

COMMISSION OF INQUIRY INTO STATE CAPTURE
HELD AT
CITY OF JOHANNESBURG OLD COUNCIL CHAMBER
158 CIVIC BOULEVARD, BRAAMFONTEIN

12 NOVEMBER 2020

DAY 305



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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH
D MILLS



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PROCEEDINGS RESUME ON 12 NOVEMBER 2020

CHAIRPERSON: Good morning Mr Kennedy, good morning everybody.

ADV KENNEDY SC: Good morning Chair. Good morning.

CHAIRPERSON: Are we ready.

ADV KENNEDY SC: We are. We are ready with the next witness.

CHAIRPERSON: Yes.

ADV KENNEDY SC: And we would ask your leave to call
10 him.

CHAIRPERSON: Yes.

ADV KENNEDY SC: His name is Mr Talib, T-a-l-i-b, Sadik,
S-a-d-i-k.

CHAIRPERSON: Yes.

ADV KENNEDY SC: And he is ready to take the oath.

CHAIRPERSON: Okay please administer the oath or
affirmation.

REGISTRAR: Please state your full names for the record.

MR SADIK: My full name is Mohammed Talib Sadik.

20 **REGISTRAR:** Do you have any objection to taking the
prescribed oath?

MR SADIK: No.

REGISTRAR: Do you consider the oath to be binding on
your conscience?

MR SADIK: Yes.

REGISTRAR: Do you swear that the evidence you will give will be the truth; the whole truth and nothing else but the truth; if so please raise your right hand and say, so help me God.

MR SADIK: So help me God.

ADV KENNEDY SC: Good morning Mr Sadik. Yes you can take off your mask. May I just ask you when you give evidence can you please try and speak in a clear voice and try I know it may be difficult because I am asking most of
10 the questions although the Chair may also ask some questions of you. But even when I am asking you questions try and look towards the Chair rather than me.

MR SADIK: Okay.

ADV KENNEDY SC: So that you show him the respect so that he can – he can hear you and also so that your voice is directed into the microphone. Okay. Thank you. Mr Sadik is it correct that you have furnished an affidavit at the request of the commission?

MR SADIK: That is correct.

20 **ADV KENNEDY SC:** Now you should have in front of you a bundle that is marked Denel Bundle 11 and another one Bundle 12.

MR SADIK: That is correct.

ADV KENNEDY SC: And if I can take you I have indicated to you already where you should be looking for the page

number. It is the top left the last digit of the numbers on the top left page 4. Is that the first page of your affidavit?

MR SADIK: That is correct.

ADV KENNEDY SC: And may I ask you please to turn to the last page of the affidavit before your annexures at page 60.

MR SADIK: Yes I have it.

ADV KENNEDY SC: Is that your signature the first of the two signatures that we see on that page?

10 **MR SADIK**: That is correct.

ADV KENNEDY SC: Is it correct that you signed this affidavit swearing the oath before a Commissioner of Oaths?

MR SADIK: That is correct.

ADV KENNEDY SC: And I note that the affidavit was signed on the 9 February 2020

MR SADIK: Correct yes.

20 **ADV KENNEDY SC**: Now you have indicated to me in consultation that there are some – that there is one correction that you want to – want to make to a word in the body of the affidavit. I will take you there in a moment but there are also some events that have changed since you signed the affidavit in February 2020 is that right?

MR SADIK: That is correct.

ADV KENNEDY SC: And I will take you through the – the

events that have changed to the extent it is necessary. First to deal with the correction of the word that is wrong. If I can take you to page 6. Paragraph 152 you indicated to me that there is an error that you want to correct there. What is the error?

MR SADIK: The error it is 1 – paragraph 152 reads final report when it should read draft report presented by Ndidi.

ADV KENNEDY SC: Right thank you. Now apart from that correction or subject to that correction and apart from the
10 events that you want to update the Chair on that have occurred since February 2020 does the affidavit contain facts that were correct at the time of February 2020.

MR SADIK: That is correct.

ADV KENNEDY SC: Can you confirm that?

MR SADIK: That is correct.

ADV KENNEDY SC: And can you confirm you have been through this affidavit and you able to attest to that under oath that all of the contents subject to the correction of that word that you have just indicated are true and correct
20 in every respect?

MR SADIK: Correct – agreed.

ADV KENNEDY SC: Thank you. Chair I would then ask – may I just indicate Chair that the witnesses agreed to assist us further in providing a supplementary affidavit that formerly corrects the error in paragraph 152 that he has

alerted you to Chair and also to update you on the specific changes. It largely relates to the different role that Mr Sadik is now playing with in Denel and he will provide that supplementary affidavit and his attorney I should have mentioned he is assisted by his attorney Mr Pillay who has been here on previous occasions in the Denel stream.

CHAIRPERSON: Yes.

ADV KENNEDY SC: Evidence and we appreciate his cooperation as well.

10 **CHAIRPERSON:** Yes. Yes. Well let us just get him to place himself on record properly.

ADV KENNEDY SC: Thank you Chair.

