RE: ARMS PROCUREMENT COMMISSION

SUBMISSIONS (RATIONALE)

INTRODUCTION

1. On the 4th of November 2011 the President of the Republic of South Africa, Mr Jacob Gedleyihlekisa Zuma appointed the Arms Procurement Commission ("the Commission") in terms of Section 84(2)(f) of the Constitution of the Republic of South Africa Act 108 of 1996, ("the Constitution") read with section 1 of the Commission of Enquiries Act 8 of 1947 (" the Commissions Act") to investigate allegations of wrong doing in the Strategic Defence Procurement Packages ("SDPP").

2. The Commission was appointed in terms of the following terms of reference published in the Government Gazette dated 4 November 2011, namely:

> "The Commission of Inquiry shall inquire into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and relevant legislation, policies and guidelines:
>
> 1.1. The rationale for the SDPP.
>
> 1.2. Whether the arms and equipment acquired in terms of the

SDPP are underutilised or not utilised at all.

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

1.3.1. if they have, the extent to which they have materialised; and

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

1.4. Whether off-sets anticipated to flow from the SDPP have materialised at all and:

1.4.1. if they have, the extent to which they have materialised; and

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

1.5. Whether any person/s, within and/or outside the Government of South Africa, improperly influenced the award or conclusion of any of the contracts awarded and concluded in the SDPP procurement process and, if so:

1.5.1. Whether legal proceedings should be instituted against such cancellation, and the ramifications of such cancellation.

3. In these submissions we intend dealing with the term of reference 1.1 in respect of the rationale for the SDPP. In its investigation of the term of reference on the rationale of the SDPP, the Commission received various documents from relevant state departments, led oral evidence from former and current officials of the relevant state departments and interested parties. In particular, oral evidence was led from the current and former official of the Department of Defence ("DOD"), Armaments Corporation (Pty) Ltd ("ARMSCOR"), Department of Treasury, and the Department of Trade and Industry, ("DTI") and the former Cabinet Ministers who

were in the Minister's Committee appointed to consider the recommendations from the relevant committees evaluating the SDPPs.

4. In preparation of these submissions we have considered the relevant documents submitted to the Commission as formal submissions (in response to invitation to make submissions), documents submitted by state departments, and the evidence of witnesses who testified at the Commission. Noting that the terms of reference require the Commission to consider the Constitution, relevant legislation, policies and guidelines in its investigation, we also considered these instruments.

5. During the opening address[1] by the evidence leaders on the eve of the commencement of the hearings at the Commission, the evidence leaders undertook to present evidence on the rationale to deal with the following:

    5.1 The history of the state of the forces as they were before the decision was taken to acquire armaments;

    5.2 The process followed by Government to determine the needs of the Defence and its ability to discharge its actual mandate;

    5.3 The origins of the Strategic Defence Packages;

    5.4 The reasons for the purchase of arms, being the rationale;

    5.5 The Cabinet decision to acquire arms ; and

    5.6 The procurement processes applicable at the time.

[1] See: Record p 37 lines 5-15

6. In these submissions we intend dealing with the term of reference relating to the rationale in the following terms which in our view will encapsulate the issues set out in paragraph 5 above:

(a) Whether the decision to acquire the relevant arms was justifiable;

(b) Whether the acquisition was duly authorised ;

(c) Whether the decision to change the acquisition model was justifiable;

(d) Whether the acquisition model was justifiable;

(e) Whether due process was undertaken to mitigate the risks inherent in the procurement process, especially the procurement of such magnitude; and

(f) Whether due process was undertaken to ensure the affordability of the equipment;

7. In dealing with the questions raised in paragraph 6 above, we have taken into account that from inception to the eventual implementation of the SDPPs various administrative and executive decisions were taken. It is therefore apposite to deal with the question whether the decisions made throughout the SDPP procurement process until implementation met the rationality test. In enquiring into the rationale of the SDPPs, it is imperative that the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution") be considered as it applied at the conception phase of the SDPPs. As it will appear more fully hereunder, the mandate for the acquisition for the armaments was further amplified in the Constitution.

8. We submit that in considering the rationale of the SDPPs it is inescapable for the Commission to take judicial notice of the fact that procurement of this magnitude was novel and unprecedented. The traditional procurement process for armaments by ARMSCOR in our view had to be reconsidered by *inter alia* ensuring that the executive and Parliament had the necessary oversight of the SDPP process from conception to the eventual implementation thereof. It is further unavoidable to note that the traditional acquisition process by ARMSCOR before the advent of democracy in 1994, was being implemented during the arms embargo and sanctions imposed against the Republic of South Africa. It is for this reason that we also deal with the rationale to deviate from the traditional DOD and Armscor procurement process hereunder.

9. The Commissioners will also have to take into account the legislative framework available at the time of conceptualization of the SDPPs and that which evolved during the procurement process and implementation phase. At the time of the inception of the SDPPs process the relevant legislations were, the Defence Act[2], the Armaments Development and Production Act[3], the Exchequer Act and Audit Act[4] and the Interim Constitution. However, during the SDPP process, the Constitution, the Promotion of Administrative Justice Act[5], ("PAJA"), the Public Finance Management Act[6],(" the PFMA") were promulgated. In particular, PAJA was promulgated to give effect to section 33 (1) and (2) of the Constitution dealing with the right to administration action that is lawful, reasonable and procedurally fair,

[2] 44 of 1957
[3] Act 57 of 1968 before its repeal by Act 57 of 1968
[4] Act 66 of 1975
[5] Act 3 of 2000
[6] Act 1 of 1999

while the PFMA *inter alia* gave effect to section 217 of the Constitution requiring organs of state to procure goods and services in accordance with a system which is fair , equitable, transparent, competitive and cost-effective. Notably, PAJA only came into effect on 9 March 2001, while the PFMA came into effect on 1 April 2000. This was after the appointment of the suppliers in 1999 and during the signing of the supplier contract and loan agreements in 2000 and 2001 respectively.

B. **AD BACKROUND**

10. Prior to dealing with the rationale of the decision by the Government of the Republic of South Africa to procure armaments, it is apposite to consider the relevant backround leading to the justification to the SDPPs decision making process. In particular, it would be inappropriate not to consider the embargo that was imposed against the South African government before the advent of democracy in 1994.

11. In dealing with the conceptualisation of the SDPPs, we are mindful of the fact that at the advent of the first democratically elected government of the Republic of South Africa, ARMSCOR was in the process of procuring military equipment on behalf of the DOD. This acquisition process related in particular to the South African Navy (SAN) and the South African Air Force (SAAF). However, during this period, the United Nations Security Council Resolutions on arms embargo against South Africa were still in force. We therefore wish to briefly deal with the relevant resolutions of

the Security Council as a matter of backround leading to the initial decision making process to acquire armaments.

ARMS EMBARGO-RESOLUTIONS OF THE UNITED NATIONS SECURITY COUNCIL

12. The Security Council on 23 July 1970 adopted the **United Nations Security Council Resolution 282**, which was intended to consider the effectiveness of the previous Resolution 191 it had adopted on 18 June 1964. The Security Council in adopting Resolution 282 noted that despite the passing of Resolution 191 which had condemned apartheid, and established a group of experts to study the feasibility and effectiveness of measures that could be taken under the Charter, it was concerned by violations of the arms embargo passed against South Africa. The Security Council in passing Resolution 282, reiterated its total opposition to the policies of apartheid and reaffirmed its previous resolutions on the topic. The Council called upon member states to strengthen the arms embargo by ceasing the provision of military training to members of the South African armed forces and by taking appropriate action to give effective to the resolution's measures.

13. However, it appears that Resolution 282 was not effective to ensure compliance by member states as it was voluntary and not mandatory. On 4 November 1977, the Security Council unanimously adopted the **United Nations Security Council Resolution 418**, which imposed a mandatory arms embargo against South Africa. However, as is evident from the evidence and documents before the Commission, the South African Government continued to circumvent this embargo in an attempt to strengthen its Navy and SAAF and to sustain its bush war. However, according to Rear Admiral Alan Green this resolution had a direct impact in the failure by the SADF to procure corvettes from France. Further circumventions by South Africa led the Security Council to pass Resolution 591.

14. On 28 November 1986, the Security Council unanimously adopted the **United Nations Security Council resolution 591**[7], after recalling resolutions **418** (1977), **421** (1977), **473** (1980) and **558** (1984). The Security Council strengthened the mandatory arms embargo imposed against South Africa by Resolution 418, and made it more comprehensive. Resolution 591 sought to clarify vague terms from previous resolutions on the topic. Most importantly, the resolution urged Member States to ensure that components of embargoed items did not reach South Africa through third countries, including spare parts for aircraft and other military equipment belonging to South Africa, and any items which other countries may feel are destined for use by the South African police force or military. These items included aircraft, aircraft engines or parts, electronic and telecommunications equipment, computers and four-wheel drive vehicles. In terms of "arms and related material" from Resolution 418, this included nuclear, strategic and conventional weapons, all military and paramilitary police vehicles and equipment and other related material. The Security Council urged particularly against any cooperation in the nuclear field.

15. The Security Council then went on to urge Member States to not receive any imports of arms, ammunition or military vehicles from South Africa, asking those that had not yet done so to put an end to all exchanges and visits, including by government personnel. It also requested Member States, and those who are not a member of the United Nations, to not participate in any activities in the country that may contribute to South Africa's military capability, ensuring national legislation should reflect this. It was apparent from the evidence of the DOD and ARMSCOR that some states still cooperated with South Africa; This in our view is apparent from the

[7] See: Record p 428 lines 18 to 24 where R/Adm Schultz confirms that Resolution 571 was more draconian going as far as banning the sale of 4 x 4 vehicles to South Africa because of possible military use, this left the South African government with not many options whereby they could get additional ships and submarines. However, in the 1970"s the SA government was able to acquire three strike craft missile boats from Israel and build a further six locally.

assistance from Israel in the upgrading of the Mirage III to a digital cockpit and a few twigs to create a Cheetah aircraft.

16. Further, Resolution 591 called on the then Secretary-General Javier Pérez de Cuéllar to report on the progress of the implementation of the current resolution by no later than 30 June 1987.The adoption of Resolution 591 was important to tighten the loopholes left by the previous Resolutions. It was clear to the Security Council that the then South African government circumvented the embargo in various ways which included procurement of military technology and components which it could not procure openly.

17. As it will appear more fully hereunder, the effect of the embargo and sanctions had an adverse effect on the failure to procure or upgrade equipment for the Navy and the SAAF. The aforesaid Security Council resolutions, though circumvented in some instances had a direct effect on status of the defence equipment prior to 1994.

18. The embargo was lifted by Resolution 919 following democratic elections in 1994. **United Nations Security Council resolution 919**, adopted unanimously on 25 May 1994, after recalling all resolutions on South Africa, in particular resolutions 282 (1970), 418 (1977), 421 (1977), 558 (1984) and 591 (1986), the Council welcomed the recent general elections and new government and decided, under Chapter VII of the **United Nations Charter**, to terminate the arms embargo and all other restrictions against South Africa. Measures imposed in other resolutions would also be ended. The Committee of the Security Council established in Resolution 421 was also dissolved.

19. We submit that Resolution 919 was instrumental in paving the way for the SDPPs procurement. As it will appear more fully hereunder, Germany only agreed to participate in the SDP procurement process in relation to the Frigates and the Submarines after the lifting of the embargo and sanctions against South Africa. We therefore wish to deal with the status of the arms equipment before the SDPPs immediately after the lifting of the arms embargo, which in our view is relevant to the question of rationale on the decision to procure the armaments.

THE STATUS OF ARMS EQUIPMENT PRE-1994 AND THE NEED FOR ARMAMENTS

THE NAVY

20. The first witness to give the Commission an overview of the status of the arms equipment in the South African National Defence Force was Rear Admiral Alan Green. Although a naval officer, he gave a general overview on the state of the armaments in both the Navy and to some extent the SAAF.

21. Rear Admiral Alan Green testified that at the advent of the new dispensation post 1994, the SANDF was established leading to the integration of the former SADF and from the former liberation movements of South Africa so that there was a fair integration.

22. In regard to the status of the equipment as at 1994, he mentioned that a lot of equipment was at the end of its life cycle and that was due to the sanctions that were imposed prior to 1994. He indicated that during pre-1994 era the role of Armscor, was largely to gain equipment on a sanction busting type formula[8].

23. As early as the 1970's, 1980's and early 1990's the SADF had identified a need to rejuvenate the main equipment they would use to defend and protect the Republic. The reason for doing so according to him, was that the equipment had been used extensively both at sea, on the land and in the air.

THE FRIGATES

24. The last of the large ships the Navy had were the frigates. The Navy then engaged in an acquisition programme in France to acquire Corvettes, the project became the victim of the mandatory United Nations embargo in 1977[9]. The Navy had to continue to endeavour to create capacity to acquire large ships and a number of programmes ensued as fully referred to hereunder[10]. The requirement for large vessels came a long way and the same can be said about the submarines which were also at the end of their economic life cycle. The SADF had no alternatives at the time and they had to stretch it . The same could also be said about the SAAF that had similar processes in place to rejuvenate their aircraft because a number of them were getting old and numbers were diminishing. Rear/Adm Green during his

[8] See: Record p 101

[9] See: Paragraph 13 above dealing with United Nations Security Council Resolution 418 and p 428 of R/Adm Schultz evidence where he stated that it was two A69 Aviso Corvettes and two Agusta submarines the Navy had attempted to purchase and the procees was aborted in November 1977 as a result of Resolution 418.

[10] See: Record p 103 lines 5 to 15

evidence gave an example of the maritime patrol aircraft (the Shackelton) that was used frequently in their maritime operations and that eventually went out of commission in the Air Force. This maritime aircraft has not yet been replaced and according to him, it is a huge gap for maritime operations[11].

25. The demise of the frigates was exacerbated when the SA's President Kruger was lost at sea in 1982 during an exercise resulting in a tragic loss of 16 members of the SA Navy[12]. As the Navy was left with two vessels, the Navy would rarely have one vessel available all the time. In fact Rear Admiral Higgs indicated that these frigates had been acquired from Britain in the early sixties which were known as President Kruger , President Steyn and President Pretorius. There was an attempt to engage in an upgrade programme and this failed and the last frigate was decommissioned in 1985[13].

26. In regard to the status of submarines over time, the SADF had three Daphne class submarines from France. These submarines were also extensively used and their maintenance became quite demanding. The vessels had also come to the end of their life cycle and the last submarine was decommissioned towards the end of 2004[14].

27. The strike crafts were the only combatants the Navy had after the frigates were decommissioned. The first strike craft arrived in the late seventies[15]. There were nine strike crafts of which at best they could only have six at sea at any one time but

[11] See: Record p 104 lines 1 to 8
[12] See: Record page 262 Lines 1 to 15 Rear Admiral Higgs evidence
[13] See: Record p 105 lines 10 to 16
[14] See: Record p 105 lines 1 to 10.
[15] See: Record page 263-r/Admiral Higgs's evidence

normally the SAN would have less than that. The strike crafts of 400-tons were primarily designed to operate in an environment very much different to that of the South African coastline as they were mainly designed for the Mediterranean which is not as rough as the shores of the East Coast of South Africa. This fact was corroborated by Rear Admiral Higgs to the effect that our seas are miserable and needs big ships. A 3500 frigate is perfectly able to operate and to achieve and help overcome the problems encountered by strike crafts. The last frigate the Navy had was up until 1985[16]. These ships (strike crafts) were also getting at the end of their life cycle in terms of electronic equipment, the propulsion system and the hull because of the demands made on the hull when it is underway in very heavy seas[17].

28. Further, the small size of the strike crafts limited their mobility, weapons and sensor performance, crew endurance in the adverse sea conditions. They could also not carry a helicopter to provide for over the horizon surveillance, for scouting, for targeting or for attack. They also lacked space to provide for a nation command post facility. They had no anti-submarine capability. Rear Admiral Schultz in his evidence stated that in the Second World War more than 133 ships were actually lost to submarine-type action around our shores and so the fact that the SAN did not have an anti-submarine capability weighed heavily on the minds of the naval planners. The design life of the strike crafts was coming to its end with the first of these vessels having been built in 1977, the first three in Israel and the last six being built in Durban by 1986[18].

[16] See: Record p 294 lines 10 to 17
[17] See: Record p105 lines 10 to 25
[18] See: Record p 261 lines 1 to 25 and p 262 line 1

29. Although there were upgrade programmes engaged in, the ships were not suited for the tasking around the South African coast. These strike craft are still in operation today but in a different configuration. They are considered to be offshore patrol vessels rather than surface combatants. They no longer carry missiles and they are used extensively for training and force preparation but they still do execute exercises and operations[19].

30. Rear admiral Schultz in his evidence indicated that the need for armaments in the Navy historically came about in the early 1800 as South Africa had been primarily threatened twice and colonised twice in terms of matters maritime. It was as far back as 1885 when the Natal Naval Volunteers was formed at the time when government then had feared a possible attack on the port by a Russian Cruiser. In 1921 during the Imperial Conference in London, at the time when Japan was rising to power , it was recognised that the Cape coast and the sea route around our shores was vulnerable and it was recommended that a Cruiser be provided to South Africa to protect these routes . It was also decided that South Africa should also acquire own escort vehicles or vessels[20].

31. During 1955 a Simonstown Agreement was concluded between South Africa and Great Britain in terms of which both countries would jointly use their maritime forces to protect the Cape sea route and this also permitted South Africa to purchase vessels from Great Britain. This agreement resulted in the purchase of Three Type 12 frigates during the 1960's as well as the three Daphne Class submarines[21].

[19] See: Record p 106 lines 1 to 7
[20] See: Record p 427 lines 5 to 23
[21] See: Record p 428 lines 1 to 11

32. When vessels are purchased, the Navy looked at a lifespan of 30 years. Given that the run-up in terms of acquiring a new capability could take up to ten years, normally after approximately 20 years in service of a platform process are undertaken towards its replacement. With regard to the frigates and their eventual replacement, Naval Staff Target 6/80 was prepared during 1980 which specified the need for six vessels to be acquired during the period 1987 to 1991. The Naval Staff Target 6/80 noted that there was a shortage of ships to meet the Navy's commitments. The equipment that was used was facing block obsolescence. It was important to ensure that whatever equipment was acquired met the SAN operational needs and would be in operation for approximately 30 years. There was therefore a need to commence the process of replacing the Type 12 Frigates that had been acquired in the early sixties (the same rationale holds good for the commencement of the submarine replacement process in the nineties) . Cognizance was taken for the need for replacement as the Type 12 frigates were withdrawn from service in 1985[22].

33. The Naval Staff Target 6/80 set out the following requirements for the new vessels, namely, capability of carrying out sustained operations and performing surface missile attacks, sub-surface attacks, mine laying , sea training, self defence and limited intelligence gathering. The Ministerial approval was granted on 15 September 1980 and Project OUTWARD was registered against Naval Staff Requirement 6/80 Revision 1. As a result of lack of funds Project OUTWARD

[22] See: Record p 431 lines 1 to 25

remained dormant and during 1989 it was superseded by Project FORESHORE (later renamed Project FALCON)[23].

