginated papers, parr 1 and 2

²⁹ See: Record, p968, lines 15 – 20 and the Statement of General Bayne, p6 of Index and paginated papers, par 36

³⁰ See: Record, p969, line 1 - 4 and the Statement of General Bayne, pp6 – 7, par 36

- (a) Hawk is a transonic, single engine, dual seat aircraft able to perform all required fighter training missions.³¹
- (b) Hawk is utilised to ensure safe and seamless fighter training, bridging the gap between the Pilatus – PC-7 and the Gripen Advanced Light Fighter Aircraft. It is also utilised for certain collateral SANDF support.³²

11.1.3 South African Gripen system consist of 26 aircraft (17 single seat and 9 dual seats).³³

11.1.4 Hawk System consist of 24 dual set aircraft.³⁴

10.1.5 The utilisation of Hawk and Gripen should be measured against the SAAF staff requirement which finds credence in the Constitution of the Republic of South Africa, the white paper on defence and defence review of 1998.³⁵

10.1.6 The SAAF staff requirement gives the best estimated average flying hours of the aircrafts per year and also serves as a baseline to determine the costs and the funding needed for each aircraft.³⁶

10.1.7 Hawk and Gripen have met all requirements set out in

³¹ See: Statement of General Bayne, p7 of Index and paginated papers, paragraph 38

³² See: Statement of General Bayne, p7 of Index and paginated papers, paragraph 38

³³ See: Record, p975, line 14 to 16 and the Statement of General Bayne, page 7 of Index and paginated papers, par 37

³⁴ See: Statement of General Bayne, p7 of Index and paginated papers, par 39

³⁵ See: Record, p1038, lines 8 – 22 and General Bayne’s Statement, p8 of the Index and paginated papers, par 42

³⁶ See: Record, p1038, lines 15 – 22

the SAAF staff requirement. Hawk aircrafts have flown over 10 000 major accident free hours since 2005 and the Gripen aircrafts have flown 3 500 since 2008.³⁷

10.1.8 These hours include completion of 95% of Hawk and 80% of Gripen operational test and evaluation (OT and E) down the units operating the aircraft with air and ground crews. The remaining OT and E for both types will be completed before final system handover.³⁸

10.1.9 Hawk and Gripen have taken part in many SAAF, joint SANDF and multi-national exercises in and outside the Republic of South Africa and specific SANDF operations since 2005. The two flight test instrumented (FTI) aircraft have been utilised for various test programmes and clearances at the SAAF Test Flight and Development Centre in (TFBC) in Overberg.³⁹

10.1.10 Operations taken by the Gripen and the Hawk aircrafts include, *inter alia*:⁴⁰

- (a) Kwele (World Cup Project). This project took place during June 2010 to July 2010;
- (b) Corona – (This operation took place during February 2011);
- (c) Marikana (This operation took place during September

³⁷ See: Record, p1058, lines 6 – 13 and General Bayne’s statement, p9 of Index and paginated papers, par 45 and Annexures “JWB8” and “JWB9” attached to the statement of General Bayne

³⁸ See General Bayne’s statement, p9 of Index and paginated papers, paragraaf 45

³⁹ See: Bayne’s statement, p10 of Index and paginated papers, p49

2012);

- (d) Prosper (This project took place in January 2012);
- (e) Vimbezela (This project took place during April 2013);

11.1.5 Gripen Aircrafts were involved in the following exercises:

- (i) Shield;
- (ii) Good Hope;
- (iii) Blue Glaster;
- (iv) APCD;
- (v) Seboka;
- (vi) Ndlovu, lion effort
- (vii) Ibsomar.

11.1.12 **Hawk:**

- (a) Corona Air – (This operation took place during February 2011);
- (b) Kwele – (This project took place during January 2010 to July 2010);
- (c) Phefo – (This project took place during January to February 2013);
- (d) Goss – (This project took place during August 2007).