CHAIRPERSON: Mr Pillay. I think just put on that microphone. Ja I do not know if it is working failing which you can go to the one.

ADV PILLAY: Good morning Chair.

CHAIRPERSON: Good morning.

ADV PILLAY: My name is Yagashen Pillay again I confirm what Advocate Kennedy has transmitted to you this
20 morning.

CHAIRPERSON: Yes. No thank you. Thank you.

ADV KENNEDY SC: Thank you Chair. May we then on the basis that is already indicated ask you – ask your leave please formerly to admit this affidavit which is accompanied by many annexures. So that is the affidavit

that appears at Denel Bundle 11 from page 4 as Exhibit W26. In fact I beg your pardon it fact appears in both bundles 11 and 12 as one affidavit with numerous annexures.

CHAIRPERSON: Yes.

ADV KENNEDY SC: Would – may we ask for leave to admit the entire affidavit as Exhibit W26.

CHAIRPERSON: Yes. The affidavit of Mr Talib Sadik starting at page 4 with its annexures which go up to Denel
10 Bundle 12 is admitted and as Exhibit W26.

ADV KENNEDY SC: Thank you Chair. And with your leave may I lead the witness on the initial issues.

CHAIRPERSON: Yes.

ADV KENNEDY SC: That appear to uncontroversial.

CHAIRPERSON: Ja.

ADV KENNEDY SC: Thank you Chair. Mr Sadik you set out in your affidavit your – the background that you have in relation to Denel. May I just ask you before we get to that what is your – what is your overall background by way of
20 qualifications and by way of experience before you became involved in Denel.?

MR SADIK: Chair I am a qualified Chartered Accountant. I studied at the University of Natal and I completed my CA exams. I qualified as a CA at the – around 1991 and since then I have been mainly working in the corporate

environment occupying senior finance roles and the role that I had occupied for a time at Denel was the Group CEO. So I have over twenty years' experience.

ADV KENNEDY SC: Right thank you. And when did you first start at Denel as an employee?

MR SADIK: I started in Denel as an employee in 2006 as the Group CFO in 2006 and then in September 2018 – 2008 I then took over the role as the acting Group CEO and was confirmed in September 2008 as the Group CEO of Denel.

10 **ADV KENNEDY SC:** And was that before Mr Saloojee was appointed as Group CEO?

MR SADIK: That is correct Chair he had replaced me.

ADV KENNEDY SC: And when was that replacement?

MR SADIK: He had replaced me effective from 1 February 2012.

ADV KENNEDY SC: Right. So you were either acting or as the fully fledged as it were GCEO for about four years – four or five years, is that correct?

MR SADIK: That is correct Chair.

20 **ADV KENNEDY SC:** Right. When you – did you then leave the employ of Denel when Mr Saloojee replaced you as Group CEO?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: And were you then on the board of Denel as you left at that time?

MR SADIK: No I was not on the board of Denel at the time.

ADV KENNEDY SC: But you later joined the board of Denel, is that correct?

MR SADIK: That is correct. I re-joined the board on an interim basis in April 2018 and it was confirmed a month later. So I am now part of the current board of Denel.

ADV KENNEDY SC: And that is the current board of Denel under the chairpersonship of Ms Hlahla, is that correct?

10 **MR SADIK:** That is correct.

ADV KENNEDY SC: Right. And we have heard evidence from her and others that the board in fact started operating fully from about May 2018. So you were there from the beginning of the new board – the current board's term, is that correct?

MR SADIK: That is correct.

ADV KENNEDY SC: Right. Now in addition to the – sorry were you executive or non-executive member of the Denel board then?

20 **MR SADIK:** At the time I was a non-executive director on the Denel board and I was also appointed Chair of the Audit Committee.

ADV KENNEDY SC: Is that the Audit and Risk Committee – is that its full title?

MR SADIK: No it is – it was called the Audit Committee.

ADV KENNEDY SC: I see. And so you chaired that. What is your current situation in relation to Denel?

MR SADIK: Currently with the – from effective 15 August I have appointed as the interim Group CEO and I am an ex officio member now of the board. I am still a member of the board. I am no longer the Chairman of the Audit Committee.

ADV KENNEDY SC: Because you are now the acting or interim Group CEO, is that right?

10 **MR SADIK:** That is correct.

ADV KENNEDY SC: Yes.

MR SADIK: Chair.

ADV KENNEDY SC: So it is really a role that you previously served in Group CEO there was then quite a gap; you then came back to Denel in a different capacity as a non-executive director and as Chair of the Audit Committee. But now you back in the hot seat as it were as the interim GCEO since August you mentioned I think 18 August? Is that of this year?

20 **MR SADIK:** 15 August from 20 – from this year ja 2020.

ADV KENNEDY SC: Right. Thank you. Who is the current chair of the Audit Committee?

MR SADIK: The current chair of the Audit Committee is Ms Siya Tola she was part of the original board that was appointed in April 2018 and she is now taken over the

chairmanship of the Audit Committee. We have now combined it with the Risk Committee and it is now called the Audit and Risk Committee of the board.