34. The Project FALCON requirement was for four multi-purpose vessels to be delivered over the period 1997 to 2002 with the possibility of additional vessels in the future. The vessels were required to be Anti-Surface and Anti-Submarine Warfare capable to carry a helicopter and provide suitable command and control facilities. However, in July 1991 the project was cancelled due to lack of funds. Following the aforesaid cancellation two years later in May 1993 the same Naval Staff requirement was revised and it formed the basis of Project Sitron which eventually delivered the Frigates under the SDPPs[24].

35. During 1994 and 1995 there were two tendering processes with international bidders before the process was deferred in May 1995 by the then Minister of Defence in order to await the outcome of the White Paper on Defence and the Defence Review. On completion of the White Paper on Defence and the Defence Review and after confirmation of the Frigate requirement, the tendering process was reopened during the latter part of 1997 as part of the SDPPs initiative and by November 1998 Cabinet had approved the German Frigate Consortium as the preferred bidder. Subsequent to contractual negotiations and the build programme ,the first of the four new MEKO A200 Frigates was commissioned into the SA Navy in February 2006 and the fourth in March 2007[25].

[23] See: Record p 435 lines 15 to 25
[24] See: Record p 444 lines 1 to 11
[25] See: Record pp 447 to 453

THE SUBMARINES

36. The acquisition of the submarines followed the failure to acquire the AGUSTA in 1977 from France following the arms embargo. This led the SA Navy to conduct a half –life refit of its submarines during 1980 and followed it up with a submarine Life Extension Programme (Projects NICKELS and FANTAIL) during 1989. These life extension projects were to ensure that the capabilities of the submarines are retained until such time as replacements could be acquired[26]. It would appear that the SA Navy during 1996 also made attempts to acquire three UPHOLDER Class submarines from the United Kingdom[27].

37. During September 1999 Cabinet announced the approval for the acquisition of three new submarines as part of the SDPPs initiative. The submarines were acquired under Project WILLS. According to the Preliminary Staff Requirement 1/99 dated 6 January 2000, it was noted that if the DAPHNE submarines were not replaced by 2005 , the country would lose its submarine capability and once lost, this capability would be extremely be difficult to restore and would be costly in terms of vessels , infrastructure and most importantly , expertise. Notably, while in the past the Staff Requirement preceded the packages, Staff Requirement 1/1999 was written after the announcement by Cabinet that South Africa would be receiving new submarines[28].

[26] See: Record p 457 to 459
[27] See: Record p 460 lines 1 to 4
[28] See: Record p 460 lines 5 to 25

38. Subsequent to the contractual negotiations, and the build period the first Type 209 submarine arrived in South Africa during April 2006 and by May 2008 all three had arrived.

THE SAAF

THE AIRCRAFT

39. Five witnesses from the South African Air Force ("SAAF"), namely Major General Gerald Malinga ("Malinga"), General Pelser, Brigadier General Bayne ("Bayne"), Brigadier General Pieter Burger ("Burger") and Col Viljoen gave evidence before the commission on the rationale for the procurement of both the fighter aircrafts and the Light Utility Helicopters. Prior to the commencement of the evidence of the SAAF witnesses, a slideshow presentation was made by Bayne, witch took the Commision through the history of fighter Aircraft in the Air Force from 1940's through until the advent of the SDPP's . Bayne took the Commission through the changes in some of the performance of the aircraft. A schematic presentation was also shown to describe the differences between fighter aircraft[29]. Similarly, Burger made a similar slideshow presentation on the past and current capability in respect of the helicopters acquired by the SAAF over the years[30].

40. General Malinga, the Deputy Chief of the SAAF gave a historical backround on the SAAF generally and in particularly on the rationale for the acquisition of the SDP packages in relation to the aircrafts. He corroborated the evidence of Admirals

[29] See: Record pages 687 to 706
[30] See: Record pages 707 to 715

Green and Higgs to the effect that the SANDF derived its mandate from the Constitution with the primary mandate to defend and protect the Republic, its territorial integrity, its sovereignty and its people in accordance with both the Constitution and the principles of international law regulating the use of force. General Malinga made reference to sections 200 of the Final Constitution and sections 227 (1) of the Interim Constitution in explaining the constitutional mandate and obligations of the SANDF[31].

41. General Malinga stated that South Africa is a member state of several regional and global organisations namely the United Nations and the African Union and from time to time the SANDF is called upon to assist with their military capabilities He gave examples of the involvement of the SANDF in Burundi and Democratic Republic of Congo to promote peace after responding to a request by the United Nations. He emphasised that the responsibilities of the SANDF are not only landward but it is required to also protect the coastline and the marine resources that lie within the territorial waters of the Republic of South Africa. General Malinga corroborated the evidence of Admiral Higgs that the decommissioning of the maritime aircraft left a gap in as far as the capability of our Navy to secure our marine and territorial interests at sea. Further, he elaborated that one of the SAAF's roles was to give support to surface forces, namely the Army and the Navy[32].

42. General Malinga testified that South Africa has areas of responsibility being its landmass and its territory on the sea but also certain international obligations which requires the SAAF to comply with particularly in peace keeping operations.

[31] See: Record pages 756 to 764
[32] See: Record pages 762 to 763 lines 1 to

43. The aircrew would thereafter be selected to go to 85 Combat Flying School for initial Fighter training on Impala Mk1 aircraft, then fly the Sabre which was later replaced by the Impala MkII as a stepping stone completing training on the Mir III.

44. Some aircrew would return to operational Impala Squadrons in between , flying both MkI and MkII types. From graduating on the Mk III operational conversion course aircrew would be posted to any one of many operational Squadrons to fly MIR III, Mir F1, Canberra and/or Buccaneer.

45. The SAAF acquired the above types of aircraft as an ongoing process of renewal of the ageing equipment and these were procured from various countries and companies throughout the seventies and eighties in which period there was an embargo. However, during this period sanctions were becoming more effective and technology on the other hand was developing at an ever increasing rate.

46. The aforesaid three-tier fighter training system was established in the SAAF In the late fifties when it acquired the transonic Sabre fighter from Canada as its fighter aircraft. Prior to then, the SAAF was using the 333 American Harvards for its basic training as well as the Vampire jet trainer and fighter aircraft to train jet crews and create jet fighter capability. In or around the mid-1960s and early 1970s the Vampires came to the end of their useful life and these were replaced by the Impala MK2 and MK1.Impala MK1 was the trainer for fighter pilots and Impala MK2 was a light fighter attack aircraft. At this point, the AirForce was using the two tier system. In the mid-seventies the SAAF acquired two variants of the Mirage F1. The two variants of the Mirage as well as the Impala MK2 became the operational fighter aircraft. So the SAAF reverted to the three tier system with the Harvard the MK1 and ultimately one of the Mirage variants or MK2.

47. The South African Air Force retained a three-tier training system throughout its history. This was implemented as follows, the Harvard was used for the basic pilot training after qualifying, getting your wings for your basic flying then you would go to the Impala Mk1 if you were streamed as a fighter pilot. From the Impala Mk1 then to the operational aircraft, in this case all the types of operational variants, those being the Mirage III, Mirage F1 and the Impala Mk2 at that time.

48. Also in this period the Sabres were decommissioned, as they had reached the end of their useful life. However, prior to their phasing out in 1980, the SAAF had around 350 jet trainer, fighter, bomber and reconnaissance aircraft. At present, the quantity of the air force armament available in the SAAF is about 15% of what the Air Force was in the 1980's. The three tier system has always been the SAAF approach. When the SDPP acquisition model was introduced, the three tier system was in place.

49. Both General Malinga and Bayne testified that the fighter component of the SAAF is required to deliver the three key tenets of airpower, namely flexibility, mobility and firepower which could be mustered, utilised and delivered rapidly, with surprise and over long ranges. To this end, the SAAF acquired fighter aircraft with an in-flight refuelling (IFR) capability and also in the mid-eighties, acquired Boeing 707 aircraft to deliver the IFR capability, electronic warfare, heavy freight and passenger carriage roles in the eighties.

50. By the early eighties many aircraft manufactures were developing fly by wire controlled engines, digital cockpits with integrated avionics including sophisticated Electronic Warfare Suites and precision weapons delivery capabilities, eg the F-16,

Mig-29 and Mirage 2000. The Israeli Aircraft Industry (IAI) had also started to upgrade the Israeli Air Force fighters with advanced airframe features and a digital cockpit.

51. In order to keep up with these advances in the airpower domain, the SAAF, Armscor and local arms industry embarked on a programme with IAI to upgrade the MIR III aircraft to the Cheetah standard and enable the SAAF to enter the digital era of aircraft operations. Dual and single seater variants of Cheetah aircraft were delivered to the SAAF between 1986 and 1994. The exposure to these digital era aircraft enabled the SAAF to grasp the value of a multi role type fighter.

52. During the late eighties, the Bush War came to an end. Unlike during the eighties when the Defence Budget had grown, the defence budget was cut drastically in the early nineties and many squadrons closed and a lot of aircraft were phased out. These included the Canberra, Buccaneer, Mi F1CZ and some Impala/Cheetah aircraft.

53. Subsequent to the elections in 1994 and the adoption of the interim and the final Constitutions respectively, a White Paper on Defence and the Defence Review, the Defence budget was cut drastically and a further budget cut was effected in 1997.

54. The budget cuts on defence had an impact in the phasing out of the F1AZ, some Cheetahs and more Impalas. During the period, the Impala fleet of aircraft was rapidly ageing with a life to maximum 2003 and the remaining Cheetah fleet was estimated to have an upgrade life until 2008 for the dual seater and until 2012 for the single seater.

55. It is apparent that the Impala fleet needed replacement by 2003 and the upgraded Cheetah medium fighter fleet needed to be replaced by latest 2008 to be operational by 2012. The SAAF rationale in 1996 was to replace the Impala fleet with 48 Advanced Fighter Trainers (AFT) and to replace the Cheetah fleet with 32 Future Medium Fighter (FMF). The SAAF took cognizance of the replacement programme of the Harvard basic trainer fleet with the Pilatus ASTRA in the mid nineties

56. In respect of the SAAF the Defence Review of 1998 mandated the need for a SAAF Air Defence capability that included 2 frontline Squadrons of 32 FMFs and a light fighter Squadron of 16 AFTs and a Combat Flying School of 22 AFTs. This was a total of 70 aircrafts. The 22 AFTs were earmarked for training. However, the force design did not include training assets but only operational assets.

57. Due to the budget cuts in 1997, the SAAF had to lower its sights in terms of performance class of the future front line fighter. Hence the requirement for an Advanced Light Fighter Aircraft and an attempt to move to a two tier fighter training system instead of the three tier system previously in use.

58. It has transpired during evidence of General Hechter that it was only after the receipt of the Requests for Information (RFIs) and after the SAAF had concluded its work sessions in that regard that it became apparent that the SAAF would need to stay with the three tier system, which then required the procurement of the Lead in Fighter Trainer (LIFT) aircraft. This requirement was presented to and endorsed by the Armaments Acquisition Council (AAC).

59. The aircrafts were ultimately scaled down because the country was no longer at war, the cold war was over and South Africa having become a democratic country was now promoting good relations within the region. As indicated above, in 1990

the first biggest defence cut happened and when the SDPPS were under consideration in 1997, there was another huge budget cut. In the eighties the air force had about 350 jet trainer fighter aircrafts but as at August 2013, the SAAF had only 52 fighter aircraft. In the mid-1980s the defence budget was 4.7% of the GDP, which constituted 25, 7% of the total government expenditure. Today the defence budget is about 1, 2% of the GDP, which constitutes about 16 % of the total government expenditure.

60. After having considered numerous options during 1994 qnd 1997 the final decision was to acquire 28 ALFA under project Ukhozi and 24 LIFT under project Winchester. This according to evidence Bayne, was cost driven rather needs driven. The number of aircrafts was reduced from 70 to 52. This is evidenced in the revised staff target and staff requirements for project UKHOZI and WINCHESTER[33].

61. The ALFA and the LIFT, the Gripen and the Hawk were selected in November 1998 by the government as the preferred bidder solution to satisfy the SAAF combat system requirements. This was preceded by a year of contract negotiations and the Gripen and Hawk contracts were signed in December 1999.

THE HELICOPTERS

ALOUTTE III REPLACEMENT

62. In the late 1950s the RSA acquired three helicopters and in 1962 light utility helicopter (LUH) Alouette III were also acquired, while Alouette II helicopters were

[33] See: annexures JWB1 and JWB 2 attached to the statement of General John William Bayne

acquired in 1961. The three tier system was established even in respect of the LUH in that the Harvard was used as the basic flying training equipment, then those who streamline to the rotor wing would then train on Alouette II before they go to operational. In the present day our three tier system is in the following flow; the Pilatus PC7 MK2, the Augusta A109 and then the Oryx. Thus, in the early 1990's a need was identified to either upgrade or replace the Alouette which was about 30 years old.

63. In 1992 the Alouette III Replacement Capability Study was done and the upgrade study was done in 1993. The study involved many stake holders and concluded that the existing capability needed to be replaced rather than upgraded, further, it determined that the number of helicopters required for replacement would be in excess of sixty (60). This study information was incorporated into the User Requirement Statement (URS) which was developed and Version 1 thereof was concluded in 1994. Subsequently, the URS was developed into various versions with Version 5 ultimately being signed in March 2000. The Required Operational Capability (ROC) was approved in 1995 and the Staff Target in 1996. The approval of the staff target by the Armaments Acquisition Board on 16 May 1996 elevated the programme to the project status registered as Project Flange[34].

64. It is common cause that on 17 June 1996 a request for Information (RFI) was issued to 16 companies that were considered to have an interest in satisfying the Alouette III replacement. The responses from these companies were subjected to the approved Armscor evaluation process. This resulted in the shortlist of products from three helicopter companies namely Agusta Un' Azienda Finmeccania S.p.A for the A109 "Power" helicopter, Bell Helicopter Textron , a Division of Canada Ltd for

[34] See: Annexure FKSV-3 of Colonel's Frank Kevin Sargent Viljoen statement

the Bell 427 and the Eurocopter, a subsidiary of the Europe Aerospace and Defence Systems (EADS) for EC635.

65. The three shortlisted companies offered different engines namely, Agusta offered either the Pratt and Whitney or the Turbomeca engine, while Bell only offered the Pratt and Whitney and Eurocopter only offered the Turbomeca engine.

66. On 29 September 1997 a second RFI was issued to the three shortlisted companies in terms of the Strategic Defence Packages (SDPs) process which replaced the traditional acquisition process of Armscor. All three companies met the each of the 19 mandatory criteria and were qualified for further evaluation.

67. The Agusta A109 was found to be cheaper and to be the superior product when measured against the approved Military Value Index (MVI) in terms of the second evaluation model which was compiled to accommodated the SDPs.

68. A Request for Offer (RFO) for sixty units was issued on 13 February 1998 to all three shortlisted contenders and Agusta was found to be a superior product as measured against the approved MVI. Agusta A109 was recommended to Cabinet as the best suited system to replace the Alouette III and on 18 November 1998 such recommendation was accepted by Cabinet.

69 The Cabinet gave approval for negotiations to be entered with Agusta in respect of the supply of fourty (40) Agusta A109. Subsequent to the negotiations, on 15 September 1999 Cabinet approved procurement of 30 Agusta A109s with an option of the additional 10 helicopters to be procured at the original price later. A contract was signed on 3 December 1999 for the procurement of the 30 LUH with the option

to procure the 10 helicopters within two months after the contract signature. This option was never exercised.

70. It is apposite to note that after the contract effective date, Agusta decided to upgrade the 109 Power helicopter to the A109 Light Utility Helicopter. This included an efficient rotor system, a new fuel and hydraulic system, different under carriage system, crashworthy aircrew seats and larger aircrew doors. The aforesaid improvements and new developments were at no additional cost to the Project and were over and above the new avionic suite and the new engine developments that were already contracted for. The changes improved the end product significantly.

71. Both the interim and the final Constitutions have been referred to extensively during the evidence of most of the witnesses to the effect that the mandate for the procurement of the SDPP equipment arose therefrom. We wish to briefly make reference to the relevant provisions of both Constitution to give context to the argument that the SDPP mandate arose from these documents.

THE MANDATE TO ACQUIRE ARMAMENTS

THE INTERIM CONSTITUTION 1993

72. In April 1993, a committee of the Multi-Party Negotiating Process (MPNP), proposed the development of a collection of "constitutional principles" with which the final constitution would have to comply, so that basic freedoms would be ensured and minority rights protected, without overly limiting the role of the elected constitutional assembly. Adopting this idea, the parties to the MPNP drew up the

Interim Constitution, which was formally enacted by Parliament as the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution") and came into force on 27 April 1994.

73. Section 227 of the interim Constitution listed the functions of the South African National Defence Force, ("SANDF") as follows:

73.1 Service in the defence of the Republic, for the protection of its sovereignty and territorial integrity;

73.2 Service in compliance with the international obligations of the Republic with regard to international bodies and other states;

73.3 Service in the preservation of life, health or property;

73.4 Service in the provision or maintenance of essential services;

73.5 Service in the upholding of law and order in support of the South African Police Service; and

73.6 Service in support to the department of state, the social and economic upliftment[35].

[35] See paragraph 8 to 10 and 3 to 4 of Admiral Green's Statements.

74. We submit that the obligations set out in section 227 justified a process to equip the SANDF with the necessary equipment to enable it to meet these constitutional obligations.

THE FINAL CONSTITUTION

75. The Constitution was signed by President Nelson Rolihlahla Mandela on 10 December 1996 and officially published in the *Government Gazette* on 18 December 1996. However, it did not come into force immediately. It was brought into operation on 4 February 1997, by a Presidential proclamation, except for some financial provisions which were delayed until 1 January 1998. The Constitution significantly further provided constitutional obligation of various bodies and functionaries relevant to the justification for the procurement of arms, namely;

75.1 That the primary function of the defence force is to defend and protect the Republic, territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force[36];

75.2 The president is the commander in chief of the defence force, and appoints the military command of the defence force, but this power of command must

[36] See Section 200(2) of the 1996 Constitution (Act 108 of 1996).

be exercised under the direction of the Cabinet Minister responsible for defence, under the authority of the president[37];

75.3 The president may, with the approval of parliament within seven (7) days of declaration, declare a state of national defence[38];

75.4 The president has the power to employ the defence force in defence of the Republic, to co-operate with the police service, and in fulfilment of international obligations[39].

76. As it will appear more fully hereunder, the basis to procure the SDPP's arises from the aforesaid provisions of both the interim and final Constitutions. The evidence of the relevant witnesses, who gave evidence on the rationale, corroborates that these provisions were in fact the source and basis of the decision to procure the SDPP's.

77. Section 2 of the Constitution is couched in peremptory terms and requires that obligations imposed by the Constitution should be fulfilled. In our view, failure by the South African Government to take reasonable steps to comply with section 200 (2) of the Constitution in particular will be tantamount to acting inconsistent with a constitutional obligation. This may also apply in relation to section 231 (2) of the Constitution in regard to binding International agreements which we may fail to fulfil due to lack of adequate armaments.