⁴⁰ See: Annexure “JWB10” attached to the Statement of General Bayne

11.1.13 Hawk Aircrafts were involved in the following exercises:

- (a) AAD, Airforce Day Parade, Exercise Shield, exercise Seboka, Inauguration parade, GBADS, Exercise Young Iglo, Exercise Good Hope, Presidential Flight Past, Day of Reconciliation Fly past, Exercise Winter Solstice, Exercise Blue Crane, mini aid, Ipsamar, Ndlovu, Air to air camp, CAS Camp, Airforce day fly past, CASNDF Co as parade fly past, Goscos Parade fly past, Freedom Day fly past, Armed Forced Day fly past, Exercise Stalwart, Rand Easter Show, Makhado Show fly past and June OC Golf Day fly past.

11.1.14 The ratio for the aircraft utilised so far is:

- (i) Hawk Aircraft at 95% force preparation and 5% force employment;
- (ii) Gripen at 94% force preparation and 6% force employment;
- (iii) The bulk of the 5% and the 6% force employment was during the world cup⁴¹.

12.

General Bayne concludes by stating the following in his statement:

"Clearly the Hawk and Gripen systems have been well-utilised since delivery in line with the current security environment. Should the security environment change to one of conflict then the utilisation of the systems will change as and when required to defend and protect the Republic in line with the Constitutional mandate".⁴²

13.

THE NAVAL OFFICERS

REAR ADMIRAL PHILLIP SCHOULTZ:

By Admiral Schoultz's testimony deals, *inter alia*, with utilisation of Frigates and submarines. Rear Admiral Schoultz testified as follows:

13.1 In December 2010 he was appointed as the Flag Officer:
Fleet of the South African Navy.

13.1.1 In terms of Naval Staff Target 6 – 80 the new vessels
(Frigates) that the South African Navy wanted were to be capable of
carrying out sustained operations and performing the following
tasks:

13.1.2 Surface missile attacks, mine laying, sea training, self
-defence and limited intelligence.⁴³

⁴¹ See: Record, p1089, lines 17-25 and Bayne's statement, p10 of Index and paginated papers, par 50-51 and Annexure "JWB11" attached to the statement of General Bayne.

⁴² See: Statement of General Bayne, p12 of Index and paginated papers, par 59

⁴³ See: Record, p435, lines 15 - 25

13.1.3 These vessels had to be acquired in terms of a project called Outward. Due to the lack of funds Project Outward remained dormant and in 1989 it was superseded by Project Foreshore.⁴⁴

13.2 In terms of Project Foreshore the new vessels to be procured through the SDPP were to be anti-surface and anti-submarine warfare capable, carrying a helicopter and provide suitable command and control facilities.

13.3 The first delivery of four Meko A200 Frigates was made during January 2006. The last delivery was during September 2004.⁴⁵ All the vessels were handed over to the South African Navy by the 20th of March 2007.⁴⁶

13.4 The submarines, on the other hand, were acquired under project called Wills.⁴⁷ The first delivery of the submarines was during April 2006. The last delivery was in May 2008.⁴⁸

14.

FRIGATES UTILISATION

14.1 During 2002 the SA Navy recognised that the Frigate

⁴⁴ See: Record, p436, lines 1 – 9

⁴⁵ See: Record, p455, lines 1 - 21

⁴⁶ See: Record, p456, lines 1 - 5

⁴⁷ See: Record, p453, lines 9 - 16

utilisation as defined in Naval Staff Requirement 6 – 80 would not be possible under the South African Navy's then budget allocation. As a result a new operational profile was proposed for basic sparing and the manner in which the frigates should be utilised in future. This new operation profile reduced the number of days, reduced the sea days per annum and reduced the total mission duration for the four ships to 131 days per annum. In essence the Frigates would have an annual day cycle providing for a 27% for Ops available, 21% sea days and 9% mission deployment. Days ops available are days when the ship is out of maintenance and its post-maintenance certification is complete and it is available for operations until its next maintenance period.⁴⁹

14.2 On p472, lines 7 – 15 of the record, Admiral Schoultz told the Commission that the project indicator operational profile means that one must be able to maintain the ship and prepare the ship for a certain number of days of the year the ship will be available for utilisation, a certain number of days per year you must be able to utilise the ship at the sea and you must be able to send the ship on operations for certain number of days.