ADV KENNEDY SC: Right now in your affidavit we obviously going to focus only on some specific points that appear to be of particular concern. You set out a number of facts to appear to fall if I am – I understand your affidavit correctly and please correct me if I am wrong into two categories.

10 There are some facts and events that you were personally involved in. For example you deal with certain transactions that occurred while you were Group Chief Executive Officer, is that correct?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: The other category relates to some events that took place while you had no role at Denel. For example contracts that were entered into while others were involved in management particularly Mr Saloojee was in the role of Group CEO. Is that right?

20 **MR SADIK:** That is correct Chair.

ADV KENNEDY SC: And it appears from your affidavit that you have dealt with those issues even though you do not have personal involvement in them or personal knowledge of them. You were asked by investigators because at the time that the request was made you were sitting on the

board and the chairperson of the Audit Committee to address, is that right?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: And in that regard in that second category you have referred us to – or the Chair to various reports that were – that were the product of investigations done by various – by various entities, is that right?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: Now you refer at page 6 in your
10 affidavit to reports that you received from various entities. So 151 refers to a report from – a draft report from Dentons that is the 20 January 2016 and that dealt with the acquisition of DVS previously known as Land Systems South Africa also abbreviated to LSSA, is that right?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: And then you have corrected the word final to read draft in 152. You have – the draft – there was a draft report prepared by Ndidi in GIDI business advisory dealing with the review of the process relating to the
20 conclusion of the MOA between Denel and VR Laser. Now you have indicated to me that – that it was in fact only a draft report as the correction indicates but has there ever been a final report submitted by Ndidi?

MR SADIK: No there has not been a final report.

ADV KENNEDY SC: Do you know why?

MR SADIK: Chair we have made contact with them because this draft report that we have does not contain any annexures although the main report referred to annexures. So we have approached them and they have indicated that they did – they no longer wanted to be involved in the Denel – in the Denel – to complete the assignments.

ADV KENNEDY SC: Right. Now but have you furnished to the commission whatever you have received from Ndidi?

10 **MR SADIK:** Yes Chair we have.

ADV KENNEDY SC: Right. Now to go back to the Dentons draft report. Has there been a final report in relation to the Dentons investigation?

MR SADIK: Yes Chair we did receive a final report which was presented to the Audit and Risk Committee and then presented to the board on Tuesday this past Tuesday which would have been the 9 November.

ADV KENNEDY SC: 9 November this week.

MR SADIK: Yes.

20 **ADV KENNEDY SC:** Right and so what is the status of that? You have received that report. Is that – is that now the subject of consideration?

MR SADIK: That board – that report Chair was considered by the board on the Tuesday and it was noted by the board and referred back to the Audit and Risk Committee for the

consideration of the remedial action to be taken.

ADV KENNEDY SC: Right so does that still have to be then considered and decided upon any remedial action that may be appropriate?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: Right. Now you have referred then in paragraph 153 to another report from a different entity BDOPS Advisory we can refer to it simply as BDO they have submitted a final draft report on an investigation into
10 inter alia non-adherence to policies procedures and legislation by employees of Denel Corporate Office, Denel Land Systems, DLS and LMT as well as DVS. Now is that still at the level of final draft report? Is it a draft or is it a final report or is it a final draft?

MR SADIK: It is a final draft report Chair that has been approved by the board. The reason why it is – it remains a draft because of the limitation in the information that is available. But it has been approved by the board.

ADV KENNEDY SC: Right. And you have attached to your
20 affidavit as you say at the top of page 7 a copy of the BDO report but not the Dentons and Ndidi reports because as you say you do not want to make what is already a very large volume of paper even larger but you have offered to make that available to the commission, is that right?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: Right. Now you have also referred in paragraph 1.9 to PriceWaterHouse PwC rather. What did they investigate?

MR SADIK: Chair they had investigated the loans that was granted to LMT over the recent years and we had asked them to investigate the process and the approvals process that was followed in granting these loans.

ADV KENNEDY SC: And you refer in – at the top of page 8 in paragraph 1.10 to the final report of PwC being expected
10 this is the time that – that you writing this to be delivered at the end of January 2020 including recommendations. Can you give the Chair – is there any update to be reported on that? Has that – is the final version of their report actually been received?

MR SADIK: Chair the report was received. It was considered by the Audit Committee. At the time I was the chairman of the Audit Committee and there were additional work that we felt the PwC should continue with so they are now completing that exercise.

20 **ADV KENNEDY SC:** Then you refer in 1.11 to an investigation by ITIACT Pty Limited to assess the capabilities of Denel's divisions to determine if the work listed in a particular paragraph could have been done internally to provide expert opinion. Now are they the defence experts that are referred to in 1.12 of your

affidavit

MR SADIK: That is – that is correct Chair.

ADV KENNEDY SC: Right. Has – and you say that was expected to be delivered by the end of February 2020 we now in November Can you give the Chair please an update on that? Has the – have the Defence experts known as ITIACT in fact submitted a report?