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37 See Section 202 of the 1996 Constitution (Act 108 of 1996).
38 See Section 203 of the Constitution
39 See: Section 201(2) of the Constitution,

THE PROCESS UNDERTAKEN TO DISCHARGE THE CONSTITUTIONAL MANDATE

THE WHITE PAPER

78. During May 1996 the then Minister of Justice, Mr Joe Modise presented the White Paper on National Defence for the Republic of South Africa to Parliament and same was approved by all the represented political parties. The overarching theme of the White Paper was the transformation of the defence policy and the SANDF in the light of the momentous political and strategical developments which had occurred at national and international level following the demise of the Cold War and the ending of Apartheid.

79. Most importantly, the White Paper also provided for a Defence Review, the aim of which was to elaborate on the White Paper's policy framework through comprehensive long-range planning on matters such as:

79.1 the size,roles and structure of the SANDF;

79.2 integration (of former statutory and non-statutory forces;

79.3 determining the most cost –effective means of human and material management;

79.4 representativity (gender and former statutory vs non-statutory forces);

79.5 security of the state and the people;

79.6 arms control and disarmament;

79.7 international law on armed conflict;

79.8 internal deployment with the SAPS;

79.9 defence spending;

79.10 peace-time force; and

79.11 defence and the environment.

80. The following process in conducting the Defence Review was followed:

80.1 The Minister of Defence appointed a Working Group, which was to be coordinated by the Secretary of Defence to draft the Defence Review.

80.2 The Working Group consisted of Members of Parliament, the Defence Secretariat, the Regular and Part-Time components of the SANDF, Armscor, the Defence Industry, the Academic Community and Non-Governmental Organizations.

81. During February and August 1996 national conferences were held including regional workshops in the provinces to inform the South African public about the purposes and intentions of the Defence Review.

82. On 19 May 1997, public hearings were held being the last consultative exercise before the Defence Review was submitted to Cabinet and Parliament for consideration and approval. The Joint Standing Committee on Defence invited inputs from the public through the print and electronic media and received 25 (twenty five) written submissions which were made available to the Defence Review Team.

83. The imputs that were received both in writing and through oral submissions on 19 May 1997 were positive except for the submission made by Mr Terry Crawford – Browne representing the Anglican Church Diocese of Cape Town. He was critical to government spending on arms in the light of the defence establishment having conceded that there is no discernible foreign threat to South Africa and the Defence White Paper noting that socio-economic issues holds priority to government spending and that poverty was the primary threat to South African Security.

DEFENCE REVIEW

84. The White Paper on Defence was supported and followed by a comprehensive Defence Review, force design process that started in 1996 and was completed in 1998.

85. The Defence Review force design process began in March 1996 and was completed in 1998. The Defence Review process was a welcomed departure from the secretive nature of defence spending decision making of the past. It was a consultative process that brought into the debate on arms acquisition and defence policy a range of input and views that resulted in a holistic and wide-range consideration of defence policies and strategies. These inputs supplemented the opinions of the traditional arms and defence experts.

86. The Defence Review process was an extension of a new approach of South African Defence policy contained in the South African White Paper on defence which was published in 1996.

87. The White Paper called for a review in order to elaborate on its policy framework through comprehensive long range planning on such matters as posture, doctrine, force design, force level, logistic support amendments equipment, human resources and funding.

88. The process followed by the Defence Review was like that of the White Paper process. The drafting of the Defence Review was the responsibility of a working group appointed by the Minister of Defence and co-ordinated by the Secretary of defence. The working group established specialists sub-committees on defence posture, functions and force design, human resource issues, the arms industry, legal issues, land and the environment.

89. The ultimate purpose of the Defence Review process was to provide a comprehensive and analytical basis on which arms purchasing decisions and defence policy could be based.

90. The Defence Review consisted on two parts, the first part dealt with the structure, functions and force design option for the SANDF in the future, and the second part discussed the human resource requirements, acquisition process part time forces, environmental issues and management of the SANDF. The key principles of which

the SANDF ideal operation and human resource requirements were set out in the Defence Review as follows:

90.1 **THE DEFENSIVE STRATEGY**: All aspects of the SANDF approach whether strategy doctrine or tactics should have a primarily defensive orientation;

90.2 **PROTECTION OF SOVEREIGNTY**: The primary function of the SANDF will be to protect South African's sovereignty and its territorial integrity;

90.3 **CO-FORCE CAPABILITY**: A specialist ready for action co-force will be set up and maintained by the SANDF with the ability to respond to emergencies and contingencies in the short to medium term with the capacity to be expanded rapidly as required;

90.4 **SECONDARY FUNCTIONS**: The SANDF will be responsible for a range of secondary functions where appropriate budget for such functions were made available. These secondary functions included regional security co-operation, regional and international peace-keeping support operations, international internal co-operation with the SAPS (South African Police Services) to maintain law and order in selected non-military tasks such as maritime monitoring and protection, airspace and traffic control, disaster relief, search and rescue, via air transport, hydrographic services and medical services etc;

90.5 **HUMAN RESOURCES TRANSFORMATION**: The institution of relevant human resource programme is to ensure adequate transformation in terms

of National Law and to prepare armed force personal to respond to the challenges of a modern defence including civic education programme in support of part-time forces and training in demobilisation strategies after careful consideration of five principals.

91. The government tendering process for the re-equipping of the SANDF was informed by the final Defence Review force design which was approved by both Parliament and Cabinet in May 1998. The Defence Review itself was tabled in Parliament on 22 May 1998.

92. The Defence Review provided the SANDF with four force design option for the four arms of service[40]. The Department of Defence considered Option 2 to be the most prudent force design for the SANDF in the long term[41]. However, having considered all the other options, option 1 was ultimately the recommended force design for the SANDF. Although option 1 had recommended acquisition of defence equipment for all the arms of service it will become more evident hereunder, that due to cost constraints ,only the South African Air Force and the South African Navy were the ultimate beneficiaries. Option 1 therefore became a guideline on the ultimate acquisition of the SDP packages.

THE SDPPS PROCESS

[40] See: pp 47 and 48 of the Defence Review titled "SANDF Force Design Alternatives"
[41] See: p 46 Chapter 8 of the Defence Review paragraph 69.

INTRODUCTION

93. The SDPP process was formally initiated on 23 September 1997. The new cabinet strategy and tendering actions of September 1997 formally reset Project SITRON on the acquisition status in which it had been in 1994 at the start of the project study.

94. Tendering activities of the project study of 1994/95 (RFOs), offers, evaluations, selections and short listing and project study report null and void. Germany had declined to participate in the tendering process executed prior to the lifting of the sanctions. Germany was included when the process was restarted.

95. We have heard from the witnesses from the Department of Defence that the defence budget during the 1980's was at its peak 1990 when the defence budget was severely reduced and the armaments acquisition was halted in 1991. While a conscious decision had been taken to drastically reduce spending on armament, the country nevertheless still saw the need to procure arms to give effect to the Constitutional obligations imposed on the SANDF to protect the sovereignty and integrity of the Republic of South Africa.

96. The newly elected democratic government embarked in the exercise of transforming the defence force in order to have an integrated and balanced force. The all-inclusive investigation of on how to model and equip the defence force was embarked upon almost immediately after the new government was elected. At that time, the acquisition process that had been initiated was continuing parallel to the investigation undertaken.

97. During the democratic investigation leading to the compilation of the aforesaid White Paper on Defence and subsequently the unanimous adoption of the Defence Review, it became apparent to the democratically elected government that it would be in the interest of the country that the acquisition process that was already in motion be suspended so as to allow the Defence Review to be concluded. This led to the suspension of the acquisition of the processes that had been undertaken then. The acquisitions in respect of the relevant equipment had gone past the DOD (arms of service) and were now in the hands of Armscor, which had the exclusive authority to

procure equipment on behalf of the DOD.

98. The acquisition of the following armament which had gone past the Request for Information (RFI) process and was due to be considered at the Request For Offers (RFO) level was suspended in or around 1995 in order to allow for the Defence Review to be completed which were, the LUH, the submarines and the corvettes.

99. The outcomes of the Defence Review confirmed that the armament whose acquisition had been in place was indeed necessary and further that there was a need to also add some other equipment whose acquisition had not yet been initiated.

100. In response to the Defence review and with the intention of complying with the constitutional mandate, the Department of Defence under its executive head arrived at a conclusion that the equipment be procured in the form of a package rather than

staggered acquisition as the case previously was. The armament for the SAAF and the NAVY had reached a critical stage.

101. At the time when the package approach which later came to be known as the SDPP's was conceptualised, the Department of Defence had created the office of the secretary for Defence. The SECDEF became the accounting officer of the Department from 1995. The acquisition unit of the DOD was henceforth located within the SECDEF's office.

102. Upon investigation of the procurement process, it became clear that the existing policies were not adequate to facilitate the package acquisition. The executive head of the Department of Defence then promulgated policies that would augment the policies, thus curing the deficiencies. Further, the interim Constitution which was then applicable, advocated for transparency and accountability in respect of procurement. The model created to accommodate transparency and accountability was the acquisition model with a three tier evaluation process being the first to the third orders. The advent of this model meant the introduction of a new dispensation where Armscor could not be the sole roleplayer with regard to procurement at the

project level. In order to ensure that the experiences that the Armscor personnel had gained over-time, ARMSCOR had presence in all the authorities / institutions that participated in the procurement from the project study, to the final stage of the execution of the acquisition plan.

103. The unanimous adoption of the Defence Review by Parliament confirmed that the acquisition of the identified armament was necessary as per the recommended design option. Resultantly, the Department of Defence was charged with the responsibility to execute the Defence Review Directive which sought to implement the mandate of the constitution (interim then).

104. This brings us to the consideration whether the decision to change the acquisition model was rational or not. The evidence before this Commission is that the acquisition model prior to September 1997, was generally staggered and on an arm of service basis. One illustration of the deliberate staggering of the acquisition was when the Navy decided that the acquisition of the vessels would be such that the corvettes are prioritised over the Submarines. Notwithstanding the critical status in which the Navy was in relation to the above equipment, the initial arrangement was that the submarines replacement acquisition would only be initiated when the procured corvettes were in a build stage.

105. It is also important to highlight that the traditional acquisition model in place then was the contract with multiple suppliers in respect of the same equipment. This meant that the Department would procure different suppliers and conclude separate contracts with separate suppliers. The Minister of Defence ushered in a novel approach in respect of the above for the acquisition of the armaments in compliance with the Defence review directive, the acquisition Philosophy shifted from the multi-contracts for the one equipment to one contract to one equipment.

106. In considering the rationality in respect of change of the acquisition model, the following facts should also be taken into consideration:

106.1 South Africa was facing block obsolescence in respect of an equipment which was of a cardinal nature, thus the country desperately and urgently needed be equipment. This means that if the same model of multi-contractors per equipment would be implemented, the acquisition process would be onerous to the Department with the acquisition of this magnitude;

106.2 The long overdue equipment acquisition could not be deferred any longer. The practicality of the arm of service approach in the given circumstances would also have to be considered. The statutory position of the Secretary for the Defence (SECDEF) was in place and the acquisition unit had been established within the (SECDEF) office.

106.3 The constitution and the Defence Act advocated for transparency and accountability.

107. The Minister then decided to introduce the package acquisition model. The evidence before the commission is that the traditional acquisition process were not adequate to execute this novel approach. The Minister then issued directives to deal with the deficiencies in the existing policies. The directives which introduced new elements to the existing model are described by witnesses as deviations. In order to assist in

the determination whether the decision to introduce new policies in respect of the acquisition was rational or not the phased in policies will be interrogated in the context of the challenges that the old policies posed (if any) and the impact of the new directives on the principles of transparency and accountability. These consideration are based on the evidence of those who supported the procurement as well as those who were against it.

108. In considering whether the acquisition process introduced for the SDPP acquisition was rational or not, the process that was instituted and followed must be interrogated. From the evidence before the commission, the SDPP acquisition was based on two models, the first one being the traditional one until the completion of the RFI phase and the second one being the SDPP phase which effectively endorsed the traditional process undertaken up to before the RFI phase and nullified the RFI process that had been undertaken. The new RFI's containing the new elements identified for the SDPP purpose was issued. The acquisition was thus done through a fusion of the two processes.

109. The traditional procurement processes followed prior to the SDP were not informed by a Constitutional framework but were used as a means to circumvent the UN Resolutions and in our view could not have met the post apartheid constitutional requirements of a transparent, competitive and cost effective tender process. However, before we can deal with the Rationality or otherwise of the SDP tender processes it is apposite to give an overview of the pre SDP procurement processes for armaments.

TRADITIONAL ACQUISITION PROCESS

110. In terms of the traditional acquisition model, the acquisition was initiated in the Department of Defence within the relevant arm of service where the exercise of justifying the proposed acquisition was done. The requirements having been met, the acquisition process gets transferred to Armscor for the execution of the acquisition request. The process leading to the acquisition was fully dealt with by Capt Jordaan for the DOD process and Mr Griesel for the Armscor process. The acquisition would be preceded by the following steps within the DOD environment.

110.1 A study report: A study involving stake holders was commissioned by the relevant arm of service in order to investigate the need to establish a new capability or a possibility of upgrading or replacing the existing armament. The outcome of such investigation was then recorded in the study report.

110.2 The User Requirement Statement (URS**)** is a comprehensive document that is compiled by the end user that is the baseline for all your contracting and specification requirements leading towards the project and once the capability has been delivered the User Requirement is the major document used to measure the final product before it is handed to the end user, so in other words the User Requirement is mirrored against the product to ensure that it meets these requirements.

110.3 The Required Operational Capabilities (ROC) is the first document that is written when a programme is started and this is normally known as the kick-start mechanism to initiate a programme. It's a very basic document that doesn't specify too many requirements, there's definitely not funding mentioned in the document, so it basically is just a document to register the requirement, the documents that follow this document are the ones where the technical information and funding is required during the evolution process.

110.4 The Staff Target l is basically, most of the information contained in your User Requirement Statement except that it will have finances, it will have quantities and it would have envisage d time scales and a possible first order cash flow, apart from that the technical content is extracted from your URS. All the technical information contained in this document stems from either your URS or from your ROC.

Once a staff target is approved, the project is registered under a code name for the purpose of commencing procurement.

110.5. Project team promulgated. (During the traditional acquisition process, the JPT was established under the leadership of ARMSCOR, the SDPP introduced changes in this respect)

110.6 RFI drawn: the core document for drawing up any request whether it be for (RFI) or for an offer(RFO) is the User Requirement Statement (URS).

110.7 RFI issued

110.8 RFI Value system drawn and approved

110.9 Evaluation NB.

110.10 results.

110.11 RFO process is similar to that of RFI from para 7 above

111. Those who criticise the SDPP acquisition process do not take issue with the DOD acquisition process stage. Probably this is so because the SDPP acquisition process was implemented after the acquisition of all the relevant equipment but the LIFT had been completed within the DOD environment and was in the Armscor environment.

112. The submissions do focus on the Armscor acquisition environment since the criticism is levelled against that stage of the acquisition. We now turn to deal with the SDPP process

SDPP PROCESS

113. The SDPP acquisition model was introduced through the Minister of Defence directive described as DOD directive 4/147. The aim of this directive was to provide MOD Policy guidelines and management procedures for dealing with foreign

initiated international government-to-government defence equipment offers relating to armament acquisition for the South African National Defence Force that are to be integrated with an interdepartmental coordinating and decision making structure.

114. The scope of this policy was only to address the defence equipment offer facet of the foreign initiated international government to government cooperation proposals. The structure of these proposals dictates the scope of interdepartmental involvement. Non-government supported single product proposals are not addressed in this policy. There is no evidence of how the then existing directives came to be promulgated. The following deviations were highlighted by Mr Griesel in his evidence incorporating his statement to the commission:

DOD Policy Directive No 4/147

115. MOD Management of Assessment of Offers directs that prior to translating an offer into separate, standard armament acquisition projects, an assessment procedure incorporating the following iterative, multi-tier approach is to be followed **:**

115.1 First Order : Appointment by MOD of a workgroup to undertake strategic implications of the offer. First order value system incorporating military evaluation of supplier government Recommendations regarding political, interdepartmental and intradepartmental involvement are to emanate from the MOD evaluation.

115.2 Second Order : Implementation of recommendations via representative MOD evaluation team to develop second order value

system. Recommendations regarding project teams and project management requirements to bridge the gap between elements of the offer and separate, standard acquisition Projects, are to accompany the second order value system

115.3 Third Order : Project teams must develop third order value systems for the individual elements of the offer for consideration by the second order value system.

116. The main thrust of the criticism of the above policy is that there was interference with the Armscor process and further that Armscor was divested of its acquisition powers as a result of the three order institutions that were put on place to carry out the functions that had all along been discharged by Armscor exclusively. The cause of complaint is that the DOD Directive 4/147 had the effect of to implementing the process that fell outside the existing Armscor and DOD directives.

117. The main thrust of the criticism of the above policy is that there was interference with the Armscor process and further that Armscor was divested of its acquisition powers as a result of the three order institutions that were put on place to carry out the functions that had all along been discharged by Armscor exclusively. The cause of complaint is that the DOD Directive 4/147 had the effect of to implementing the process that fell outside the existing Armscor and DOD directives.

Deviations

118. Criticism against the processes relate to the process within the Armscor environment. This is so because the interruption of the procurement process

happened after the DOD process had been concluded. The witnesses highlighted the following as the deviations:

PROCESS

A-PROC-097 – Practice for the selection of contractual sources, Issue 2, dated 12 November 1997 (14-133)

119. In the SDPP process, the guidelines were used in the development of value system and RFO's, but there were deviations in respect of the responsibilities of the Armscor Program Manager and Project teams. The practice dictates that the process would be led by Armscor and only provides for participation by the DoD on evaluation panels. In the SDPP process, some of the value systems and evaluation reports were finally approved and signed off by the DoD and not by Armscor. The evidence of Griesel at P1861-1862 is that he knows that the submarine and Corvette programme value systems and evaluation reports were signed off by the DOD and not by ARMSCOR, he unfortunately cannot vouch for the others. According to Griesel's knowledge, there were approved document from a higher authority indicating that this would relieve ARMSCOR from that process so that it should now be done by the DOD. The detail of this information cannot be verified thus making it difficult to address the issue.

KP019 – Delegations (134- 184)

120 The decision-making powers and delegations within Armscor were described in this document. In terms of KP019, the Armscor Board of Directors being the Tender Board, the sole authority that can authorise preferred bidders and also authorise contracts to be places in identified preferred bidders. In the case of the SDPP's the preferred bidders were eventually authorised by Cabinet and subsequent contract placement was also authorised by Cabinet.