14.3 Frigates and submarines are managed within an operational cycle which provides for both operational availability / utilisation / maintenance periods. Operational cycle allows for periods when the

⁴⁸ See: Statement of Admiral Schoultz, p4 of the paginated papers, par 12

ship is operationally available during which it can be utilised but also for a period when the ship is not operational available when it is in a maintenance period.⁵⁰

14.3.1 Since their arrival, Frigates spent 1932 days operationally deployed, engaged in the conduct of joint or multinational exercises or engaged in other ordered commitments. 16,5% of 1932 days was in respect of mission deployment. Frigates were involved in 24 operations, 25 joint and multinational exercises and 5 other ordered commitments. The operations range from goodwill visits to countries such as Brazil, Nigeria, China, India, Vietnam, Singapore, Tanzania, Mauritius, East and West Coast Patrols, anti-piracy patrols in Mozambique, rescuing of injured sailors of Tristan da Cunha, safeguarding of the 2010 Soccer World Cup, drug runner interdiction and the escort of a vessel carrying nu-clear waste.⁵¹

14.4 Exercises conducted by Frigates range from simple procedural exercises to complex task force tactical exercises. The exercises performed by SA Navy involved the following countries: Argentina, Brazil, French, China, India, Mozambique, Namibia and Uruguay as well as with Nato spending maritime Group One. The exercises were conducted off the Southern African coast, off the South American coast and of La Reunion in the Indian ocean.

⁴⁹ See: Record, pp469 - 472

SUBMARINES UTILISATION

14.5 Submarines have spent 807 days operationally deployed and engaged also in the conduct of joint, multi-national exercises or engaged in the initial delivery, trials and training. The submarines have conducted 16 operations which have included East and West Coast patrols, two anti-piracy patrols in the Mozambique channel, two patrols to Marion Island, one of which was aborted due to a technical problem and, participated in safeguarding Soccer World Cup 2010. Submarines have also participated in 26 joint and multinational exercises with Navies of Argentina, Brazil, Germany, India, Namibia, United States of America and Uruguay as well as NATO standing Maritime Group One. Most off the exercises were conducted of the South African coast.⁵²

14.6 Considering that utilisation also involves force utilisation, it should be noted that SA Navy has trained some 4 040 personnel (647 support personnel, 1191 technical personnel and 2204 combat personnel).⁵³

15.

REAR ADMIRAL ALAN GRAHAM GREEN:

⁵⁰ See: Record, p480, lines 8 – 15 and the statement of Admiral Schoultz, p5, par 18

⁵¹ See: The statement of Admiral Schoultz, p6, par 21

⁵² See: Statement of Admiral Schoultz and Annexure “BS9” attached to the statement

⁵³ See: Statement of Admiral Schoultz, p8, par 24 and Annexure “PS10” attached to the statement

15.1 On 15 September 2014 the Commission requested the Department of Defence to provide details of the projected numbers of days it was anticipated the Frigates and the submarines would spend at sea.⁵⁴

15.2 On 24 November 2014 Admiral Green gave the following evidence:

15.2.1 The projected number of days it was anticipated the Frigates and submarines would spend at sea was conducted in terms of the Department of Defence ("DOD") Planning Process which is known as the Strategic Direction Process.⁵⁵

14.2.2 The Strategic Direction Process consist of four activities, namely:

- (a) Environmental analysis – this determines the type of the business that the DOD will conduct for the next 5 years;
- (b) Medium term strategic framework – this deals with the term of the administration of Government;
- (c) Medium terms expenditure framework – this involves a three year fiscal indication; and
- (d) Reporting – this involves reporting the actual hours anticipated to be spent by the vessels at sea.