MR SADIK: Chair they have submitted a very high level draft report and we have been working through that. They
10 have not yet finished the exercise and they – we have spoken to them recently to try and conclude the exercise they have been having challenges on their side but from our side we have also been experiencing liquidity challenges and we were not able to meet the payments that was due to them.

ADV KENNEDY SC: Right. May I now deal with some of the specific transactions that are the subject of your affidavit. And we can start if we may please at page 9 your paragraph 2 deals with financial assistance granted to LMT
20 and this is I understand it from your affidavit relates to an advanced payment of approximately R12.7 million. Is that right?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: The full figure the exact amount is set out in your paragraph 12 – sorry 2.1. Correct?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: And this was an advanced payment made by DLS that is a division of Denel, is that correct?

MR SADIK: That is correct.

ADV KENNEDY SC: To LMT. Now we have – the commission has heard evidence that LMT was – was initially privately owned but then a majority shareholding was bought by Denel and the evidence has been that one of the objectives was to acquire the capacity reduction of
10 capacity of LMT to enable it to be within the Denel group so that it would have in-house capacity and would also be able to manage it. Is that your understanding?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: Right. Now as I understand your evidence the R12.7 million advanced payment was made before Denel acquired the 51% shareholding in LMT. Is that right?

MR SADIK: That is correct.

ADV KENNEDY SC: Now when did this take place the
20 advanced payment and was it during the time that you were employed by Denel as Group CEO?

MR SADIK: That is correct Chair I was the Group CEO and the payment was – the agreement was made on the 29 April 2010.

ADV KENNEDY SC: Thank you.

MR SADIK: And 28 June as per clause 213.

ADV KENNEDY SC: Right thank you. Now did you as Group CEO at that stage approve the transaction in which the R12.7 million was paid as an advanced payment to LMT?

MR SADIK: Chair we had – we had a Denel Land Systems divisional board in place. I was part of the board at the time and we had received a presentation by management and part of the board we had approved this transaction.

10 **ADV KENNEDY SC:** Right. Now essentially why was this paid? The other evidence that the Chair has heard in the earlier days of these hearings to do with Denel have suggested that it was not simply paying in terms of the contractual time table for the provision of the goods concerned by LMT but it was actually provided as it were as a benefit to LMT because they were facing some financial difficulties. Is that correct?

MR SADIK: Chair they were a combination of issues around LMT and LMT as I point out in paragraph 2.14 the
20 you know what caused us to go ahead one of the issues was the financial challenges that the company was facing but the important thing is that they were the localised partner of an international OEM called Patria and the – we had then placed a contract on them called a trunnion contract. And on that contract we had paid 25% of that

truncheon contract as an advanced payment.

ADV KENNEDY SC: Yes. But are the other witnesses correct to the effect that if you had simply followed the letter of the contract between DLS and LMT you were not due to make that payment but this was as it were a concession to LMT. It was a way of assisting them to get an advanced payment which they were not contractually entitled to but which you were persuaded to pay in order primarily to assist them in a situation of a financial
10 difficulty.

MR SADIK: Chair we – when we place a contract we normally will pay a supplier an advanced payment which is generally about 25% of the contract value. So it is on that basis we made the – we – so it was part of our normal course of business to make a portion of the pre-payment especially when a contract is quite material.

ADV KENNEDY SC: Now you have referred...

MR SADIK: I am sorry.

ADV KENNEDY SC: Sorry Chair.

20 **CHAIRPERSON:** I take it that you are saying you dispute the evidence of those witnesses who said this payment of R12.7 million was a way of coming to the assistance in terms of it being an advanced payment giving assistance to LMT to assist it deal with its financial difficulties.

MR SADIK: Correct Chair.

CHAIRPERSON: I take it that you dispute that evidence?

MR SADIK: I would say I would dispute it because it was based on the contract that we have placed on them and on that contract we had given them 25% of the value of the contract.

CHAIRPERSON: Hm. You dispute it completely or you say that consideration was one of the considerations and not necessarily the only consideration?

MR SADIK: Chair the latter is – it was not the only
10 consideration it was one of the considerations.

CHAIRPERSON: To assist them.

MR SADIK: Yes.

CHAIRPERSON: Hm. Mr Kennedy.

ADV KENNEDY SC: Thank you Chair. In paragraph 218 you say that the pre-payment was not precluded by any law, treasury directive or instruction or policy of Denel and so you say it was therefore not unlawful to make the advanced payment and not unusual commercial practice at Denel and the industry. You stand by that evidence?

20 **MR SADIK:** That is correct Chair.

ADV KENNEDY SC: Right. Then you...

CHAIRPERSON: So – I am sorry. Earlier on you said something to the effect that advanced payments were normal or abnormal at Denel that is where normal during your time. If you say they were normal it might mean that

they happened with a certain degree of regularity frequency. They happened with a certain degree of frequency. It may mean that – is that what you intend to convey or is the position that they were not a norm but they did occur from some time to time.

MR SADIK: Chair it was a norm.

CHAIRPERSON: They were norm.

MR SADIK: Yes.

CHAIRPERSON: Okay. Alright.