121. The SDPP process deviated from the normal Armscor process in the sense that Armscor would not solicit RFO's from prospective bidders if funding had not been budgeted for the specific acquisition, Armscor would also not enter into negotiations with a preferred bidder if a budget ceiling had not been established, and the DOD would also not approach the Armscor Tender Board with a submission for contract authorization if an FA had not been approved by the DOD. The criticism relating to the finances, including the budget and the budget ceiling should be assessed bearing in mind that, the Department of Finance was also involved in the process at all material times from the beginning to the end. This approach illustrates the appreciation of the fact that this being massive acquisition, it would have a serious impact on the economy of the country.

122. The constitution of the SOFCOM did not provide for decision-making authority in respect of any matters that would materially affect the evaluation as it pertained to the selection of the preferred bidder. However the SOFCOM was entitled to submit recommendations to the COD. The Minister of Defence had approved this deviation from the standard Armscor procurement procedures through the appropriate structures. In this case, the witness submits that the Minister of Defence had

approved this deviation from the standard Armscor procurement procedures through the appropriate structures. There is no suggestion that the Minister acted improperly, the concern seems to be "why does the Minister flood the Armscor terrain with non-Armscor officials. The answer to this is found in the advocacy for transparency and broad representivity in respect of a massive acquisition of this nature.

123. The evaluation results and indicated preferred bidders that were presented to the AASB, AAC, the Minister's Committee and subsequently to Cabinet for approval, were all presentations and were not part of the project governance documentation that would normally be submitted to structures such as the AASB and AAC. In terms of the Armscor's standard procurement process where Armscor would normally be solely responsible for authorising a preferred bidder. This criticism goes to the style of communication, the authority for a particular style of information sharing was not presented before the Commission as a result, this point cannot be taken any further.

124. The evaluation results of the DIP and NIP evaluation teams were moderated jointly by DOD and DTI. The moderation was done to ensure that no duplication of offered Industrial Participation projects exist between the DIP and NIP offers. The cause of complaint seems to be that Armscor was excluded from moderating the DIP proposals. The reality is that there were now three distinct areas of evaluation(with the IP split into two) who operated in silos to avoid or minimise the risk of information sharing. What is important is that the user on his input Armscor relied for the registration of the acquisition project was part of the moderation and would

be best suited to evaluate the benefit value that was likely to materialise from the DIP proposal.

125. What was also introduced as part of the tender adjudication process was the integration of the DIP and the NIP. The DTI was involved in the evaluation of the NIP proposals and a team comprising members from the DOD and Armscor was responsible for the evaluation of the DIP proposals. The DOF evaluated the financing component of the offers. The objection seems to be strongly aimed at the introduction of the NIP factor as well as the integration of the DIP and the NIP. This criticism must be assessed mindful of the status of the NIP at the relevant time. The NIP was a national policy adopted by cabinet while the term DIP is used interchangeably with the term countertrade/ offset which had become customarily used exclusively within the Armscor enviroment. Countertrade was introduced in the 1960s when the supply of armament to or from South Africa was sanctioned. . The DIP programme was structured to provide direct support for sustainable indigenous defence related industries in order to maintain strategically essential technologies and capabilities as identified and prioritised by the SADF. Dr Rustomjee testified that the countertrade only applied for defence and security related sectors. He also registered a concern in his evidence, that, Armscor tended to apply offset commitments in two relatively unsustainable ways, first by confining benefits to South African firms which were primarily involved only in defence related productions activities, second, Armscor often took a narrow short term focus on the balance of payments.

126. The Dti was determined to ensure that foreign procurement of the threshold of $10m would be managed under one industrial policy. To suggest that the National Industrial Policy ought not to be implemented within the Armament acquisition while the *quasi industrial* participation(DIP) was being implemented as promulgated by Armscor is suggestive of the intention to undermine the principles of intergovernmental co-operation and the co-operation between the state and its organs as enshrined in our Constitution. The examples of cases which illustrate the seriousness with which the government took the NIP concept are the rejection of acquisitions recommendations because of the failure by the organs of state to factor the NIP policy in the acquisition model in respect of a multibillion Boeing by the South African Airways in 1995 and the procurement of the corvettes in 1994.

127. There was a deviation from standard Armscor procurement process where the evaluation did not simply take place on technical Industrial Participation and cost grounds. The core of this criticism is the notion of resisting change in all respects and at all costs. The SDP was a special project with special and unique features. The observation is that while the traditional procurement model rested solely on Armscor for the full process of execution, the SDP procurement promoted a broad spectrum of participation by the stakeholders, this approach it would seem is in line with the spirit of transparency.

128. According to Armscor's standard tendering and contracting processes Armscor as the Tender Board would have been responsible for all phases in this process. However, in the case of the SDPP, the decisions regarding the selection of the preferred bidders and the awarding of the contract was not made by Armscor Tender Board, but rather was made by Cabinet and signature of the contracts was

only subsequently ratified by the Armscor Board. This concern is covered by the comments above relating to the promotion of transparency and representativity.

129. The evaluations were not performed strictly to A-proc-097 (Armscor procedure for the selection of contractual resources) since the process was influenced by parties outside Armscor.

130. The establishment of the IONT with the mandate to negotiate the umbrella agreements with the prospective preferred suppliers also constituted a deviation from the standard Armscor procurement processes. In the ordinary course of Armscor's standard procurement process, Armscor would be solely responsible for the negotiations and conclusion of contracts with the preferred suppliers. The test and rationale of the introduction of the IONT in the acquisition process is conducted through the assessment of the IONT in relation to the scope, process and outcomes.

131. The factor that should be taken into consideration to establish whether the establishment of the IONT was rational or not, one must look at whether, when the announcement of the preferred suppliers was done there was still work to be done and if the answer is yes, the next question is how best could the post announcement process be carried forward. Having answered this enquiry, the next question is whether the manner in which the IONT was constituted was rational or not. The evidence before this commission is that the team was initially constituted of the government departments that were key to this process. Because of the magnitude of the task and the major impact it would have on the country, the team strengthened

its capacity on by appointing experts who would assist with legal advice, financial advice and economics.

132. The initial scope of the IONT was to negotiate six sets of contacts each with a separate defence company. Each contract would comprise of three (3) separate sub agreements on supply of equipment, DIP terms and NIP terms. Associated with each contract was separate finance contract to be negotiated with an international bank. Finally there were negotiations with four different export credit agencies in the UK, Sweden, Germany and Italy. The package had already been put into tender so the work of the IONT was not really just price negotiation but to review the model and find ways to accomplish affordability with all factors taken into consideration. In order to accomplish its task, the IONT, after consultation with the relevant departments reviewed the size of the equipment to be purchased as well as the industrial participation model. Further the team undertook a risk assessment and reviewed the financial costing and management.

Equipment size review

133. As a result of the consultation and negotiation with the relevant departments, the equipment except the ALFA was sized down in accordance with the IONT recommendations.

Special Amendment of the NIP policy

134. Regarding the NIP, the IONT had to establish whether the IP was realistic and find ways to better the NIP benefit.The review of the NIP model was based on the challenges that the model posed in respect of implementation, the size of the equipment related to affordability and the financing costs related to affordability.

From its engagement and consultation with the stakeholders, the IONT's view was that the Dti's industrial participation system for non-defence project was a relatively untested system only established in 1998. The industrial policy provided for the IP investment in respect of nine variables which included job creation. The existing system appeared to inflate the benefits in an aggregated manner. The NIP assessment having shown a higher level of risk for the DTI due to the IP design as well as the challenge of institutional capacity in respect of the SDPP, the negotiating team introduced the NIP system amendments which required the preferred bidders to improve their offer significantly above the tender requirements.

135. The outcome of the IONT negotiations in respect of the NIP system was the reduction of investment variables in respect of which the credits would be allocated. With the consent of the IMC and the DTI, the investment variables were reduced from nine (9) to three (3). The objective of the IONT and the IMC was to have roughly, one rand of investment equal to one rand of expenditure on procurement as well as one rand investment on the multipliers were thus eliminated on exports and sales. With this objective in mind, the only three variables that were retained for the SDPPs were investments, exports and sales because they were all concrete numbers and each number could be faceted into the economic model. A specialized NIP implementing mechanism was recommended.

136. On 15 September 1999, the IONT presentation giving full details of the amendment of the NIP system was tabled before cabinet. The cabinet endorsed the amendment. The amendment was to be factored into the NIP agreements. The remaining variables for the SDPP being export, investment and sales. The NIP credits would be awarded on a ratio of 1/1 i.e. one credit per one currency.

THE AMENDMENT OF THE RFO NIP PERFORMANCE GUARANTEES

137. With the exception the GFC, the Industrial participation performance guarantees were raised from 5% which appeared in the bid documents to 10% being the negotiated commitment. The outcome of the negotiation in this respect speaks for itself and it will thus not be necessary to belabour the point.

FINANCING

138. The IONT with the consent of the IMCC established a committee which came to be known as the affordability team (AT). The mandate of this team was to evaluate the overall economic fiscal and financial impact of the procurement of the Republic of South Africa. The AT also had to focus on the timing and the need for the different defence equipment types, the economic benefit to be delivered by the industrial participation offered and the attendant fiscal and financial risks. Armed with the studies that the AT had commissioned, the financial experts' advice and risk assessment undertaken, the team negotiated with suppliers, the ECA and the investment bank. The outcome of the negotiations were that the need for commercial loans was completely eliminated and export credit agencies (ECA) could be used for all of the imported content, including down payments. The benefits of this outcome are fully dealt with in the evidence of Donaldson.

139. The participation even at all levels included Armscor, which used to be the sole role player during the traditional acquisition process. The Armscor much needed

participation had presence throughout the process from the registration of the project to the final delivery of the equipment.

The next enquiry is whether the IONT executed its mandate in a rational manner.

140. It is on record that the team engaged all stakeholders, it kept the public informed through media conferences, the outcomes of the mandate speaks volumes about the impact that the IONT work had on the process. The IONT also recommended risk management mechanisms in areas where the possibilities of risks seemed to be high. For instance, the team identified the contract as well as market risks which could manifest itself in the form of failure of offset commitments to materialise due to the supplier's failure or inability to deliver, the IONT recommended effective monitoring and a clearly defined industrial strategy. The manner in which the IONT executed its mandate finds praise even from the Audit institutions.

141. The following extracts from Mr Griesel's statement dated 29th September 2013 go a long way to answer the question whether the existing processes were necessary or not:

"……

4.12 The distinction with the SDPP was that each product system (save for the corvettes which were to incorporate the "nominated" local combat suite into a foreign main contract) was essentially for existing foreign designed and developed system products that require certain adaptations or modifications to meet the unique South African

requirements. It was accordingly necessary to adapt and interpret VB 1000 so that it was integrated with a foreign procurement programme of this nature.

4.13 The SDPP was a unique acquisition management programme, in that 7(seven) cardinal projects systems had to be brought to a common starting baseline. This required extensive interaction within the DoD with regard to individual authorisation procedures. Approvals and recommendations were obliged to be submitted to the DoD and Armscor at corporate level for final approval and execution.

……

5.4 As alluded to in paragraph 4.13 above, the SDPP was unique acquisition management programme not only because it involved bringing 7 (seven) cardinal project system to a common starting baseline, but because it introduced certain deviations from Armscor standard procurement process. These deviations are specifically pointed out throughout this statement."

142. Mr Griesel concludes in his evidence that the basic principles and the rationale of determining best value for money were applied in the acquisition process.

NATIONAL INDUSTRIAL POLICY(NIP)

Introduction

143. The GN started implementing the NIPs even before they were formally adopted by cabinet. An example of this is the SAA tender which was issued in 1994.

Perspective from the The WTO

144. The concept originated from the days of bartering and developed to more sophisticated instruments on international business based on government procurement. Offset and countertrade was refined within the domain of trade in military equipment to a specialized skill, namely industrial participation. Offset, Countertrade and Industrial Participation are implemented by both developed countries and developing countries. Some examples include Denmark, Sweden, Norway, Finland, Belgium, Switzerland, United Kingdom, Portugal, Spain, Poland, Austria, Hungary, UAE, South Korea.

Industrial Participation development from the South African perspective

145 The development of the NIP in South Africa began during 1995. During the 1980's to 1996 the RSA GN had no policy on National Industrial Participation. Until the formal institution of The NIP policy was formally instituted in 1996. On 30 April 1997, the Cabinet approved the NIP policy and its operating guidelines thus introducing a national policy instrument that would be used systematically in the state procurement giving the state the power to sustainably induce long-term investment in industrial and commercial undertakings. The NIP came into effect on 1 September 1997. The GN started implementing the NIPs even before they were formally adopted by cabinet.

146. During 1994, Armscor had tendered for 4 patrol Corvettes. The tender had included the Armscor countertrade requirement but Armscor had not involved the Dti in the

negotiations around the offsets with any of the bidders. The tender was subsequently deferred in mid-1995. Prior to the deferment, Armscor was directed by a cabinet decision to involve the Dti in the offset negotiations. For the dti the issue was about ensuring that offsets' benefits were aligned as much with the Dti's industrial policy objectives as they were to Armscor strategic objectives. The NIP architecture was very different to the countertrade/offset approach. It aimed at allowing the bidder considerable flexibility in discharging their IP obligations, but such obligations could only be fulfilled through the establishment of a registered company within the South Africa over a period of seven years. The key difference between NIP fulfilled through a legally incorporated entity in South Africa and that entity had to be financially sustainable for at least 7 years subsequent to the transaction. Offset agreements are often far less sustainable in nature. Industrial participation programmes are generally sustainable whereas offset arrangements are not.

147 The NIP/DIP participation by Dti commenced in 1996. One part of the process involved a bilateral interaction with Armscor/DOD and it was during this interaction that the Defence industrial participation (DIP) programme evolved as an integrated part of the NIP Programme in the case of any defence – related government procurement where the import content exceeds $10m. The DIP programme was structured to provide direct support for sustainable indigenous defence related industries in order to maintain strategically essential technologies and capabilities as identified and prioritised by the SADF.

The 1998 NIP evaluation process

148 From 1997 to 1998 the Dti NIP directorate was drawn into discussions with potential suppliers to clarify the NIP programme and to identify the projects that could qualify for IP credits. By around February 1998 some 22 projects areas had been identified and had been communicated to all potential bidders. The NIP technical evaluation was carried out by the IP Directorate which also acted as the Dti representative on SOFCOM.

The origin of the promise of about 65 000 jobs

149 Interrogating each NIP project business plan required additional technical capacity and this was obtained from the Council for Scientific and Industrial Research (CSIR), MINTEC and the Industrial Development Corporation (IDC). Independent external assessments were carried out on three large steel projects that had been proposed by various bidders before they were accepted by the Dti. The view at the time was that, for the respective proposed project, the bidders could not avoid making some commitment to the exclusion criteria of employment, training SMME promotion, HDI promotion, R & D investment and technology transfer. From this perspective at the time, the Dti believed that the estimated employment from NIP projects that had emerged from the original bid evaluation scores was realisable. The Defence Minister referred to some 65 000 potential jobs in a statement to parliament in March 1999. **This figure had emerged from the original 1998 NIP evaluation of projects proposed by bidders.**

NIP MANAGEMENT PROCESS

150 The contracts also outlined the mechanism and process to be followed should any of the listed projects either not proceed according to plan or require to be substituted by replacement projects.

AFFORDABILITY OF THE SDPPs

151. The question of the affordability of the SDP's was not considered in isolation. Historically, ARMSCOR was reposing;el e to procure on behalf of the SANDF and conculed relevant contract. However, the funding was provided by the Department of Defence through the Special Defence Account. The financial authority was issued by the DOD to authorise the placing of orders of the required deence equipment[42].

152. Before the SDP's the Financial Contract Administration Division was established at Armscor which had the responsibilities to look at the contractual conditions , the financial contractual conditions such as price, post placement of the contract. The financial Department responsibility was to make payment to suppliers in terms of the contractual conditions and to ensure that the financial authority was not exceeded through the whole contract.

153. The Defence Force did not borrow money as they received their funding from the budget provided by Parliament. ARMSCOR's auditors were also responsible to verify the costing structures of offers from single source supplier companies to make sure

[42] See: Record p 5355 (Hoffman)

that the price offered was fair and reasonable but this did not apply to multisource suppliers companies which were appointed after a tender process[43].

154. The SDPPs were unique in that there was no committed budget within the SDPPs to finance the equipment to be purchased. Requests were made to bidders which contained financial requirements. These financial offers had to be evaluated . These RFOs were issues on 16 February 1998 with deadlines for responses[44].

155. The financing and evaluation team was responsible for the financial requirement criteria that went into the RFO. Finance Evaluation Team also included financial experts from the bankers of ARMSCOR, namely ABSA Bank[45]. The Department of Finance also took part in creating a value system with four discriminating criteria namely, cost of finance, cash flow, hidden cost and financial soundness. These were the four pillars of the value system. Agreements were reached on the weight to be given to the different criteria being, cost of finance 30%, cash flow 30%, financial soundness 10%, hidden costs 30%[46].

156. SOFCOM meeting of 6 May 1998, requested Department of Finance to participate in the evaluation of the offers.5368 To this end, on 14 April 1998 Mr Pierre Steyn, the then Secretary of Defence, dispatched a letter to Department of defence to assist the Armscor, the DOD and the DTI in the financial evaluation so as to lend substantial credence to the recommendation that will be forwarded to Cabinet[47].

[43] See: Record p 5356 to 5357
[44] See: Record p 5360
[45] See: Record p 5366
[46] See: Record p 5367
[47] See: Record p 5368

157. A finance report was prepared after the evaluation process with the summary of the work of the team , procedure followed by the team , the value system described , including the critical and discriminating factors set out in the RFOs. The team conducted a presentation of the report to SOFCOM 1 and 2 July 1998. The Finance Committee noted some non-conformities by several of the bidders which included non-conformance with the critical criteria and same reported to SOFCOM[48].

158. The Auditor-General in his Audit Findings for the Period ended 31 MARCH 2000: Strategic Defence Packages p 216 thereof, in regard to the Finance Evaluation Team he reported that " *some arithmetical errors were discovered but they had no effect on the final results*."[49]

159. Further, two internal audits were done by the internal Armscor auditors during 1991 and no improper conduct was found on the part of Armcor employees involved in the evaluation of the various proposals[50]. After conclusion of the financial report, the actual financing was done by the Department of Finance[51].

160. In his evidence, Andrew Donaldson, DDG Head of Budget Office in the National Treasury and Acting Head of the Public Finance Division mentioned that the arms procurement (SDPPs) was done at the time the Exchequer Act was in force. The PFMA repealed the Exchequer Act, however, the transitional provisions (section)93 provided that anything done in terms of the Exchequer Act that can be done in terms

[48] See: Record 5381 and 5384
[49] See: Record 5390
[50] See: Record 5391
[51] See: Record 5392

of the PFMA must be regarded as having been done under the PFMA. The Finance Department had exercised oversight over the procurement and its financing throughout the SDPP process. The SDPP procurement had a very substantial expenditure with possible macro-economic and fiscal implications. As a result, the Finance Department had oversight on the budgetary implications of the arms procurement programme[52].