⁵⁴ See: Supplementary Statement of Admiral Alan Green, p1, par 3

- 15.3 The planning is divided into two components, namely force preparation and force employment.
- 15.3.1 Force preparation requires the Navy to ensure that the vessels are prepared adequately for force employment. The Navy should also know what it intends to do with the vessels and how many hours it will normally take for the vessels to be at sea based on empirical data.
- 14.3.2 Force employment, on the other hand, is directed by Government.⁵⁶
- 15.4 The Department of Defence is using hours instead of days because of the instruction of the Auditor General that the performance of the Frigates and submarines should be indicated in hours, not in days.⁵⁷
- 15.5 When it comes to planning the hours, hours in respect of force preparation are a more manageable figure than hours in respect of force employment because force employment is directed

⁵⁵ See: Record, p8923, lines 20 – 25

⁵⁶ See: Record, p8924, lines 1 - 14

⁵⁷ See: Record, p8925, lines 1 - 8

on the need of the Government at that time.⁵⁸ The hours are then summated and put into Navy's plan for the year.⁵⁹

15.6 The hours projected and spent at sea by Frigates since the first delivery can be summarised as follows⁶⁰

15.6.1 The planned hours for the financial year 2006/2007 were 7 720. The actual hours were 5 052.

15.6.2 The planned hours for the financial year 2007/2008 were 9 114. The actual hours were 5 704.

15.6.3 The planned hours for the financial year 2008/2009 were 7 344. The actual hours were 5 658.

15.6.4 The planned hours for the financial year 2009/2010 were 9 888. The actual hours were 3 019.8.

15.6.5 The planned hours for the financial year 2010/2011 were 6 412. The actual hours were 4 415.9.

15.6.6 The planned hours for the financial year 2011/2012 were 6 412. The actual hours were 6 928.42.

15.6.7 The planned hours for the financial year 2012/2013 were 9 824. The actual hours were 1 419.

15.6.8 The planned hours for the financial year 2013/2014 were 15 920. The actual hours were 5 553.52.

⁵⁸ See: Record, p8925, lines 16 - 20

- 15.7 The hours projected and spent at sea by the submarines since the first delivery can be summarised as follows:⁶¹
- 15.7.1 The planned hours for the financial year 2006/2007 were 432. The actual hours were 1 758.
- 15.7.2 The planned hours for the financial year 2007/2008 were 537. The actual hours were 1 636.
- 15.7.3 The planned hours for the financial year 2008/2009 were 6 456. The actual hours were 2 199.3.
- 15.7.4 The planned hours for the financial year 2009/2010 were 5 230. The actual hours were 1 972.
- 15.7.5 The planned hours for the financial year 2010/2011 were 4 371. The actual hours were 3 941.
- 15.7.6 The planned hours for the financial year 2011/2012 were 4 371. The actual hours were 3 643.
- 15.7.7 The planned hours for the financial year 2012/2013 were 4 559. The actual hours were 1 348.89.
- 15.7.8 The planned hours for the financial year 2013/2014 were 6 291. The actual hours were 1 283.96.

If the force employment that was planned for the year, does not materialise, in other words, the need for ship to proceed, on a particular mission or operation, is

⁵⁹ See: Record, p8925, lines 23 – 25

⁶⁰ See: P8927, lines 3 – 16

no longer required, then that ship will not go to sea for that reason, ergo, the hours will be reduced.⁶²

17

Admiral Green concluded his testimony by stating as follows:

"So, when, when we hear the critics and they discuss that the ships have not been at sea, or make the intimations that there have been some, some problems or how they term it that the vessels are not capable of going to sea, that is not true. It is simply, the requirement for them to go to sea, no longer exist".⁶³

18.

WHETHER THE EVIDENCE TENDERED BY THE OFFICERS OF SANDF REBUTS THE ALLEGATIONS OF THE PUBLIC AND THE CRITICS THAT THE EQUIPMENT PROCURED BY SANDF ARE UNDER UTILISED OR NOT UTILISED AT ALL?