10 **ADV KENNEDY SC**: Then in paragraph 219 you say this is ordinarily done in recognition that large manufacturing contracts demand a cash outlay and financial commitment which a manufacturer may sometimes not be able to meet or unwilling to carry at full risk.

MR SADIK: That is correct Chair.

ADV KENNEDY SC: And in this case were you satisfied that LMT was in a financial situation that it could not carry the risk upfront you would need to – you would need to follow the norm. It was justifiable to follow the norm and
20 make an advanced payment.

MR SADIK: That is correct Chair.

ADV KENNEDY SC: Now what seems to have been slightly different about this is apparent from paragraph 217. Normally Denel would seek advanced payment guarantee from a bank on behalf of a supplier but due to weak

financial position of LMT Denel accepted alternative forms of guarantees. So are you saying that they were not able to get a bank guarantee which you would normally expect and require?

MR SADIK: That is correct Chair.

ADV KENNEDY SC: Now you say that you accepted other forms of guarantees other than a bank guarantee. Can you recall what sort of guarantees were provided by LMT?

MR SADIK: Chair not in the exact detail but it would have
10 been guarantees over their assets in particular their debtors' book and some of the IP that they would have owned as well.

ADV KENNEDY SC: Right. And some of the other witnesses have dealt in some detail with that. And you confirm that after this advanced payment it happened that LMT's majority shareholding was – the majority shareholding in LMT rather was acquired by Denel?

MR SADIK: Ja part of the arrangement to secure the guarantee Chair we had a section to convert our - well,
20 really as security. So if we believe we need to get closer to the business or it is an option for us to convert that into an equity, which is what we then did. At the time when we gave them the loan... Oh, sorry, not the loan, the prepayment.

We had an option to acquire 70% of the company and we then brought in another shareholder who came in as a

consortium and we then converted that option of 70% in to a 51% stake in LMT.

ADV KENNEDY SC: Was the other entity that you brought into the consortium Pamodzi?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Right. Are you aware that LMT, in fact, wanted to bring in a different entity as a BBEE partner into the consortium, a company known as Beryl? Are you aware of that and that Denel said no, they wanted rather to have
10 Pamodzi. Are you aware of that?

MR SADIK: No, Chair I am not aware of that.

ADV KENNEDY SC: Right. Now you then deal in paragraphs 2.3 and 2.4 with an advance payment of R 5.7 million relating to the Malaysian Tarots Contract in 2011 and a R 378 million loan by Denel to LMT which was the total of various individual loans. In respect of both, you say you have no personal knowledge of these?

MR SADIK: That is right Chair. It happened when I was not part of Denel in any way.

20 **ADV KENNEDY SC:** Right. Now. Well, was the Malaysian transaction not during your time? It says in 2.3 that that took place in July 2011.

MR SADIK: Sorry. Chair, yes it was during my time but I have no knowledge of that.

ADV KENNEDY SC: Right.

MR SADIK: Yes.

ADV KENNEDY SC: And then the big amounts of loans from Denel to LMT. Was that after your time there?

MR SADIK: That is correct.

ADV KENNEDY SC: Okay.

MR SADIK: Yes.

ADV KENNEDY SC: Well, now let us get to the next transaction which is dealt with in paragraph 3 from page 14 and that is the Platform Hulls Contract and as you point out
10 in 3.1.1. VR Laser was appointed with that contract in 2014 to provide Platform Hulls. Now you had already left by that stage in 2012, correct?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: So as I understand it Mr Sadik. You do not have personal knowledge of what went on but what your affidavit then goes on and then being requested by the investigators to deal with this. It goes on to deal with what the BDO Report then investigated and made findings on. And it is your affidavit's section that starts here. A summary
20 of what comes out of the BDO Report.

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Right. Now did you say that the BDO Report has been accepted by the Audit Committee?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: And the Board of Denel?

MR SADIK: That is also by the Board of Denel.

ADV KENNEDY SC: And did they make certain findings and recommendations?

MR SADIK: Yes, Chair the report did make findings and recommendations which the board has, to a large extent, have followed through with those findings and recommendations.

ADV KENNEDY SC: Right. Now can you indicate just by way of a brief summary because there has been evidence in
10 relation to what actually happened in this contract. And also, the BDO Report is an extensive report which you have attached. In fact, can I just ask you please to look at page 61, the first annexure to your affidavit?

MR SADIK: [No audible reply]

ADV KENNEDY SC: Is that the first page of the BDP Report?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Right. And that runs, it seems, to 300 pages and attached to the 300 pages, in turn, a whole lot of
20 annexures.

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Right. Now can you just summarise in a few sentences please for the Chair's assistance what the bottom line is of the BDO Report's findings in relation to whether there was anything improper or unlawful done in

relation to the awarding of the DLS contract for Platform Hulls to VRL?

MR SADIK: Sure. So, Chair there were three contracts or three big contracts that were entered into with VR Laser, with the VR Laser Group. One was the Platform Hulls Contract.

The others were two Memorandums of Understanding. One of the Memorandums of Understanding was between Denel Land Systems, which was a division of Denel and the
10 VR Laser Group.