161. The finance department played a role in relation to provision of expenditure in the appropriation of the Defence vote as they presented to Parliament annualy and importantly also in financing the parts of the programme which were supported by international loan facilities. The financing aspects of the procurement were managed by National Treasury and Finance Department. The cost estimates as procurement was over a long period, the exchange rate movements that affected those cost were subjected to inflation adjustments.

162. The responsibility of the Finance Department under Treasury was the financing agreements. The overall Arms Procument Programme had two sets of agreements being the procurement agreements which was the responsibility of the DOD and of loan agreements which were the responsibility of the National Treasury[53].

163. The Department of Finance was part of the management committee (SOFCOM) for the evaluation of the international offers and assessment of the affordability of the procurements. Treasury was involved in the early stages following the Defence

[52] See: Record p 5401
[53] See: Record p 5403

Review. It was involved doing preliminary estimates of likely costs implications of the SDPPs.

164. The bid evaluation process comprised three elements , assessment of military value, assessment of the industrial participation offers and financing offers. The Finance Department undertook a very substantial assessment of the affordability which looked at the various fiscal and macroeconomic and employment implications of the procurement in order to assist the Minister's Committee. The Department of Finance was also involved in preparing the initial costing and risk assessment . Further, it was involved in preparing a more comprehensive affordability report that was presented to the Ministers Committee in August 1999. This Affordability assessment of the Defence Special Packages Programmnes dated November 1998 had a model of the Defence Budget projected over a 20 year period and was not as comprehensive as the later Affordability report of 1999.[54]

165. At the time of the preparation of the of the White Paper and Defence Review, the defence spending had declined between 1990/91 and 997/98 from 4.0% to 1.7% of GDP. Subsequent to the approval of the Defence Review on 22 May 1998, recommending the purchase of 4 corvettes, 4 submarines, 32 medium fighter aircraft, 16 light fighter aircraft and 12 combat support helicopters, the officials of the Finance and State Expenditure undertook a review on the financial implications of the Defence Review. The outcome of this review was that defence spending should be stabilised at around 11/2 percent of the GDP, service personnel numbers

[54] See: Record p 5410 and 5411

be reduced and efforts were needed to improve defence budgeting and inventory management[55].

166. Subsequent to a presentation by the DOD on 18 November 1998, Cabinet approved the Department's recommendation of the said preferred suppliers for six armament packages with the preliminary cost estimate of R29, 773 billion. The DOD, DOF, DTI and Department of Enterprises was tasked to proceed with further detailed negotiations with the preferred bidders with a view to achieving affordable agreements.

167. Cabinet proceeded to appoint a Ministers Committee which included the Minister of Finance. Subsequent to their appointment, the Minister's Committee appointed an International Offers Negotiating Team (IONT) to negotiate best possible terms on the cost of the procurement , the value of the industrial participation offered by preferred bidders and the terms of the loans to fund the packages.

168. The IONT consisted of the inter-departmnental team, namely, Mr Jayendra Naidoo (the Chief Negotiator), Mr Chippy Shaik (Chief of Acquisitions for the DOD) , Mr Llew Swan (CEO of Armscor), Mr Vanan Pillay, (Acting Director : Industrial Participation of the DTI) and Mr Roland White (Senior Manager in the Budget Office of the DoF).

169. The IONT conducted workshops as part of its involvement in the procurement and these were the Finance Negotiation Workgroup, a Military /Technical Workgroup

[55] See: The summary of the Defence Expenditure Review submitted to Cabinet as part of the 1997 Medium Term Expenditure Framework (MTEF) report attached to A Donaldson affidavit as annexure "AD5"

and an Industrial Participation Workgroup. Armscor and DoF appointed Warburg Dillion Read to act as financial advisors, and to assist the FWN and IONT in assessing the financial aspects and risk of the SDPP.

170. The Minister's Committee mandated the Finance Negotiating Workgroup to work in accordance with the set terms of reference. The Finance Workgroup became involved in direct negotiations with the suppliers on matters other than financial aspects of the proposals. Technical negotiations were done by Armscor and DOD, the terms of the Defence Industrial Participation were negotiate by Armscor, the terms of the Non-Defence Industrial Participation (NIP) obligations were negotiated by the DTI.

171. The summary of the objectives realised thorough the negotiations by the IONT and FNW as per the Executive summary of the Affordability Report of August 1999 detailed *inter alia* the achievement of almost all of the achievement of the negotiating objectives. In particular it indicated that the concessions by the ECAs were largely unprecedented . Further that the terms achieved with the ECAs and banks had substantially improved the financing in terms of cash flow , foreign exchange risks and have produced substantial savings for the borrower amounting to approximately US$101. 09 million (over R600m).

172. In March 1999 the Ministers Committee requested additional affordability study of the SDPP bids. (resulting from the negotiation process). An Affordability Team was appointed from DoF to evaluate the overall macro-economic, financial and fiscal risks and impact of the SDPPs. This included alternative scenarios for consideration

by the Minister's Committee to assist it in its decision on the scale and financing of the procurement.

173. The assessment was conducted whereby the procurement of aircraft was divided into three "tranches: an initial tranche of 12 lead-in trainer and 9 advanced fighters, a second tranche of 12 further lead-in trainers and a third tranche of 19 advanced fighter aircraft. This Affordability Team's Affordability report was presented to the Minister's Committee in August 1999.

174 The total estimated costs as per the Affordability report due to the likelihood of cost associated with exchange rate movements including the full three procurement tranches was R36 482 million in 1999 prices and R25 364 million if the second and third tranche options were not exercised.

175 These costs were higher than the DOD and DoF s earlier estimates of R29 773 million in November 1998 based on the preferred bidders Best and Final Offers and as presented to Cabinet in November 1998 and the DoF's estimate of R31 443 million as set out in the report on Defence Strategic Packages: An Assessment of the Potential Fiscal Impact (March 1999).

176 The higher estimates in August 1999 report were *inter alia* the following:

176.1 August 1999 estimates are based on 1999 contract prices as opposed to the 1998 prices used for the November 1998 estimates;

176.2 While the November 1998 estimate was based on the tender prices, the August 1999 estimate took into account more complete costs of the procurement, e.g statutory costs including freight and taxes, project management costs incurred by the DOD and Armscor in managing the procurements; financing costs associated with deferred payments to suppliers in order to optimise cash flows, ECA premiums payable on ECA-backed loans and cost increases associated with the projected depreciation of the rand against other contract currencies (US$, Euro, GPB and Swedish kroner.

177. As at August 1999, the underlying contract prices of the armaments had general decreased due to negotiations on price, downgrading of specifications, adjustment of delivery time tables where possible and the reduction in the number of arms procured.

178. Most importantly, the Affordability Report provided the Minister's Committee with a comprehensive overview of the costs of the envisaged arms procurement programme with a strong emphasis on risks associated with adverse economic circumstances.

179. The criticism levelled against the Affordability were:

179.1 That the costs of the SDPP were under estimated because the effects of inflation were not taken into account; In response thereto, Donaldson stated that the nominal rand costs over the full

procurement period substantially exceed the contract cost in 1998 or 199 prices. Future inflation is unknown and so contract values are routinely stated in “real” or constant price terms.

179.2 that the costs of the SDPP were under-estimated because the risk of rand depreciation was not sufficiently taken into account;- According to Donaldson, it was true that the nominal rand costs over the full procurement period were affected by exchange rate movements. In the wake of the 1998 financial crisis the Department of Finance and the Ministers Committee were aware and alive to this concern and the associated risks were dealt with in detail in the Affordability Report. The depreciation risks are partially mitigated by offsetting balance of payments and fiscal adjustments.

179.3 that the costs of the SDPPs were underestimated because the future interest and debt repayments were excluded.-In response, Donaldson argued that the true sum of the procurement costs and associated financing costs substantially exceed the original prices . The cost of a vehicle purchased through a loan agreement, can either be stated as its purchase price or as the sum of a series of interest and debt redemption payments, but to add both together is a double-

180. The Minister's Committee took into account the Affordability Report, the relevant military benefits and the industrial participation considerations when they gave advise to Cabinet and Cabinet having noted the recommendations of the Ministers Committee proceeded with the procurement. The initial procurement committed the government to the first trance procurement only, after 2002 in aa context of improved economic financial and fiscal outlook, the full three tranche procurement was confirmed.

181. The Minister's Committee having considered the Affordability Report recommended to Cabinet to reduce the number of arms to be procured as follows:

181.1 the number of LUHs from 40 to 30;

181.2 the exclusion of Maritime Helicopters from the SDPP;

181.3 the splitting of the aircraft packages for the (ALFA, Gripen) and the LIFT (Hawk) into three procurement "tranches" , allowing for later decisions in respect of tranche 2 (12 Hawks) and tranche 3 (19 Gripens).

182. On 15 September 1999 Cabinet decided to procure through the SDPP, three Submarines from the German Submarine Consortium, 4 Corvettes from the German Frigate , Thomson and ADS, 30 Light Utility Helicopters (Agusta), 12 Lead-in Fighter Trainer Aircraft (Hawk and 9 Advanced Light Fighter Aircraft (Gripen, both for tranche 1, 12 LIFTs (Hawk) and 9 ALFAS (Gripen) for tranche 2 and 3 respectively. The total amount including the first, second and third tranches amounted to a total of R29 992 billion.

183. Cabinet announced that the initial tranche 1 cost was R21.3 billion over 8 years (1999 prices at a fixed exchange rate of R6.25:$1). Cabinet noted that including the option to procure additional equipment in tranches 2 and 3 (the option was to be exercised no later than 2004), would raise the cost by R8,7 billion to R30 billion over 12 years(at a fixed exchange rate) or to R35.1 billion assuming forward forex rates. These costs excluded the price escalation associated with inflation[56].

184. In giving effect to the basis of its decision, the following statement was made in the 1999 Medium Term Budget Policy Statement at p 60[57]:

" *Government is committed to the resolution of conflict on our continent , to make Africa safer and more prosperous. The strategic defence procurement package allows the SANDF to upgrade obsolete defence equipment to help contributor towards Government's objectives in this regard. The total price for the military equipment is R21.3 billion (in 1999 rands) or R29.9 billion if all aircraft options are taken"*.

185. The costs commitments were also set out in the February 2000 Budget Review (p 141) and the 2000 National Expenditure Survey (at p 155)[58]. In the 2000 Budget R2.8 billion was added to the 2000/01 Defence allocation and R3.8 billion to the 2001 /02 allocation to provide for additional costs not accommodated with the Defence baseline vote.

[56] See: Cabinet Press release attached as annexure AD 15of A Donaldson statement
[57] See: Annexure AD 17 to A Donaldson Statement
[58] See: Annexures AD18.1 and AD18.2 to A Donaldson' Statement

186. The cost of the SDPP was provided in the 2000/2001 Defence appropriation vote and by agreement between the National Treasury and the DOD a rising share from the Defence "baseline" allocation. The costs of the procurement have been approved by Parliament annually through its appropriation of funds for the Defence vote.

187 The Total expenditure on the SDPP from 2000/01 to 2013/14 amounted to R46 666 million and this expenditure had been accommodated within the overall Defence budget which had remained at 1.5 % and less throughout the years except in 2000/03.

188. The SDPP procurement did not affect the other social and development priorities as some have argued. In fact, in the 2002/03 year SDPP expenditure was at its peak but it only amounted to R6 342 million. In the 2003 Budget Review the government expenditure for the 2002/03 was reflected:

188.1 On Education : R62 757 million;

188.2 On Health Services : R34 940 million;

188.3 On Social Security and Welfare Services : R41 966 million;

188.4 On Housing and Community Development: R13 677 million;

188.5 On Transport and Communication: R13 825 million;

188.6 On Police Services : R20 529 million.

189. There has been strong growth both in nominal and real terms on education, health, social security and welfare, housing, transport and other social and development priorities during the years of expenditure on the SDPP.

190. Notably, during the years where SDPP expenditure was highest from 2001/02-2007/08 the budget deficit did not exceed 2.7% of GDP and in 2007/08 a budget surplus of R20.4 billion was recorded. Subsequent to the 2008/09 recession the budget deficit increased substantially, but the SDPP expenditure accounted for a small fraction of this.

191. The Minister of Finance concluded the loan agreements with foreign banks in respect of the SDPP on 25 January 2000. Notably, the PFMA was not yet in force at the time and the Minister concluded the agreements in terms of section 66(2)(a) of the Exchequer Act read with section 71 of the PFMA. Criticism has been levelled against the authority of the Minister to sign the agreements to the extent that the matter was a subject of a failed High Court litigation which sought to challenge such authority.

192. The loan agreements have been managed by the National Treasury, through the Asset and Liability Management Division. The National Treasury has also selected and managed the interest rate and currency options under the loan agreements with a view to reducing overall costs and exchange risks to the Government.

193. A total of R26 021.4 billion had been repaid by 31 March 2014 approximately 68% of the total amount drawn, an amount of R10 148.9 million had been paid in interest and as at 31 March 2014 an amount of R12 181.7 million has still to be paid and

R2 663.3 million in interest[59]. The all in costs of the loans actual and projections as at 31 March 2014 amount to R38 203. 2 million (capital and R12 838.2 million (interest). The fees paid for management, commitment and legal fees amounted to R211.2 million.

THE ROLE OF CABINET AND THE MINISTER'S COMMITTEE IN THE SDPPs PROCUREMENT PROCESS

194. During May 1998 and subsequent to the completion of the Defence Review, Cabinet resolved to approve the option 1 of the SANDF Force Design alternatives set out in the Defence Review. It is apparent from the Defence Review itself that the Defence Force had opted for option 2 of the Force Design however, Cabinet considered option 1 as the best option in the circumstances.

195. Subsequent to the approval of the option 1 above, the Cabinet appointed a Cabinet sub-committee, referred to inter-ministerial committee was established in 1998. Its members were appointed to have oversight over the SDPP process. It comprised of the following members:

195.1 Deputy President Thabo MBEKI, (Chairperson);

195.2 The Minister of Defence (initially Joe Modise and later on Minister Mosioua Lekota);

195.3 Minister of Finance (Trevor Manuel);

[59] See: paragraph 118 to 120 of A Donaldson statement

195.4 The Minister of Public Enterprise (Minister Jeff Hadebe} and

195.5 The Minister of Trade and Industry (Alec Erwin)

196. With respect to specific areas of responsibility, the Minister of Finance led the discussions on financing, budgeting, affordability and the wider economic effect of the SDPP, the Minister of Public Enterprise was responsible for the key state owned defence company, Denel reporting to his Department. The Minister of Trade and Industry had executive responsibility for the NIPP and took responsibility for providing guidance on the use of the NIP as a tool for advancing socio-economic imperatives of Government.

197. The sub-committee's main function was to render executive and policy guidance to the procurement process and to report to Cabinet. There were various structures that reported to the Committee and their reports were considered and where appropriate, recommendations incorporating information furnished in these reports would be made to Cabinet. One of these structures was the IONT which played a primary role in negotiating the best terms and conditions for the contracting parties.

198. It is apposite to note that the sub-committee only made recommendations and it Cabinet that took the final decision.

199. On 21 October 1998, Cabinet was addressed by the Minister and Mr S Shaik on the procurement offers *inter alia* preliminary proposals relating to the procurement package, strategic packages, revised Defence design and the package versus the total capital budget. At this meeting Cabinet resolved that the Committee dealing with the procurement must further consult on the recommendations with the Minister of

Finance and the same Committee must also consider the implications of the procurement in real terms for the budget of other government departments. The Committee was also directed to give a clear indication of the benefits of the procurement for the social sector and indicate which areas of industry will benefit most.

200. On 15 September 1999, Cabinet considered a presentation from the IONT led by Mr J Naidoo *inter alia* dealing with negotiation outcomes in terms of costs and loan packages, a comparison between the November 1998, May 1999 and August 1999 figures as presented to Cabinet, an overview of the affordability assessment with reference to element risk analysis, expenditure scenarios and a conclusion. It is at this meeting that the total price of military equipment of R29 992 million was approved.

201. On 8 January 2001 a Special Cabinet Meeting considered the effect of the Constitutional Court Judgement that made a finding that it was unconstitutional for a Judge to head a Special Investigation Unit instituted under the Special Investigations Units and Special Tribunals Act of 1996 and the intention of the President to give effect to the judgement.

202. On 20 February 2002 Cabinet considered the request from DOD and National Treasury for the approval of Tranche 2 procurement of 12 Hawk Lift Aircraft and the associated support equipment and requested the Minister to do a full presentation to Cabinet on the National Industrial Participation of the SDPP.

203. On 6 March 2002 Cabinet considered a request from the DOD for a further Tranche 2 for acquiring the Hawk and the Gripen. At all material times, Cabinet took decision based on recommendation and after presentation from the sub-committees and relevant officials from the state departments.

THE ANALYSIS OF THE RATIONALE IN THE DECISION MAKING PROCESSES OF THE SDPP

204. The government entities that were involved in the decision making process regarding the acquisition of the SDPs are organs of state as defined in section 239 of the Constitution read with section 1 of the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA").

205. In terms of section 1 of PAJA, a decision means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision These organs of state and the executive were empowered in terms of the interim and final constitution, the white paper, the defence review and the Defence Act including the Exchequer and the PFMA Acts to make decision/s in respect of the acquisition of the SDPP equipment including the financing thereof.

206. Prior to 1994, the legal regulation of government procurement in South Africa was subject to both national and provincial legislation. The State Tender Board

Act[60]governed procurement at national and provincial government level. With the coming into effect of the interim Constitution, government procurement was afforded constitutional status[61], and this position was confirmed in the 1996 Constitution[62]. Besides section 217 of the Constitution, section 33 which provides for the right to just administrative action has an impact on government procurement.

207. Sections 215, 216, 218 and 219 of the Constitution furthermore require the National Treasury to introduce uniform norms and standards within government to ensure transparency and expenditure control measures which should include best practices related to procurement and provisioning systems. To further give effect to the new constitutional status of government procurement , legislation has also been enacted[63] that supplement and in some instances replace previous laws regulating procurement.

208 While the decisions taken by the organs of state and its officials during the SDPP process may be subject to PAJA, the executive decisions taken are not subject to the PAJA enquiry. However, one of the core values of the Constitution is the supremacy of the Constitution and the rule of law[64]. In **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others**[65] the court said the following:

[60] 86 of 1968
[61] Section 187 of the Interm Constitution
[62] Section 217
[63] The PFMA and the Regulations thereto; note further that the PFMA repealed the Exchequer Act
[64] See: section 1 (c) of the Constitution
[65] 1998 (12) BCLR 1458 (CC)

" *It is a fundamental principle of the rule of law , recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law –to the extent at least that it expresses this principle of legality –is generally understood to be a fundamental principle of constitutional law.*

It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then , the principle of legality is implied within the terms of the [1993] Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the [1993] Constitution is a principle of legality…"

209. We submit that the Executive which was instrumental in taking the material decisions relevant to the SDPP cannot escape scrutiny if the power and functions they performed in the decision making process were inconsistent with section 1 of the Constitution. However, the term of reference of rationale invariably requires the Commission to enquire whether the decisions taken during the SDPP process were rational. It is apposite to refer to relevant authorities in this respect to test and answer the question posed.