Airforce:

Hawk and Gripen:

⁶¹ See: Record, p8927, lines 20 – 25 and p8928, lines 1 – 6

⁶² See: Record, p8928, lines 11 - 29

⁶³ See: Record, p8928, lines 22 – 25 and p8929, line 1

Allegations of under-utilisation in respect of Hawk and Gripen Aircrafts were raised by David Maynier. According to Maynier the Hawks and Gripen are under-utilised for the following reasons:

- (a) Hawks have flown 2 000 hours per year instead of 4 000 hours during 2009 to 2012 as stated by General Gagiano.⁶⁴
- (b) The Minister of Defence and Military Veterans told the Portfolio Committee on Defence and Military Veterans that the South African Airforce has placed 12 Gripen Fighter Aircrafts in long-term storage.⁶⁵

19.

General Bayne, on the other hand, has tendered the following evidence rebutting allegations of under-utilisation in respect of Hawks and Gripen. General Bayne adumbrated in his testimony as follows:

19.1 The utilisation of Hawk and Gripen should be measured against SAAF staff requirement which is underpinned on the Constitution of the Republic of South Africa, the white paper on defence and defence review of 1998.⁶⁶

19.2 The SAAF staff requirement gives the best estimated

⁶⁴ See: Record, p7885, lines 21 – 25 and p7886, lines 8 - 15

⁶⁵ See: Record, p7888, lines 14 – 21 and Annexure “DM1” attached to the statement of David Maynier, p22 of indexed and paginated papers

⁶⁶ See: Record, p1038, lines 8 – 22 and General Bayne’s statement, p8 of the index and paginated papers, par 42

average flying hours of the aircrafts per year. It also gives a baseline to determine the cost and the funding needed for each craft.⁶⁷

19.3 Hawks and Gripen have met all requirements set out in the SAAF staff requirement. Hawk aircrafts have flown over 10 000 major accident free hours since 2005. Gripen aircraft have flown 3 500 hours since 2008.⁶⁸

19.4 SAAF has adequate Hawk pilots to feed the Gripen.⁶⁹

20

With regard to the allegation that 12 Gripen aircrafts have been placed in long-term storage, General Bayne testified as follows:⁷⁰

20.1 During the first quarter of 2013, the Director: Combat Systems investigated the possibility of inhabiting 12 Gripen aircrafts due to the low allocated flying hours in the 2013/14 financial year.

20.2 During the engagement with the original equipment manufacturer (SAAB) a more effective and less costly process was agreed to, reducing the number of maintenance activities required for storage and making the aircraft readily available for flying.

⁶⁷ See: Record, p1038, lines 15 - 22

⁶⁸ See: Record, p1058, lines 6 – 13 and General Bayne’s statement, p9 of index and paginated papers, par 45 and Annexures “JWB8” and “JWB9” attached to the statement of General Bayne

⁶⁹ See: Record, p1104, lines 23 – 25

⁷⁰ See: P1170, lines 1 - 25 and p1108, lines 1 - 5

20.3 The Director: Combat System and SAAB agreed on embarking on a rotational preventative maintenance (RPM) programme to better retain fleet integrity. In terms of RPM each aircraft is flown at least every 60 days.

20.4 Director Combat System also placed the aircrafts that were identified for RPM in tents inside revetments to prevent corrosion, external damage to the aircraft to strictly control the environment in which the aircrafts are secured. All 26 Gripen aircrafts will be flown and managed in accordance with RPM.

21

On page 1109 of the Record, lines 1 to 6, General Bayne told the Commission that as a result of embarking on RPM there are no Gripen aircrafts that are placed in long-term storage.