And the other, which was the subsidiary of Denel called DVS and there was a Memorandum of Agreement between VR Laser Group and Denel Vehicle Systems which we abbreviate as DVS.

So what the investigation found is that all three of those contracts were irregular. That they have not followed proper process as specified in terms of Treasury Regulations and also in terms of the company policy of Denel.

And as a result of that, the report from BDO had
20 recommended that pursue both civil, criminal and disciplinary action against relevant individuals in the company.

ADV KENNEDY SC: Right. Now when you say there was non-compliance with the requirements of Treasury Regulations and also Denel's own internal processes, does

that relate to Supply Chain Management, procurement requirements of law or does it involve other measures or both?

MR SADIK: Chair, I think it probably would have been a whole host of regulations. One in particular was around Supply Chain non-compliance. I think one may say it was also against the Constitution of South Africa as well.

ADV KENNEDY SC: Yes.

MR SADIK: So it probably was larger than Supply Chain.

10 **ADV KENNEDY SC**: Right. Now you then mention that action was recommended to bring criminal and civil legal proceedings as well as internal disciplinary proceedings against individuals. Would that be employees of Denel?

MR SADIK: Chair, they were former employees of Denel and there are some current employees of Denel that has been implicated as well.

ADV KENNEDY SC: Now if I can take you please to page 24?

MR SADIK: [No audible reply]

20 **ADV KENNEDY SC**: And here we are dealing with the Hoefyster Platform Hulls Contract.

MR SADIK: Yes.

ADV KENNEDY SC: We will get to the other two contracts that you have mentioned in a moment. You appear to be summarising findings from the BDO Report that the closed

tender process and signing off on the seven year contract was non-compliant with the policy stated above and it was irregular expenditure

And then you have referred to Mr Burger in particular in 3.6.2.1. He was the one who actually signed the MOA notwithstanding having the knowledge that the Group SCM Executive disapproved.

And then Mr Saloojee as the ultimate approver of the appointment of VR Laser. Now has any action been taken
10 against these individuals at the level of disciplinary action?

MR SADIK: Chair, no we have not taken any disciplinary action because they no longer in the company.

ADV KENNEDY SC: Did they resign?

MR SADIK: Both of them are... Mr Burger did resign.

ADV KENNEDY SC: Yes.

MR SADIK: And I think Mr Saloojee, his contract would have ended at the time.

ADV KENNEDY SC: Yes. In fact, he has given evidence to that effect. In fact, that was by agreement that he would
20 then leave before the end of his contract but would be paid out for the balance of the contract or a portion of the balance. Is that right?

MR SADIK: Chair, I have no knowledge of that.

ADV KENNEDY SC: Were you not involved at the time that that was done?

MR SADIK: No, I was not.

ADV KENNEDY SC: Was that done at the time of the board prior to the board on which you served under Ms Hlahla? Was it the prior board headed by Mr Mantsha as chairperson?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Right. Now you mentioned also the recommendation by BDO that criminal and civil legal action be taken. Let us deal with the criminal action first. 3.6.3
10 refers to action being taken by the current Chief Executive Officer of Denel. Who was that at the time you signed this affidavit at the beginning of February this year?

MR SADIK: It was Mr Daniel du Toit who was at the time the Group CEO of Denel.

ADV KENNEDY SC: And he has since left. Is that right?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: And was it Mr Du Toit that you then had replaced as interim CEO since August?

MR SADIK: That is correct, Chair.

20 **ADV KENNEDY SC:** Right. So Mr Du Toit, based on the recommendations of the BDO Report, you say has taken action at the level of a criminal complaint under POCA. Is that right? The Prevention of Organised Crime Act in relation to this transaction. Is that right?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Now are you aware of that because at the time the criminal complaint was laid, were you then chairing the Audit Committee of Denel?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Right. And have you in that capacity or since then as interim or acting Group CEO since Mr Du Toit left, are you still monitoring that process?

MR SADIK: Chair, we are monitoring it, yes.

ADV KENNEDY SC: And can you inform the Chair from your
10 own knowledge. Has there been any progress in the police investigation and has any prosecution in fact started to your knowledge?

MR SADIK: Not to my knowledge but there was a meeting held between the NPA and the Hawks on this matter.

ADV KENNEDY SC: And is Denel cooperating with the Hawks in this regard?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Right.

MR SADIK: Ja.

20 **ADV KENNEDY SC:** Now. So you refer in 3.6.4 to the fact that Burger and Saloojee had both left. So it was not possible to take disciplinary action. And then you refer in 3.6.5 to the investigation that we mentioned earlier. Apart from BDO, you also have had the investigation undertaken by ITI. They are the defence experts. Is that right?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: And that report is still not finalised.

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: And you indicated that that will consider whether or not Denel suffered any financial loss from contracts from VR Laser including the Platform Hulls Contract. So is there investigation currently underway. Does that extend beyond the Platform Hulls Contract and look also at the two single source, single supply contracts
10 awarded by DLS and DVS?