210. Chaskalson P (as he then was) held as follows in *Pharmaceuticals Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) at paras 85 and 90:

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

"*Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is*

objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."

(our underlining.)

211. In *Bel Porto School Governing Body & others v Premier, Western Cape & another* 2002 (3) SA 265 (CC) at para 89, Chaskalson P (as he then was) found, with reference to *Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 ILJ 1425 (LAC), that "*for a decision to be justifiable … it should be a rational decision taken lawfully and directed to a proper purpose*".

212 In *Carephone (supra)*, Froneman DJP decided at para 37 that the test for justifiability is as follows:

"*Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion that he or she eventually arrived at?*"

213. In para 32, the court held:

"*According to The New Shorter Oxford English Dictionary 'justifiable' means 'able to be legally or morally justified, able to be shown to be just, reasonable, or correct; defensible'. It does not mean 'just', 'justified' or 'correct'. On its plain meaning the*

use of the word 'justifiable' does not ask for the obliteration of the difference between review and appeal. Neither does the LRA itself: it makes a very clear distinction between reviews and appeals."

(*our emphasis*)

214. The notion of justifiability thus gives rise to a range of reasonable decisions. In *Bel Porto School Governing Body (supra)* at para 45, Chaskalson P (as he then was) put is as follows:

"*The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable*."

(*our emphasis*.)

215. In Minister *of Environmental Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA), Schutz JA remarked at para 52:

"*During the course of the argument for Phambili we were frequently told that something that the Chief Director had done was 'wrong'. This is the language of appeal, not review. I do not think that the word was misused, because time and*

again it appears that what is really under attack is the substance of the decision, not the procedure by means of which it was arrived at. That is not our job. I agree with what is said by Hoexter ['The Future of Judicial Review in South African Administrative Law' (2000) SALJ 484]*:*

'The important thing is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and <u>thus obliterate the distinction between review and appeal</u>.'"

(our emphasis.)

216. As we have already indicated hereinabove that the advent of the SDPPs was novel and was introduced immediately after the government procurement process had assumed constitutional status. It is common cause that the Minister of Justice then was responsible for the formulation of the policy in respect the White Paper which gave birth to the Defence Review. Policy formulations where same involves a political decision has been held not to constitute administrative action. Both the White Paper and the Defence Review in our view did not constitute administrative action as they only constituted policy formulation[66].

[66] See: Permanent Secretary of the Department of Education of the Eastern Cape Province and Another v Ed-U-College (PE) (Section 21) 2001 (2) SA 1 CC para 18

217. We submit that even if the formulation of policy may be found to have constituted administrative action, the decisions to formulate such policies were rational and would have met the review test if challenged. As indicated above both the White Paper and the Defence Review were products of an extensive public consultation. As Rear Admiral Higgs who was a member of the Defence Review committee, the Defence Review was not formulated in a smoke room. Further, in our view, the decisions taken in respect of the White Papers and the Defence Review will stand any Review test in that they were both unanimously approved by Parliament during May 1996 and 22 May 1998 respectively.

218. It is our respectful submission that the decisions by the then Minister of Defence in respect of the White Papers and the Defence Review were rational. The witnesses particularly from the Navy and the Airforce in our view were able to make out a case that there was a need for the procurement of the armaments acquired through the SDPP process. It is not in issue that the circumvention of the aforestated Security Council resolutions on the arms embargo by the apartheid government was not successful. Unless the newly democratic government took reasonable steps to either upgrade or replace the equipment from the Navy and SAAF which had reached its life cycles, the constitutional obligation imposed by section 200 (2) of the Constitution will not have been met.

219. In particular we submit that the South African Government's decision not to purchase the armaments will also have been inconsistent with section 226 which required that the defence force be established in such a manner that it will provide

a balanced, modern and technologically advanced military force, capable of executing its functions in terms of the Interim Constitution. The functions that were required to be executed in terms of the Interim Constitution were all listed in section 227 of the Interim Constitution.

220. Section 2 of the final Constitution requires that the obligations imposed by it should fulfilled. We submit that failure by the new democratic government to respond to the needs of the Navy and SAAF will have been a failure to fulfil the obligations imposed by the Constitution.

221. The evidence of the Navy, Airforce officials was not challenged in respect of the need and capability of the equipment purchased through the SDPP process. Products.

222. As indicated above, the DOD had already commenced with a procurement process for the replacement of the frigates, the submarines and the Alouette however, this process was halted to await the approval of the Defence Review. Subsequent to the approval of the Defence Review, Council of Defence on 19 September 1997 approved the continuation of the SDPP[67].

223. The initiation of the SDPP acquisition process could be traced back to June 1997. We submit that the decision to approve the continuation of the SDPP process after

[67] See: Record page 7 of the statement of J C Ferreira

having awaited the approval of the Defence Review met the rationality test in the circumstances. Noting the urgency within which some of the equipment needed to be replaced, including the fact that it took approximately ten years to finalise a procurement process of the magnitude of the SDPPs any delay would have been unjustifiable.

CRITICISM OF THE SDPP PROCESS AND MATTERS INCIDENTAL THERETO

Paul Holden and Andrew Feinstein submitted in their joint submissions that:

224. Selection of Hawk and Gripen aircraft as the preferred suppliers of the Lean-In Fighter Trainers ("LIFT") and Advanced Fighter Aircraft ALFA was beset by numerous procedural irregularities and the repeated intention of acquisition staff to the benefit of the BAE/SAAB[68].

225. The Gripen's selection was bedevilled with irregularities and inconsistencies.

226. In October 1997, a month before the decision to re-adopt the three-tier system was made, three suppliers are officially shortlisted to provide the ALFA component. The three options selected were Germany's Daimler-Benz Aerospace's at 2000 fighter, France's Dassault Mirage 2000 fighter and BAE/SAAB's Gripen[69].

[68] Page 104 at Para 1 of Paul Holden and Andre Feinstein
[69] Page 106 at Para 4

227. According to critics above at this point, the Gripen was the least preferred of all the planes submitted.

228. The AT 2000 received the highest score as it was credited with the best cost-effectiveness and best optional capability.

229. Meanwhile the Gripen was acknowledged to be a "capable modern fighter with low development risks, but, vital was still considered to be "high cost".

220. The decisive area in which BAE/SAAB outsourced their competitors was in the evaluation of the financing proposals[70].

221. In the case of a Gripen, it was selected after Dassault and Daimler-Benz had failed to submit any information regarding their financing offer. This means in short that only the Gripen was given a score for a part of the bid that would count 33% towards the final score.

222. It was largely on this basis that the Gripen emerged as the preferred bidder not on an equal competition between bidders, but as a result of the alleged failure of Dassault and Daimler-Benz to submit their financial evaluation[71].

223. During the meeting at which the Grippen was chosen, it was claimed that Dassault and Daimler-Benz had "failed to offer financing, notwithstanding repeated requests'[72].

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[70] Page 107 at Para 2
[71] Page 107 at Para 2

THE HAWK

224. The Hawk only emerged as the preferred bidder after a series of manipulations[73].

225. Initially, the Hawk was considered to be one of the least desirable planes. During the technical evaluation of the various aircrafts, which was to be combined with the price to determine their cost effectiveness, the Hawk was placed in third position with the AEROMACHI MB339FD clearly the preferred option. The MB339FD was considered to be twice as suitable as the Hawk with regard to the technical competence[74].

226. It received an indexed score of 100, while the Hawk managed merely 44.2.

227. The MB339FD was considered to be the best plane for the job, which was obvious. It was, in the developmental terms, the natural successor to the Impala trainers that were already in use, and was offered at roughly half the costs of the Hawk.

228. Interestingly, during the entire process, the SAAF was deeply concerned about meeting its acquisition targets without massively exceeding its budgetary allocations. The AEROMACHI MB339FD helped in part to allay these fears, as it could be purchased without exceeding an already strained Department of Defence's

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72 Page 107 at Para 3
73 Page 107 at Para 4
74 Page 108 at Para 2

budget. The Hawk, if it was selected, would do exact opposite. The budgetary allocation for the LIFT (R2 – 2bn) would have to be exceeded by a remarkable degree[75].

229. The Hawk's bid was saved, however, by the direct intervention of Joe Modise. During a meeting of the Arms Acquisition Council on 30 April 1998, Modise argued that it was necessary to take a visionary approach: the cost of the deal would be put aside in the selection process, as it was the industrial participation programme in the end, which would determine the economic benefits or shortcomings of the anticipated deal.

230. As such, Modise instructed that two separate evaluations be completed: one evaluation with costs included and one evaluation with costs excluded[76].

231. In the model which excluded the costs, the MB399FD still emerged the preferred bidder as it was simply the best plane for the job.

232. Nevertheless, the Hawk now came in second place (up one from third), and was given a score that would ensure once other factors had been evaluated (the offsets and financing terms), it could be considered a contender, rather than a dead duck.

233. In July 1998, shortly after Modise's instruction that a non-cost option be included, Steyn had chaired a meeting at which he argued that this option should not be

[75] Page 108 at Para 3
[76] Page 108 at Para 4

provided to cabinet for consideration. As a result, it was resolved that only the cots option, which placed the Hawk in last place, would be forwarded to the cabinet[77].

Source C BAE and the arms deal: Part 2, Moneyweb, 15 August 2007, available at: www.info.gov.za

234 During the meeting of the same board in August 1998, Modise overruled Steyn's suggestions, despite Steyn pointing out the absurdity of a situation where the Hawk doubled the cost of the LIFT aircraft for an increase in performance of approximately 15%[78].

235. Modise argued that the political decision needed must not revolve around operational aspect of the aircraft[79]. Modise's argument was that politicians must decide.

236. Critics submitted that DIP offers made by all the bidders were roughly the same, suggesting that it was the NIP element alone that would be used to discriminate between the various bidders.

237. BAE's emergence as the preferred bidder to supply both the Hawk and Gripen aircraft as the SAAF's new ALFA and LIFT was achieved after a considerable amount

[77] Page 109 at Para 1
[78] Page 109 at Para 1
[79] Page 109 at Para 1

of manipulation the most obvious being the use of a "non-costed" option to ensure the Hawk's selection[80].

238. So large was the burden of the Hawk and Gripen on the fiscus that the IONT began to express concern about whether the purchase of Gripen would be feasible or prudent[81].

239. At a meeting of the Minister's sub-committee on 26 May 1999, the IONT, in fact started to make the argument that the purchase of the Gripen should be shelved at the time[82].

SELECTION OF THE LUH

240. While the Auditor-General's office could not find any manipulation in the award of the primary helicopter contract, they came across information which suggested impropriety in relation to the procurement of the engines;[83]

241. In particular, the Auditor-General was able to establish that the selection of Turbomeca engines over Pratt and Whitney's engines was frequently manipulated to the point where the matter was sent back for review four times before Turbomeca was selected[84].

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80 Page 110 at Para 2
81 Page 111 at Para 4
82 Page 111 at Para 4
83 Paul Holden and Hennie Van Vuuren, The Devil in the Detail, 2011, Page 240 at Para 2
84 Paul Holden and Hennie Van Vuueren, The Devil in the Detail, 2011, Page 240 at Para 2

242. It seems that, initially at least, this interest in the sub-contractors was motivated by information fed to Agusta by Futuristic Business Solutions. According to the draft version of the Auditor General's report, FBS and Agusta had signed a number of understandings that included a stipulation regarding the involvement of the local defence industry.

243. Back to the sub-contract. Initially, it seemed that Agusta will still have a relative free hand in choosing the sub-contractors to be used to build the helicopters. In particular, Agusta recommended the use of the Pratt and Witney 207C engine, which some how upset the applecart at Armscor, which had favoured the selection of the Turbomeca Arrius 2k2 engine. Armscor wrote to Agusta on 3 December 1998 to request that the Turbomeca decision be reviewed to compare certain characteristics, costs and industrial participation proposed from each of the two engine manufactures. The result, it seems, was not what Armscor had expected. Agusta listed a number of reasons why the Pratt and Whitney was the favoured engine, including the fact that Turbomeca engine was more expensive than Pratt and Whitney offered an 80% better industrial participation programme. Also tipping the scales to towards Pratt and Whitney was the fact that Agusta had already used their engine in previous regions of the light utility helicopter, and that Turbomeca's engine was still in the prototype and design face, suggesting that it might not meet the eventual technical requirements of the process[85].

244. As a result, on the 3rd of February 1999, the SAAF and Armscor CO Llew Swan were tasked with re-evaluating the proposal, which was presented on the 24th of June

[85] Paul Holden and Hennie Van Vuueren, The Devil in the Detail, 2011, Page 241

1999. Yet again, the Pratt and Whitney emerged as the favourite contender, largely as a result of cost and the fact that the Turbomeca engine was still in the development phase. The costs implications were substantial. Selecting Turbomeca would have increased the total acquisition cost by $2,701,835-00. Roughly R19 million. In the mean time, however, while the evaluation was being conducted, Llew Swan received a letter dated 11 February 1999 from Mr. J. Botha, the acting CEO of Denel, stating the following:

244.1 LUH in many ways it is vital for Denel that Turbomeca to secure this contract and as it is out hope that their bid is on equal footing or better than that of their competitor Pratt and Whitney. This is for the following reasons.

244.2 Should they win, they will establish Denel as a major service, repair an overall centre for their primary range of engines, covering the entire African continent.

244.3 Significant manufacturing work, for which the first order of batch or ten sets of gears has already been received.

244.4 Engines, and where they are currently supporting us in Australia (*sic*).

244.5 Turbomeca has declared their intention to acquire controlling share, of 50% +/- Denel automotive[86].

[86] Paul Holden and Hennie Van Vueren, The Devil in the Detail, 2011, Page242 at Para 2

245. When the military evaluation was discussed at the meeting of the helicopter project control board (the official body overseeing the LUH acquisition, which was to report to cabinet on preferred suppliers), it was argued that the evaluation was not complete. According to minutes of the first June meeting, which was signed by Chippy Shaik, it was argued that the evaluation might be overridden by strategic issues on the part of the cabinet's sub-committee, and that the NIP and DIP proposals were still to be included[87]. This suggested that the considerable weighting will be given to the NIP and DIP concerns, and that cost and technical evaluation might be overruled as cabinet saw fit. In order to rank the NIP and the DIP values of the engine, Armscor personal were tasked with evaluating the proposal that had been made, the final result will have in favour of Pratt and Whitney, which scored 100% on the revise on the said evaluation compared to 84 for Turbomaker. To date, therefore, Pratt and Whitney had won in every evaluation undertaken. It was cheaper, safer, technical better suited, and offered a better offset programme[88].

246. Upon completing the evaluation, the head of Armscore DIP team over viewing the evaluation, Johan Van Dyk, wrote to Llew Swan informing him of the outcome. Importantly, the result of this evaluation was never presented at a meeting of the Project Control Board for discussion. Instead, Swan wrote to Van Dyk, stating that they needed to evaluate the investment by Turbomeca in Denel Airmotive. It was believed that some 100 million could alter the DIP evaluation. On Swan's instruction, the matter was reviewed again. The DIP evaluation team refused to include the proposed 100 million investments in Denel as no business plan had been

[87] Paul Holden and Hennie Van Vuueren, The Devil in the Detail, 2011, Page 242 at Para 3
[88] Paul Holden and Hennie Van Vuueren, The Devil in the Detail, 2011, Page 243 at Para 1

submitted. As a result, the revised evaluation again favoured Pratt and Whitney. Indeed, the re-evaluation left Turbomeca to score only 78, compared to their original 84. After yet another review was requested, Turbomeca still failed to come top of the list, scoring 85 compared to Pratt and Whitney's 100.

247. These evaluations were still not to the liking of key decision makers. As such, a forth review was conducted in June 1999, and as a result, Turbomeca emerged at the victor with a score of 100 compared to Pratt and Whitney's 94. This was only achievable as a result of the fact that the entire evaluation system was changed. The NIP proposal, which were weighted differently to the DIP proposal, were suddenly bundled together with the DIP proposal – a basket of officials, if you will. This is what was claimed, because of the alleged duality. Some of the NIP proposal, it was claimed, could just as easily be thought of as DIP proposal, at least if you squinted your eyes in the rights way. In other words the offset evaluation criteria were changed, and Turbomeca investment in Denel Airmotive was included, despite the fact that it had been previously specifically excluded because no business plan had been submitted at that time[89].

248. The evaluation, listing Turbomeca as the preferred bidder, was presented to the Helicopter Project Control Board on 6 July 1999, and discussed in an extraordinary meeting called on 3 August. The technical team who had overseen the initial evaluation that did not select Turbomeca because of the costs and other concerns raised their concerns to the new information. As they had already expressed their preference for the Pratt and Whitney for a whole host of reasons. The result of the

[89] Paul Holden and Hennie Van Vuueren, The Devil in the Detail, 2011, Page 243 at Para 3

meeting, which was chaired by Chippy Shaik with Llew Swan as alternative chairperson, was that *"the forum present was unable to reached consensus with regard to the engine selection. It was decided that the information will be presented to cabinet for final decision on the choice of engine. The chair indicated to the members that PCB could not over turn the final evaluation Figure of Merit"*[90].

249. In effect, this meant that both the revised offset evaluations (which favoured Turbomeca) and the technical and cost evaluation (which favoured Pratt and Whitney) were supposed to be presented to the cabinet for a discussion. However, at a further meeting held on 22 September 1999, it was only recorded that the engine selection of LUH was performed and the engine decided upon was the Turbomeca Arrius 2k2. As a result, the cabinet was not provided with any options.

250. That this situation was highly irregular is confirmed in the draft Auditor-General's Report. Indeed, a representative of Pratt and Whitney lodged a letter of complaint noting that Denel and Armscor were dealing directly with Turbomeca, despite the fact that this was against the rules governing the acquisition process. The summary provided in the draft Auditor-General's Report agreed, noting:

> *"The facts and circumstances relating to the selection of sub-contractor for the supply of engines for the LUH showed that the process leading to the awarding of the contract to Turbomeca was irregular.*

[90] Paul Holden and Hennie Van Vuueren, The Devil in the Detail, 2011, Page 344 at Para 2

The proposals from Turbomeca and Pratt and Whitney (sic) were evaluated against and approved value system … The results were in favour of the Pratt and Whitney proposal. The main bidder, Agusta, also recommended the Pratt and Whitney (sic) engine. Direct intervention by Mr. Swan led to several re-evaluations that ultimately resulted in the contract being awarded to Turbomeca …

Before the final IP evaluation in June 1999 various documents were submitted to DTI and Armscor on Turbomeca letterheads, but they appear to have emanated from Denel Airmotive. Some of these documents were faxed from Denel Airmotive to Armscore and in would appear that the documents originated from the office of the Acting CEO of Denel, Mr. Botha. It transpired that one of the main evaluators, Mr. van Dyk, subsequently resigned from Amscor and joined Denel as the Executive Manager to coordinate the Industrial Participation. He submitted during evidence that this position was only negotiated much later during the first months of 2001.