22

The Navy:

Frigates and submarines

Admiral Schoultz tendered the following evidence to refute allegations of non-utilisation of Frigates and submarines:

22.1 SOS Manthatisi has been utilised less than the other two submarines:

22.1.1 Admiral Schoultz denied that SOS Manthatisi is utilised lesser than the other two submarines:

22.1.2 Admiral Schoultz told the Commission that the Navy operates 2 of 3 submarines within the operating cycle. SOS Manthatisi is not utilised currently because it is undergoing a refit.⁷¹

22.2 Amatola (Frigate) is not utilised because it has been fitted with a defective engine:

22.2.1 The Navy has purchased a replacement engine which will be installed during the Ship's refit.⁷²

22.2.2 Amatola can operate with one engine considering the fact that the Frigates procured by the South African Navy are fitted with three engines.⁷³ This allows the Frigates to use the other two engines whilst one of the engines is inoperable.⁷⁴

22.2.3 Amatola has done approximately 200 days' deployment in

⁷¹ See: Record, p570 and p571, lines 1 – 13

⁷² See: Record, p613, lines 1 - 9

⁷³ See: Record, p614, lines 21 - 22

⁷⁴ See: Record, p616, lines 7 - 17

the Mozambique channels whilst using one engine.⁷⁵

22.3 Submarines are inoperable because of mechanical fault relating to faulty batteries fitted into them:

22.3.1 Batteries for the submarines have a 7 to 8 year lifespan. Therefore, submarines undergo refit every 8 years to replace the batteries.⁷⁶

22.3.2 SA Navy discovered that there was a build-up of gas in the batteries. This gas was in the form of hydrogen. The matter has been addressed after being reported to the original manufacturer.⁷⁷

22.3.3 In any event whether the defect in the battery had been identified or not, all the batteries have reached their lifespan and must be replaced.⁷⁸

Admiral Green has tendered the following evidence to refute the allegation that the non-utilisation of Frigates and submarines is due to the lack of funding:

⁷⁵ See: Record, p616, lines 18 – 25 and p617, line 1

⁷⁶ See: Record, p611, lines 15 - 19

⁷⁷ See: Record, p611, lines 20 – 25 and p612, line 1 – 3

⁷⁸ See: Record, p612, lines 4 - 10

- 23.1 The usage of the equipment is done in terms of the Department of Defence Planning Process, which is known as the strategic direction process.⁷⁹
- 23.2 The strategic process is guided by force development, force preparation and force employment.
- 23.3 Force employment requires the Navy to ensure that the equipment are prepared adequately. In other words, force employment is directed by the Government.⁸⁰ Assets have to be utilised in a life cycle that ensures that the minimum number that is required for force employment is available in terms of being prepared as required by the relevant doctrine.⁸¹
- 23.4 Force preparation, on the other hand, gives the Navy a direction as to how many hours will the equipment spent at sea including how long it will take the Navy to prepare forces.⁸² The strategic direction process assists the Navy to determine how much funding will be needed by the Navy for the particular year for the usage of the equipment.
- 23.5 If the force employment that was planned for the particular year

⁷⁹ See: Record, p8923, lines 19 – 25

⁸⁰ See Record, p8924, line 5 - 10

⁸¹ See: Statement of Admiral Green, p11 of index and paginated papers, par 35

⁸² See: Record, p8924, lines 5 – 13

does not materialise, in other words, the need for a ship to proceed, on the particular machine or operation, is no longer required, then that ship will not go to sea for that reason.⁸³

24

WHAT INFERENCE IF ANY SHOULD BE DRAWN BY THE COMMISSION IN THE LIGHT OF EVIDENCE TENDERED BY THE OFFICERS OF THE SANDF VIS-A-VIS THE EVIDENCE TENDERED BY DAVID MAYNIER AND, AS WELL AS THE CRITICISM RAISED BY THE PUBLIC WITH REGARD TO THE UNDER-UTILISATION OR NO UTILISATION OF ARMS AND EQUIPMENT?

24.1 It is manifest that the evidence tendered by the officers of the SANDF demonstrates that the equipment procured by the SANDF are utilised adequately. This evidence was never refuted by any person. There was no controverting evidence brought to the fore through cross examination. No evidence was tendered to dispute Navy Officers' evidence, except for David Maynier's testimony. David Maynier attempted to dispute the evidence of General Bayne by relying on annexures "DM1 – DM4" attached to his statement. These annexures deal with a reply to a Parliamentary question, the DOD's annual report 2012/2013, DOD's response to Portfolio Committee on defence and the Auditor General

⁸³ See: Record, p8928, lines 14 – 19

Management Report on the Regulatory Audit and the performance information of DOD for the year ended 31 March 2009.