MR SADIK: That is correct, Chair. They are looking at all of the dealings between the Denel Group and VR Laser to see whether the work could have been in-house. And also, if it was outsourced, you know, that we pay fair market related rates for that.

ADV KENNEDY SC: Right. And then you have indicated that if once that investigation is complete and you get the report from these experts, ITI, that may be able to establish whether or not you have actually suffered losses. And if so,
20 what sort of amount and will you take action, potentially, based on the outcome of that report once it comes?

MR SADIK: That is correct, Chair. And that will form the basis for our civil action.

ADV KENNEDY SC: Right. Next you deal from page 26, paragraph 4 with another contract that you have mentioned

briefly in passing earlier and that is the MOA between DLS and VR Laser. You mentioned also earlier a Memorandums of Understanding.

The Chair has heard evidence and there is a lot of documents before the Commission as well which indicate that in respect of that this transaction, there was initially a Memorandum of Understanding and that was later converted into a Memorandum of Agreement. Is that correct?

MR SADIK: That is correct, Chair.

10 **ADV KENNEDY SC**: And has the award and the conclusion of that contract, the MOA with VR Laser from DLS' side, has that also been a subject of investigation?

MR SADIK: That is correct, Chair. That was subject to the BDO Investigation.

ADV KENNEDY SC: The BDO Investigation?

MR SADIK: The BDO.

ADV KENNEDY SC: Sorry, BDO?

MR SADIK: Yes.

20 **ADV KENNEDY SC**: I beg your pardon. And you refer also to ITC Act also looking at aspects of that. Is that correct?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Right. Now this MOA specifically was a contract in terms of which VR Laser was appointed as single supplier by DLS. Is that correct? Is that your understanding?

MR SADIK: Yes, that is my understanding based on the BDO Report.

ADV KENNEDY SC: Yes. Was this for work over and above the Platform Hulls Contract?

MR SADIK: I would have assumed it is all the work that would have been required.

ADV KENNEDY SC: Right.

MR SADIK: Yes.

ADV KENNEDY SC: Now again, this was concluded, I
10 believe, in 2015. Is that correct?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: And again, you were not involved, either at management or board level of Denel at that stage. Is that correct?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: So you cannot help us with facts that comes from your own personal knowledge about what happened within Denel with VR Laser in relation to this transaction?

20 **MR SADIK**: That is correct, Chair.

ADV KENNEDY SC: Now again, is your knowledge of information that you set out from page 26, based on what you have picked up from the BDO Report?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Right. Now again, may I just you to

just in a sentence or two to indicate what your understanding is of the bottom-line of the BDO Report in respect of this particular transaction, the Single Supplier MOA between DLS and VR Laser? What were there overall findings and recommendations?

MR SADIK: Chair, this was a single source arrangement when there were other suppliers that could form something similar in South Africa. It was also quite a long contract and ...[intervenes]

10 **ADV KENNEDY SC**: What was that period?

MR SADIK: It was ten years.

ADV KENNEDY SC: Right.

MR SADIK: I think. Yes. And the Head of Supply Chain at the time, according to the BDO Report had objected to entering into a long-term contract with this. And the management at the time went ahead and finalised the contract.

ADV KENNEDY SC: Now you refer on page 29, paragraph 4.6.1, in fact, :

20 "A passage from the BDO Report which implicates Mr Burger, Mr Wessels and Mr Saloojee in relation to the recommendation and approval of the deal in question and this was done irregularly in contravention of the provision of the National Treasury Supply Chain Management Guide, as well

as the Denel Supply Chain Management document of 2014.

It refers to a total payment of R 107 million for in particular financial years being irregular expenditure as defined by the PFMA.”

So is this what BDO found?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: And have you accepted this particular finding of the BDO Report?

10 **MR SADIK**: Yes, we have.

ADV KENNEDY SC: Now in addition to Mr Burger, Mr Wessels and Mr Saloojee being implicated by BDO in their report in the passage that I have just quoted from.

You indicate in the next paragraph 4.6.2 that in DD(?) report which we know was never finalised, has also identified other people who may have been – who are implicated in irregularity. They too identify Mr Saloojee and Mr Burger. We see that in 4.6.2.1 and 4.6.2.2. Correct?

MR SADIK: That is correct, Chair.

20 **ADV KENNEDY SC**: And then it seems some additional people that were not identified by BDO but were identified in DD, the top of page 31, Mr Reenen Teubes. Correct?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Mr Wessels had already been mentioned by BDO but in 4.6.2.5 in DD also made findings in

relation to Zulake and Tshepe. Correct?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: As well as Mr Denise Govender, the former Chief Legal Officer.

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Is that right?

MR SADIK: Yes.

ADV KENNEDY SC: Now did BDO recommend that Denel take any action, such as disciplinary action, criminal
10 prosecution and civil action arising from the irregularities identified in relation to this MOA between DLS and VR Laser?

MR SADIK: Yes, they did.

ADV KENNEDY SC: Was that similar to what they had recommended in relation to the other contract, then Platform
Hulls Contract?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: And have you accepted that recommendation, did you?

20 **MR SADIK**: Yes, we have and we have acted on it by reporting it to the police.