Turbomeca was awarded the engine despite the risks that had been identified. Special measures had to be taken to abate the risk since the prime contractor was not prepared to accept the risk …"[91]

CRITISMS OF THE SDPP PROCESS AND THE LEGAL ANALYIS RELEVANT THERETO

251. We deem it appropriate to highlight various allegations and criticisms

[91] Paul Holden and Hennie Van Vuuren, The Devil in the Detail, 2011, Page 244

extracted from the affidavits of Mr Crawford, the criminal complaint laid against Mr Trevor Manuel by Mr Crawford-Browne, the transcription of the hearings on the Joint Investigation Report, various paragraphs of the Joint Investigation report as well as the submissions made by the Economists Allied For Arms Reduction (ECAAR) . Further, we also highlight briefly with the criticism against the Affordability report as set out in the JIT report in Chapter 9.

252. Mr Terry Crawford –Browne embarked upon litigation against Mr Trevor Manuel for the reasons listed below (Volume 1 Annexure A: Supplementary affidavit pursuant to the Chief Justice's Directions dated 16 May 2011 Case Number CCT 103/10 at paragraphs 125-154 pages 58-67).

253. Mr Crawford Browne and Ms Patricia De Lille had sent evidence of arms deals wrongdoing to Judge Willem Heath, he was informed that British governments Export Credit Guarantee Department of the very serious allegations and evidence against BAE and advised them that it would be fraudulent to finalise the financing arrangements for the arms deals pending Judge Heaths findings. The ECGD is the official British Export credit agency. Despite also being kept informed, the supply agreements for the arms deals contracts were signed on3 December 1999, including the BAE agreement, subject to finalisation of loan agreements to be negotiated by then Minister of Finance, Trevor Manuel. (paragraphs 126-128 Supplementary affidavit *ibid*)

254. According to Crawford Browne, the Minister of Finance signed the agreements despite concerns expressed by the International Offers Negotiating Team of the risks involved, and that expenditure on armaments would crowd out social and economic expenditure on housing, health and welfare. Mr Manuel and the Cabinet were repeatedly warned about the foreign exchange risks over a very extended period of time. Mr Manuel has during his evidence indicated that they were aware of such risks and applied their minds thereto before they made a decision to sign the agreements. The Joint Investigation Team report tabled in Parliament in November 2001

confirms in para 9.1.1.5 (page 248) that "…The Affordability team was in this regard, also assisted by the Bureau of Economic Research at the University of Stellenbosch. The final assessment was submitted to the Ministers Committee in August 1999…this report superseded all previous reports and inputs that were submitted on the matter of affordability. It sufficiently equipped the Ministers concerned to make a properly informed decision, as far as issues of affordability were concerned. Affordability is ultimately a question of political choice. The task of the Affordability team was not to make that choice, but to enable the ultimate decision makers to make a well-informed choice about what the country could and could not afford. As indicated above, Donaldson stated that the Minister's Committee did not only look into the Affordability report but also the military value and the NIP and DIP requirements.

255. The JIT report at para 9.1.2.5, page 250 state that "…the contents of the assessment and the implications of the cost of the procurement were extensively debated and considered. These debates and considerations included issues such as risk of depreciation of the Rand against other currencies over the life of the contracts, the risk of interest rate increases in the economy and the risk of non-performance by contractors in relation to industrial participation commitments. These issues were fully addressed in the risk analysis that was submitted to Cabinet in October 1999.

256. Mr Browne further submitted that paragraph 3.3.4 of the executive summary declared that "The arms procurements are likely to impact on expenditure by other government departments in two ways, both negative. Firstly, the additionally approach outlined above explicitly assumes that certain amounts of expenditure will be shifted from other government departments to Defence for the packages. Secondly, to the extent that the overall pool of funds available to government is likely to grow in line with the growth in the economy (less any fiscal contraction which may still occur) than any additional expenditure on the defence packages will reduce the portion of these funds which could otherwise have been available to other departments.

(ECAAR-SA "*Arguments for cancellation of the loan agreements that give effect to the Arms Deal"* dated 24 November 2003 page 7).

257. Mr Browne has further submitted that in ignoring warnings of the affordability study, the cabinet and minister quite obviously neither applied their minds to the issue nor complied with the requirements of section 217 of the Constitution that National Treasury must comply with generally recognised accounting practice. Such practice includes that borrowings in foreign currencies should be matched by income in such currencies. Warships and warplanes do not produce foreign currency income to meet the foreign currency liabilities. (ECAAR-SA " *South African Arguments for Cancellation of the Loan Agreement that give effect to the Arms Deal"* dated 24 November 2003 page 10). Mr Donaldson testified that in compiling the Affordability report all the financial risks were considered by the Ministers Committee and by Cabinet. Cognisance should be taken that it was the Minister's Committee that recommended to Cabinet for the reduction of the equipment and also for the purchase of the ALFA and the LIFT in tranches to mitigate the financial risk. We submit that this was a rational decision.

258. Mr Trevor Manuel's key role in the Cabinet's arms deal committee was to consider the affordability and financing of the acquisitions. According to Mr Crawford-Browne he was publicly known to believe that the country could not afford the arms deals, yet was nevertheless persuaded to enter into the loan agreements. Manuel signed the Barclays Bank and ECGD loan agreements on 25 January 2000, which gave effect to the BAE Hawk and BAe /SAAB Gripen fighter aircraft contracts. The director of the ECGD, Chris Leeds signed on behalf of the British Government. (paragraph 129-131 Supplementary Affidavit *ibid*) . During his evidence, Mr Manuel denied these allegations.

259. Mr Crawford Browne also noted that Mr Manuel seemed to have been aware of wrongdoing in the arms deals, as Feinstein records in his books, After the

Party: Feinstein as former ANC Member of Parliament and senior representative on Scopa, records how Manuel invited him to lunch near Parliament and at the end of the meal came to the real point of the meeting (page 1777 Feinstein second edition) It is alleged that Manuel seemed to believe that Modise had been involved in corruption. These allegations were also denied by Mr Manuel during his evidence.

260. As Minister of Finance as well as in his other capacities, Manuel was legally obliged to investigate any suspicions of corruption or money laundering in terms of the Prevention of Organised Crime Act (1998) and other legislation. (Paragraph 135 Supplementary Affidavit *ibid*). Mr Manuel denied any knowledge of any allegation of corruption in the SDPP acquisition

261. Mr Manuel as Minister of Finance was a pivotal player in the arms deal's cabinet sub-committee. His responsibilities were the "affordability" of the arms deal acquisitions and financing by European banks for periods up to 20 years. The Minister of Finance, Mr Manuel in his answering affidavit to the main application 9987/2001 filed in November 2001 declared at paragraph 35 and subsequent paragraphs that once the Cabinet decided to acquire the equipment, his role was merely to negotiate the most appropriate means of finance. Mr Manuel was also a member of the cabinet Ministers Committee that decided to purchase the equipment.

262. In paragraph 53.2 of the answering affidavit he avers that the agreements he signed are self-standing loan agreements with binding force and not dependent on any other agreements entered into by government. Mr Browne submitted in response to this that it is evident from the GCIS media release of November 18 1998 that ECA financing arrangements were intrinsic to the arms deal right from the start and were not, as the Minister implies, an afterthought following the cabinet commitment to purchase the equipment in December 1999. (ECAAR ibid page 7)

263 The ECAAR has also submitted that the German pleading that the sales of frigates and submarines were not government to government deals is disproved by the financial guarantees issued by the German Parliament for 184 months and 205 months, this was more than 18 months prior to Finance Minister Trevor Manuel signature to the loan agreements in January 2000. These guarantees also destroy the Minister claim that the arms deal stands independently of the financing arrangements. (ECAAR-SA "*The Arms Deal is both Illegal and Unconstitutional and can be cancelled without cost to SA Taxpayers dated 14 April 2003*" at page 35)

264. Mr Crawford Browne has also alleged that as the political head of the National Treasury, it was inconceivable that Mr Manuel was unaware of money laundering operations conducted by Henry Ansbacher and First National Bank. According to Browne Manuel not only enabled it to happen but allowed it to happen. Ansbachers clients included Basil Hersov, the late Richard Charter and John Brownrigg. (Affidavit by Mr Crawford-Browne dated 20 August 2008, Criminal Complaint to Milnerton Police Station at paragraph 2.29)

265. Mr Crawford-Browne has also referred to a Carte Blanche transcript which records an exchange on 21 June 2005 between Mr Manuel and Ms De Lille it is quoted as follows : "…We did not go to a bargain basement sale to find the cheapest aeroplane on the market. We wanted to equip the air force with the best…" According to Crawford Browne that the government wanted to equip the air force with the best is however disproved by chapter four of the JIT report which records that the air force objected to the BAe proposals as early as 1997" (para 2.30 Affidavit in support of criminal complaint *ibid*)

266. Mr Crawford Browne filed an application in the public interest in the Western Cape High Court under Case no 9987/2001 seeking the setting aside of the arms deals loan agreements that had been signed by Manuel on 25 January 2000. The rationale by the applicant was that if the loan agreements

were set aside, it might still be possible to cancel the arms purchases. (paragraph 136 Supplementary Affidavit *ibid*)

267. Manuel insisted under oath that the loan agreements stood independently of the arms deals. According to Mr Crawford Browne this was an irrational statement and was disproved by the loan agreements themselves. Mr Crawford Browne as the applicant sought discovery of additional documents to prove further that the loan agreements were not independent of the arms deals, but integral to them. Terry Crawford Browne filed an application in the Cape High Court (case 9987/2001) seeking the setting aside of the loan agreements signed by the Minister, Ms Maria Ramos as Director General of the National Treasury and against a confirmatory affidavit by Trevor Manuel responded to the application on 6 March 2002 . In para 53 thereof it was affirmed that the agreements signed are self-standing loan agreements with binding force and not dependent on any other agreement signed by government. (paragraph 137 Supplementary Affidavit *ibid*)

268. The Barclays Bank/ECGD loan agreements were verified in court by Manuels legal counsel, Advocate Kuper SC as authentic. The purpose of the loans as the purchase of the BAE Hawk and BAE/Saab Gripen fighter aircraft in five tranches, thereby contradicting Manuel's assertion under oath that the loan agreements were independent of the arms deals.

269. Mr Crawford-Browne averred that the former Minister of Finance Manuel, in committing South Africa to those loan agreements and their default clauses, exceeded his authority in terms of the erstwhile Exchequer Act or the incoming Public Finance Management Act. (paragraph 143 Supplementary Affidavit *ibid*).

270 Mr Crawford-Browne averred that the loan agreements combined with the

affordability study were alone sufficient to prove that Manuel had not properly applied his mind, and that his signature to the loan agreements was illegal and unconstitutional. However the court found that Manuel was merely implementing a cabinet decision, and therefore applicant was found to have sued the wrong party.(paragraph 152 Supplementary Affidavit *ibid*)

271. The Committee reported that on 15 September 1999, when announcing its decision to contract for the strategic arms packages, Cabinet presented the total cost thereof to be R29.9 billion. Two months later this was adjusted to R30, 3 billion. The Committee had looked into both the validity of this amount and the States attention to the full financial and fiscal implications of the purchases. It became clear to the Committee that the Cabinets announcement omitted to mention certain other cost implications which it seem would significantly add to the States commitment. These factors included the cost of servicing the loan portion of the payment obligations (i.e. the interest charged) the price escalation conditions contained in the supplier contracts and the cost effects of negative foreign exchange movements. Concerns raised by SCOPA included the cost to State, namely the validity of the contract amount. Cabinet announcement of a total cost of the procurement of R30.3 billion whilst in September 2000 the figure had allegedly risen to R43, 4 billion. The inclusion or omission in determining the final figure of the cost of the SDP of interest, price escalation conditions and the cost effects of negative foreign exchange movements. (Chapter 9 JIT)

272. The concern expressed by Scopa was that Government in its official announcement of the arms deal package advised R30.3bn as being the all inclusive cost to the country and hence to the taxpayer. In view of the affordability study, Scopa expressed the view that the public should have been informed of these possibilities. These possibilities have subsequently increased the projected cost to R43.8bn, an amount which is acknowledged by its inclusion in the 2001/2 national budget and by the Warburg Dillion

Reed computer programme. The Treasury has confirmed in writing that the R30.3bn figure was subject to other cost factors including the changing value of the rand.

273. The Minister of Finance emphasised that the cost to the state was cited in 1999 rand prices. It was noted that the Budget 20001/02 projected cost for the deal of R43bn included in the Estimates of Expenditure, however concern was expressed that the total cost of this deal comprised of the tender/contract price and the requisite escalation clauses included in the contracts, statutory and freight costs, project management costs, ECA premium and escalations and financing costs for the more favourable cash flows negotiated. The concern was that the R30.3bn figure quoted at 1999 prices does not given an adequate reflection of the overall costs to the state of the SDP inclusive of the factors listed above as the list above clearly shows that the net present value argument does not hold. The manner in which Cabinet had communicated the cost of the arms deal and the driving factors that could drive future costs upward, to the public in a more comprehensive manner than a mere price tag in rands at 1999 prices was strongly emphasised.

274. Other areas of concern raised by SCOPA included full financial and fiscal implications. The movements within certain major currency markets and the realism of the macro-economic assumptions used in determining the cost to the state of the procurement. Scopa also expressed concern in regards to the price of the Gripen and Hawk procurement, namely the suggestion that the price of these two items were improperly inflated.

275 In September 2000, the cost at current foreign exchange rates, together with contractual prices escalations, had risen to R43, 8 billion. This figure, which was quoted by the Department of Defence at the Committees hearing of the Department on 11 October 2000 and which was later acknowledged by the

National Treasury and Industry in writing, excluded the interest obligations which would arise from the associated loans. The Committee expressed its concern at the possibility of the overall cost of the arms packages increasing further over the term of the contracts concerned. It was stated that all of this is hugely material to the public interest; the Committee believed that the public should have been informed of these possibilities.

276. The Committee is satisfied that the National Treasury in its 1999 "affordability study" did address the foreign exchange, price escalation and interest considerations and that it attempted to estimate and project these considerations into its long term budget and cash-flow thinking. The National Treasury' submissions to the Cabinet were also careful to point out the risks associated with these factors. The Committee also noted the partial neutralisation of foreign exchange and balance of payment effects, through the currency –linked arrangements of the anticipated offset-related inflows.

277. An Affordability team was established as part of the IONT. The team conducted a comprehensive analysis of the economic, fiscal and financial impact of the procurements on the country. Para 4.4.2 of the report compiled in August 1999 included the following: "*Adverse Rand: forex movements The South African government is fully exposed to the depreciation of the Rand against foreign currencies, which accounts for about 75% of the total purchase amount. There is no effective means hedging the currency risk inherent in the procurements…there is clearly a possibility that currency depreciation could be even more rapid. Should this occur…the costs of the packages and their financing could be considerably higher than expected*." (JIT report: para 4.7.8)

278. Mr Browne notes that the affordability study includes exchange rate assumptions 1998/99 to 2018/19. These assumptions were conducted by Warburg Dillion Read in consultation with the Department of Finance, and

Mr Browne has noted that this was extraordinarily incompetent work in projecting forward rand/dollar exchange rates. The study notes that "built into the forward rate quoted by the market are international investors perceptions of risk (country risk, political risk etc.) and there could be some rationale for applying a discount to this premium (in other words understating these risks) on the grounds of Governments commitment to stable macroeconomic policy, inflation targeting and fiscal prudence. Mr Browne has submitted that no where in the world do forward currency markets extend twenty years, let alone for an "exotic currency" such as the rand which is historically subjected both to volatility and substantial depreciation. The unreliability and recklessness of the Warburg Dillon Read Study is illustrated by the fact that the rand/dollar exchange rate collapsed to R12.88 in December 2001, and is currently quoted at approximately R10.50 per US dollar. Browne has submitted that the Warburg Dillon Read Study had grossly understated the financing risks of the arms deal and that military spending would consequently crowd out state expenditures on social and economic upliftment. (pages 7-8 ECAAR submission). Mr Donaldson who was not challenged dealt extensively with this topic.

279. The Minister Committee appointed an Affordability Team to investigate the macro-economic impact of the defence package and the effect on the balance of payment and the fiscus. The IONT was assisted by White and Case to advise and assist with consolidating the respective subcontracts. Negotiations took place with the respective sellers and the results have been detailed separately per project for consideration by Cabinet (reference has also been made to the Gantt Chart on the "IONT Planning and Progress Report" A comparison was made between November 1998 presentation of the various projects and the August 1999 presentation.

280. The Minister Committee decided to defer the decision regarding the procurement of the JAS 39 Gripen and to allow IONT to endeavour to conclude a single contract with BAE for both the Hawk 100 and JAS 39 Gripen (JIT report para 4.7.6-4.7.7)BAe proposed as an alternative a combination

transaction for the supply of 24 Hawk 100 and 28 JAS 39 Gripen aircraft in three tranches. This however, front-loaded the non-recurring expenditure into the first tranche of payments. This resulted in a large implicit cost of cancellation of the second and third tranches and would result in a premium of some 34% being paid per aircraft delivered in the event of cancellation. (JIT report para 4.7.8.3-4.7.8.4)

281. In July 2000 the Auditor General finalised a regularity audit concerning the Arms deal and on 15 September 2000 issued "Special Review of the selection process of strategic packages for the acquisition of armaments at the Department of Defence. Section 3.8 of the AG review sets out the material findings as follows: "No formal budget was compiled as required by government financial regulations at the request for information stage. The total cost of the military equipment was approved by Cabinet only during the negotiation phase." (Annexure marked AG1 to Supplementary Affidavit CCT 103/10 *ibid*)

282. Mr Crawford- Browne laid criminal charges of perjury and money laundering against Trevor Andrew Manuel, the then Minister of Finance. The matter related to a summons for defamation brought against Mr Crawford Browne in case no 5156/2008. Cabinet persisted with the acquisition programme and on 3 December 1999 the Secretary for Defence signed the supply contracts subject to the finalisation of financing agreements by the Minister of Finance. Mr Crawford Browne therefore submitted that it was Trevor Manuel's signature as Minister of Finance that gave effect to the arms deal…. (page 4 Criminal Complaint to Milnerton Police Station dated 20 August 2008 *ibid*)

283. It has been alleged that there is no legal authority for the arms

deal. According to Mr Crawford Browne this was confirmed by Advocate Michael Kuper SC during the discovery application case on March 19 and 20, the respondents claim that parliamentary authority for the arms deal is contained in the "Defence in a Democracy" document. Examination of the document revealed that in contradiction of Ms Ramos sworn affidavit, that there is no parliamentary authority given in this document, either for the acquisitions or for expenditure. Chapter 8 specifically declares: "nor evident is there any cabinet minute that authorises these transactions." Advocate Kuper then declared that the Executive proceeded to acquire the armaments in terms of Section 85 of the Constitution and of the Exchequer Act. Examination of the Exhequer Act reveals that it provides for borrowings to meet a financial deficit and to borrow foreign currency. It does not however authorise negotiation of long-term foreign credit facilities, such as to purchase armaments or other major acquisitions. Therefore it was submitted that there is no parliamentary or executive authority for the arms deal, and the Exchequer Act does not provide authorisation for transactions such as the arms deal. In terms of this it was stated that the loan agreements signed by the Minister of Finance, which give effect to the arms deal, are illegal both in law and in terms of the Constitution. (pages 5-6 ECAAR-SA Arguments for cancellation of the loan agreements that give effect to the arms deal dated 24 November 2003).