24.2 In our considered view David Maynier failed to demonstrate that Hawks and Gripen aircrafts are underutilised. This view finds credence on the following considerations:

24.2.1 Although he informed the Commission that he can talk to the allegations of under utilisation of the Hawks, when he was asked by the Commission's Chairperson as to whether he has a personal knowledge of the information contained in annexure "DM4" (Auditor-General, Management report on the Regularity Audit and the Performance Information of the department of Defence for the year ended 31 March 2009, 30 July 2009) he responded by stating that the reason for him to bring the information contained in annexure "DM4" to the attention of the Commission was that he intended to simply flag it with a hope to assist the Commission⁸⁴.

24.2.2 David Maynier told the Commission that annexure "DM1" (a reply by the Minister of Defence and Military Veterans to a Parliamentary question (NO 288E) was

⁸⁴ See: Record, page 7886, lines 16-25 and page 7887, lines 1-20

merely brought to the attention of the Commission to demonstrate that there are two versions before the Commission⁸⁵. The first version is the Minister's version which is stated in annexure "DM1". The Minister states that:

"The South African Air Force has 12 Gripen fighter aircrafts placed in long term storage." The second version is that of General Bayne. General Bayne told the Commission that:

"During the first quarter of 2013, he investigated the possibility".

24.2.3 On page 7894 of the record, lines 5-9 he told the Commission that version of General Bayne is different from the one of the Minister of defence in that General Bayne does not concede that the aircrafts were placed in long term storage.

24.2.4 David Maynier also told the Commission that other than bringing the two versions to the attention of the Commission, he cannot take the Commission any further because he cannot adjudicate between the two versions⁸⁶.

24.3 We however exhort the Commission to make its own findings without being exclusively influenced by our reasoning in this regard.

25

CONCLUSION

25.1 In the leading case of **Julius v The Bishop of Oxford (1880) 5 AC 214** (cited with approval in many South African cases) the position is stated thus:

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

25.2 The leading English case resonates the Commission’s function to inquire into, to make findings, to report on and to make recommendations.

25.3 We submit that the Commission in discharging its function will have to interpret the word utilisation sensibly. This should be done with due regard on the one hand to the meaning of utilisation by officers from the

⁸⁵ See: record, page 7895, lines 19-25

⁸⁶ See: Record, page 7894, lines 9-10

Navy and Airforce officers "Officers" and by the public including the critics on the other hand.

25.4 We submit that grammatical usage is not the only answer. Even context in our humble submission does not provide an answer in this regard.

25.5 We urge the Commission to have regard to consideration of the language of the rest of all the five (5) terms of reference as adumbrated in the Government Notice No: 34731 of 4 November 2011. The Commission should also have regard to the matter of the terms of reference, the apparent scope of the terms of reference, the purpose of the terms of reference and within limits the background of the terms of reference.

25.6 In this regard, the Commission is exhorted to consider the words of Wessels AJA in **Stellenbosch Farmers Winery (Pty) Ltd v Distillers Corporation SA (Ltd), 1962(1) SA458 AD at 476E**. The analogy in the abovesaid paragraph is restated from **Stellenbosch Farmers Winery Ltd v Distillery Corporation SA (Pty) Ltd** in which Wessels AJA said:

"In my opinion it is the duty of the Court to read the Section of the Act which requires interpretation sensibly, ie, with the regard to the one hand, the meaning or meanings which permitted grammatical usage assigned to the words used in the section in question and, on the other hand to the contextual sense, which involves consideration of the language of the rest

of the statute, as well as the matter of the statute, its apparent scope and purpose and within limits its background” at 476E.

Adv. SM Lebala SC
Adv. IP Ngobese
424 High Court Chambers
Pretoria
17th June 2015