284. Mr Crawford further submitted that the loan agreements were so onerous as evident in clauses 21-23 (ECAAR-SA "*Arguments for Cancellation of Loan Agreements*…" at page 30)

285. The JIT at paragraph 14.1.12 (page 375) declared that certain aspects of the financial and economic model used by the Affordability team in their presentation to the Ministers Committee in August 1999 on the costs of the procurement can be criticised to an extent. However even though there may be different views and models explaining future projected costs and effects, it appears from the investigation that the Affordability team and IONT

took adequate measures under the circumstances to present to the government a scientifically based and realistic view on these matters.

286. In video testimony to the Public Protectors office in 3 July 2001, Mr White noted that the Cabinet had made a political choice to buy armaments over socio-economic alternatives and had been amply briefed on the budgetary consequences. Roland White confirmed that no attempts were made to show what extent the defence budget increase at the time could crowd out the expenditure on other functions of government.

287. In September 2000 the Auditor General expressed concern that the offsets and their related performance guarantees were unenforceable. This gave rise to further investigation and public hearings in October 2000. SCOPA's public hearings were held on 11 October 2000. The Auditor General noted that the packages were negotiated before the Budget was provided.

288. An AAC meeting was held on 9 February 1998 at para 5.4.10 of the minutes. At this meeting Steyn raised his concerns regarding funding of the acquisition in light of the budgetary constraints of the Department of Defence (Referred to at para 85 Affidavit of William Downer)

289. In response to the concerns by Steyn, the then Minister Modise sought to allay his concerns saying that funding of the package will come from outside the Defence budget and that Government will find the funds. The minister is quoted as saying the following "*we must not be in a hurry and it is wrong for us to let people know that we cannot pay for the packages. Government has a strategy, it is more of a business strategy, and that is why there is so much emphasis on a business plan. If the business plan is not attractive, there will be no funding.*" (Minutes para 5.4.16-5.4.1)

290. Steyn elaborated on his concerns in his interview regarding the

budget for the strategic defence packages as follows:

"if *you follow the trend of budgetary allocations to the Department of Defence, there was a downward trend for the last three years at least for that time under consideration. I was also in contact with my counterpart, the Director-General of Finance and was brought under the impression that it was not in their vision to readjust the appropriations to the Department of Defence so substantially that it could finance the acquisition of a package of this scope and content. So I was concerned with this fact, where on the one hand we are vigorously pursuing the acquisition of a broad based acquisition plan, yet no apparent support from the Director-General of Finance, nor by implication, the Minister of Finance was apparent and I warned my minister on numerous occasions regarding this matter. I was told however that this will be addressed in future by the fact that they had adopted a new approach, off-setting the obligations of such a large acquisition program, by inducing those countries that sell the equipment to us, to make investments far in excess in value to the cost of the acquisitions. I was concerned that the flow of investment money had no technical channel to create a source of funding the acquisitions. The only way of sourcing acquisitions is by voting a budget for that purpose and these decisions were, these decisions were progressively made throughout the course of 1998 without an apparent attempt to provide the necessary appropriated revenue for the purpose"* (Steyn interview:p2013-2014)

291. Mr Crawford submitted that the British government was requested to meet its obligations under the EU code of Conduct on Arms Exports and to postpone conclusion of the financing arrangements. (page 6 ECAAR arguments for cancellation of the loan agreements that give effect to the arms deal dated 24 November 2003)

292. The affordability study noted that certain costs which are intrinsic to these purchases and the financial packages were excluded from the figures presented on 18/11/99. The most important of these are the premia payable

to the Export Credit Agencies in order to secure the attractive loan terms offered in the financial packages.

293. The ECAAR submission also indicates that the Defence Budget since 1999 has been by far the fastest growing sector of the National Budget, increasing by an average of 15% compared with 6% for social priorities such as education, health and welfare. The financial consequences of the arms deal as warned by the Affordability report are clearly crowding out social expenditure. (at page 39)

294. Scopa had concurred with the ministers that there indeed was no increase in the cost of the physical arms package and that the contract price remains at R30,3 billion (1999 rands) The R43 billion figure as explained by the Minister of Finance therefore represents the total outflow of public funds from the defence budget over the 12 year period of the procurement process and include provision for escalation in labour and raw materials inputs at both local and foreign level as well as provision for foreign exchange fluctuations (document entitled "*Ministers Issues Views of the ANC towards the formulation of the 2nd report"* at page 6)

295. Scopa raised certain concerns about the offsets arrangements in the 14th report, amongst others the low penalties of 10% the enforcement of NIP, the estimated number of jobs to be created, the contractual or legal standing of government to government agreements and the use of two different currencies on of the contracts. Scopa suggested that biannual reports be supplied to the committee on the progressive realisation of these commitments, both of their overall value as well as the economic benefit value.

296. The Minister of Finance is quoted as saying that the chief of procurement was to address the defence procurement aspects on finance matters, on NIP matters and in part of DIP matters. The DA expressed

criticism of the view expressed by the Minister of Finance that an independent checking mechanism was not required to curtail conflicts of interest because the mechanism and institutional arrangements of the negotiating team and its structure was in itself sufficient and ad hoc in nature and therefore not requiring special codified measures to regulate conflicts. The committee was not convinced of the argument by the Minister of Finance was the due diligence was built into the mechanism. The Committee was convinced that due to a clear absence of distinct guidelines on conflicts of interest in the Armscor procedures and the structure of the negotiating team, conflicts of interest did have a bearing on the outcome of the deal. ("*Ministers Issues Views of the ANC towards formulation of the 2nd report"* at page 26)

297. The JIT noted that the affordability assessment dealt with additional expenditure to be financed, but not the cost of the financing. Financing costs do not form part of the expenditure of DOD on the SDP, but are accounted for as "state debt costs" and charged against the National Revenue Fund. (para 9.1.1.8 JIT report)

298. The scope of the investigation by the Auditor General entailed the appointment of two independent economists to assess the reasonability and appropriateness of the models used by the Affordability Team. The economist were of the view that the models used by the affordability team were reasonable. It was further stated that the affordability report was presented in a fragmented way, the implication of this is that no clear set of low to high-risk scenarious incorporating as many as possible of the major risk factors was available for evaluation. This limits the understanding of the potential future costs and associated risk of the procurement process. (para 9.2.3.15 (c) JIT report) The economists also made the remarks that a substantial impact on affordability that could materialise in future is the unsuccessful restructuring of DOD budget and the effect on DOD's budget of underestimating the long term full cost of ownership of the packages. (para 9.2.3.15 (b) JIT report) The exchange rate projections by Warburg Dillon

Read were found to be overly optimistic. Notwithstanding the benefit of hindsight, no high-risk scenarios relating to exchange rates were factored into the report and very little attention seems to have been paid to the opportunity cost analysis of spending on the SDP. (para 9.2.3.15 (i) –(j)) The economist also noted that the fact that the major elements of the affordability analysis were not available at an earlier stage of the negotiations limits the usefulness of the analysis. (para 9.2.3.15 (e) of JIT report).

299. The JIT noted that from the investigation it is not clear that the IONT made a positive contribution to improving the overall procurement process and its outcomes and it is not possible to make a conclusive finding on the total impact of the IONT because some functionalities of the package were removed, the quantity of the equipment for the LUH programmes was reduced. (par 8.12.4 page 244 JIT) In terms of the findings of the AG certain functionalities were removed and that a proper impact study was not done prior to the removal of those functionalities.

300. Question raised during the JIT hearings was what were the cost of all the functionalities that had been excluded from the original procurement process? The AG responded that the value of the functionalities that were excluded amounted to R1,169billion. Some of these functionalities identified included the Maritime Helicopters. (page 39 JIT hearings transcript) This amount was arrived at by converting the Euro value of the contract to rands. The DOD stated that some of these functionalities are essential functionalities which would have to be introduced at a later stage.

301. The AG further noted that some of the functionalities did impact on the original user requirement and hence the view that they will be introduced at a later stage and that the DOD will have to finance that. The AG expressed the view that when reducing functionalities, a proper impact study had to be done because ultimately you are not decapacitating the whole

equipment from functioning. (Transcriptions of Joint Hearings on Joint Investigation Report at page 40)

302. Ms Taljaard during the hearings on the JIT report noted that the appointment of J Naidoo was not in accordance with any formal Armscor procurement process. (page 40) In response hereto it was said that his appointment was not a unilateral decision. However it was stated that the normal procurement rules of Armscor should have applied in terms of his appointment therefore policy document STD20 was not followed in this regard. (page 41 *ibid*)

303. It was noted that in May 1999 it was already stated that there was a currency risk for that particular programme and that this was true for all the programmes as well, therefore in May 1999 the IONT indicated that there was a currency risk involved in the purchase of the SDP. (page 41 *ibid*)

304. The AG stated that Cabinet was well aware of the financing costs as well as risk of currency fluctuations. The only costs that was excluded was the currency fluctuations and the finance costs. The AG noted that it was difficult to indicate what the exchange rate was going to be. The cost of R40.3 billion was at an exchange rate applicable at a certain point in time, but based on the original contract of about US 4,8 billion dollars. (Page 43 *ibid*)

305. Ms Taljaard questioned whether a legal opinion was ever obtained on the option to acquire vs the option to cancel. (page 44) The issue on whether the contract price was based on 1998 or 1999 rands was also raised. In response hereto the AG stated that Cabinet based its decision in November 1998 on prices submitted to them by the various contractors and an exchange rate of 6,25 was used across the board. Across the board an exchange rate of 6,25 to the Dollar and 6.4 to the Euro was used. (page 47) A further question was raised as to how the price could remain static for at

least a year without factoring in price differences and inflation. (page 81 transcript of hearing on JIT report) The AG responded that when the contract was signed it was also based on an exchange rate of 6,25 and this rate remained static during the period when negotiations started and affordability was presented to Cabinet right through to when the contract was signed. The AG noted that most of these procurements were subjected to foreign loans and therefore it did not really matter what the exchange rate was at the time. (page 81 *ibid*)

306. The AG clearly noted that finance costs clearly falls within State debt category and is not part of the procurement and that for these reasons it was agreed that finance cost should be excluded. (page 45).

307. The AG confirmed that In November 1998 Cabinet took a decision on the preferred bidders and then went and told the IONT to look at affordability, so when the decision was taken in 1998, it was not based on prices as such, it was on the recommendation as to who the preferred bidders would be. It was up to the affordability team to look at the prices and negotiate terms of financing. The guideline price given to the IONT was R29, 7 billion. (page 46 *ibid*)

308. During the hearings on the JIT report it was noted that certain information on the total acquisition cost was not presented to Cabinet in 1998. This included the programme management cost of Alfa and LIFT, which amounted to an increase of R4 107 million. The impact on the decision making of the Cabinet was questioned.

309. As it can be seen above, the SDPP process was challenged in many fronts from the deviations from the traditional policies of procurement of the DOD and Armscor, the process followed in the ultimate recommedations of the successful bidders by the Minister's Committee to Cabinet. As it appears above, Scopa had its many challenges particularly about the conduct of the

executive as against the process that Scopa intended to pursue. Dr Gavin Woods, Ms Taljaard and Andrew Feinstein were members of Scopa during this period and complained fiercely about the executive interference in the investigation initiated by Scopa which led to the proceedings of the JIT. They argued that the removal of Adv Heath from the JIT investigation was partly done to weaken the JIT investigation.However, the constitutional court in the **South African Association of Personal Injury Lawyers v Heath**[92] found that Judge Heath could not head the Investigation Tribunal in his capacity as a Judge as this offended the doctrine of separation of powers.

310. We submit that the SDPP process was not a perfect process and was here and there bedevilled by inaccuracies However, that does not take away that the process followed as informed by the pressing need to acquire armaments in fulfilling the said constitutional obligations mentioned hereinabove, was rational. Similarly, in *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) at para 47, Cloete JA held:

"Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its

[92] 2001 (1) BCLR 77 (CC)

assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide."

(*our emphasis*.)

311. The ultimate question in a review of administrative action is whether the decision falls within "*the bounds of reasonableness*".[93]

312. In does not appear that the Governmebnt officials failed to meet the test when consideration is taken on the novelty of the SDPPs,the funding thereof and the procurement process followed.

313. Important in the context of the present enquiry is the requirement of prejudice. The question is whether, the public or any person will be able to raise prejudice on the procurement of the armaments. Mr Donaldson and Mr Manuel were able to show that the overall expenditure on social and development issues (bread and butter) were not affected by the procurement of the SDPP equipment. This also includes the budget deficit, which at one time had a surplus. According to Mr Manuel the defence budget is till below the international norm at about 1.5 % of the GDP. General Shoke, the Chief of the SANDF has testified on the overall

[93] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others* 2004 (7) BCLR 687 (CC) at para 45.

benefits in the use of the current equipment and that in fact more is needed. Where, in administrative law, a decision-maker relies on both permissible and impermissible reasons for acting, Baxter, *Administrative Law* (1984) at 521 postulates the following review test:[94]

"*It is submitted that the test might be better formulated in the following way: would the authority, had it not been actuated by bad reason or reasons, have reached – and been legally entitled to reach – the same decision upon the basis of the remaining permissible reasons? The question is hypothetical and its answer involves some speculation. Nevertheless, by characterizing it in this way the public authority is not penalised for insignificant errors when it would have reached the same decision anyway. If permissible reasons for the decision exist, and they would still have dictated the decision, no prejudice has been suffered*."[95]

(our emphasis.)

314. The approach advocated by Baxter accords with the approach adopted in the event of a finding of a gross irregularity on review. In *SA Veterinary Council & another v Veterinary Defence Association* 2003 (7) BCLR 697 (SCA) at para 40, it

[94] He relies principally on *Patel v Witbank Town Council* 1931 TPD 284 at 290, which has been followed in: *Johannesburg City Council v Sohn* 1933 TPD 8; *Jabaar & another v Minister of the Interior* 1958 (4) SA 107 (T); *More v Springs Town Council* 1965 (3) SA 666 (W); *Moleko v Bantu Affairs Administration Board (Vaal Triangle Area) & others* 1975 (4) SA 918 (T); *Triangle Ltd & another v Sabi-Limpopo Authority & another* 1978 (1) SA 724 (R); *Computer Investors Group Inc & another v Minister of Finance* 1979 (1) SA 879 (T); *Steyn v Raad Vir Eiendomsagente* 1980 (4) SA 690 (T); *The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of SWA* 1987 (1) SA 614 (SWA); *Cabinet for the Interim Government of SWA v Bessinger* 1989 (1) SA 618 (SWA); *Laurence v Verhoef & others NNO* 1993 (2) SA 328 (W). Cf: *Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO & another* [2000] 4 BLLR 418 (LC).

[95] The position has most recently been dealt with in *Stanfield v Minister of Correctional Services & others* 2003 (12) BCLR 1384 (C) at para 101, where Van Zyl J held as follows: "*Should the reasoning of the decision-maker, in exercising his discretion, be partly good and partly bad, the degree of the bad reasoning must be determined. If it has been material or substantial, the decision will fall to be set aside on review. Should it be impossible to determine this, the court would be constrained to set the decision aside*."

was held that in such circumstances the proceedings can be saved if it is apparent that despite the irregularity the applicant was not prejudiced because the finding "*would have been the same*" if the correct approach had been applied.

315. It is further apposite to mention that the allegations made by Crawford Brown against Mr Manuel and the SDPP procurement were the subject matter of the Court in **Ecaar South Africa and Another v The President of South Africa and Others** 2004 JDR 0593 (C)[96]. We submit that the court had the opportunity to consider the rationality or otherwise of matters relating to the SDPPs in particular the following findings of the court are worth noting:

> *[46] …Applicant's charge of irrationality is squarley based upon the "*
>
> *existence of the warnings contained in the affordability report. These warnings must however be read in the context of the document as a whole. They are contained in a report which purported to provide advise to Government in regard to affordability of the proposed acquisition . The object of the warnings in the report is to bring possible negative consequences of the decision to the attention of the decision-maker. The thrust of the warnings is not to advise the decision-maker to desist from concluding the transaction in question. The real thrust is to inform the decision-maker what risks to take into account if he does proceed with entering into the loan agreements. Other elements of the report are quite positive , for example the comments on the method of financing referred to in para [24] above. It is relevant furthermore that the affordability report (with the warnings) was before Cabinet when it took the decision to acquire the arms in question . It must be accepted therefore that Cabinet approved of the arms acquisition with full knowledge of the warnings.*

[96] See: p 32 to 47 of Mr T Manuels Affidavit

> *[47] In this case second respondent said thathe did apply his mind to the affordability report including the warnings. It is trite law that the test on review is not wheter this court agrees or disagrees with the decision in question….The question , when rationality is the yardstick , is whether the decision is so irrational that no rational person would have taken it. By mainly focusing on the warnings appicants have not established such irrationality in this case. I am accordingly of the view that there is no merit in the review.of the warnings is not to advise"*

316. We submit that the basis of the finding in Ecaar *supra* will find application in respect of the rationality of the decisions taken by the Government from the formulation of the White Paper to the decision of Cabinet to purchase the SDPP equipment. In particular, after Mr Browne and his co-applicants's application for leave to appeal was dismissed by the High Court, the Supreme Court of Appeal and the Constitutional Court on 17 May 2004, 18 August 2004 and 3 December 2004 respectively[97].

317. The is no basis in our view for the Commissioners to find that the SDPP process did not meet the rationality test. However, even if there may have been a material irregularity, still that does not justify the cancellation of the SDPP agreements, in particular , noting the period of time that has elapsed since the acquisition of the equipment. In fact, the Commissioners can take judicial notice that the DOD is currently busy with another Defence Review. . It is apposite to

[97] See: pages 49 to 52 of Mr T Manuels Statement

mention the remarks of Scott JA in ***Chairperson, Stranding Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others***[98]

"*In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) para 36 at 246D:*

It is that discretion that accords to judicial review its essential and pivotal role in administrative law for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide…

Under the rubric of the second I would add considerations of pragmatism and practicality.

[29] in my view circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) and invalid administrative act must be permitted to stand. "

Underlining our own emphasis

CONCLUSION AND RECOMMENDATIONS

[98] 2008 (2) SA 638 (SCA) at para 28.

318. We noted that some of the witnesses who have written extensively on the SDPP process and its alleged irregularities despite having made written submissions to the Commission declined an invitation to give oral evidence.

319. However, we submit that on the basis of available evidence both documentary and oral, there is no justification to make a finding that the SDPP process was irrational.

MS MJ Ramagaga,

Adv M Mphaga SC

Adv SH Zondi

Pretoria

21 June 2015