ADV KENNEDY SC: By the reporting it to...?

MR SADIK: To the South African Police Service.

ADV KENNEDY SC: And do you know whether that is still being investigated, whether any progress has been made,

whether there is any prosecution?

MR SADIK: Chair, we are fully cooperating with them. We have a case number and there has been ongoing inquiries and we have responded to that.

ADV KENNEDY SC: Yes. Did BDO also recommend you should take disciplinary action to the extent it was possible?

MR SADIK: Yes, they have.

ADV KENNEDY SC: And was it in fact possible to take disciplinary action?

10 **MR SADIK**: We, at the moment, are processing it and will continue with that.

ADV KENNEDY SC: Now you say in 4.6.4 except for Mr Teubes and Mr Douglas Masuku and Nkolisi Makatini. None of the presidents referred to the reports are still in the employ of Denel. So presumably that is why you have not disciplined Mr Wessels or Mr Burger all Mr Saloojee because they have left the employ.

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Is that right?

20 **MR SADIK**: [No audible reply]

ADV KENNEDY SC: Yes. But what about the people who are still in the employ, Mr Teubes, for example? DD implicated Mr Teubes in their Provisional draft report which has not been found the last. Has any action being taken against him thus far and is any action possible?

MR SADIK: At this stage no action has been taken but action is possible and we intend to do that.

ADV KENNEDY SC: Right. Of course under the Labour law, one is required to bring disciplinary proceedings quite speedily. I don't want you to argue any possible objections that might be racing that regard but can you just comment on why...

10 Firstly, when did you receive the BDO report? And why are you still in the process of considering whether or not to take disciplinary action against Mr Teubes?

MR SADIK: Chair, the individuals that have been mentioned here refer to in the DD reports which was a draft report and we need to, you know, we were hoping to finalise that report before we could take action. In the BDO report, they have identified the individuals with Denel but they did not specify these individuals.

ADV KENNEDY SC: Yes.

MR SADIK: So the reference here is from the draft in the DD Report.

20 **ADV KENNEDY SC:** I have no doubt that the citizens out there who know that public money is at stake will be interested in the level of accountability ...[intervenes]

MR SADIK: Yes.

ADV KENNEDY SC: ...on the part of Denel's management and its board and people such as yourself. are you able to

tell the Chair to what extent you may be addressing these issues that have arisen from these various reports?

MR SADIK: We are addressing them to the extent we can and we believe we are making good progress but these are the outstanding individuals that we need to follow through. With some of them they were charged or they were allegations with him on other matters which we then concluded the investigation on. And some of those individuals were cleared on those other matters. So we will
10 now proceed with the next stage.

ADV KENNEDY SC: Right. You then deal from page 33, it is quite a long section in your paragraph 5 that is headed, the Armscor/Hoefyster Contract. and specifically the procurement process followed in contracting Patria for the usage of this Vehicle Platform for the Hoefyster vehicle various. Was that also the subject of investigation by BDO or anyone else?

MR SADIK: Chair, It wasn't really an investigation as such but it is more the factual situation.

20 **ADV KENNEDY SC**: Right. now you have set out in some detail the background and what - and you were asked specific questions. For example, if I can take you two page 37, paragraph 5.5? Why DLS did not send personnel to Finland from LMT and/or BAE But instead decided to capacitate personnel, et cetera. That is the question. Who

raised that question? Was that a question from the investigators off the Commission?

MR SADIK: From the Commission, Chair.

ADV KENNEDY SC: Right. So you were asked to specifically deal with these aspects?

MR SADIK: [No audible reply]

ADV KENNEDY SC: Now I don't propose unless the chair would direct me to. I do not propose to go through this section.

10 **CHAIRPERSON**: Ja, it is not really necessary because the report is there.

ADV KENNEDY SC: Thank you, Chair.

CHAIRPERSON: Ja.

ADV KENNEDY SC: May we then turned to what seems to require some focus at page 46 and that is your paragraph 6 and that is the Denel's acquisition of all LSSA, BAE. Now known as Denel's Vehicle Systems, a division of Denel.

Now there is some evidence in relation to this transaction previously. as I understand it and please correct
20 me if I'm wrong in my summary. As I understand it, BAE is the British defence entity. Correct?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: and it earned a local entity that was referred to as Land Systems South Africa.

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Because it is a South African subsidiary.

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Involved in defence item manufacture. is that right?

MR SADIK: Yes, that is correct.

ADV KENNEDY SC: And BAE then sold its shares in LSSA to the Denel holding company. Is that right?

MR SADIK: That is correct, Chair.

10 **ADV KENNEDY SC:** Was that hearing your 10 year as Group CEO?

MR SADIK: It was not Char.

ADV KENNEDY SC: When did it take place?

MR SADIK: It took place during 2014 and 2015.

ADV KENNEDY SC: Right. So again, are you simply providing information to the Commission at its investigators' request and you do so on the basis of what you have been able to glean from the report of those who investigated it?

MR SADIK: That is correct, Chair.

20 **ADV KENNEDY SC:** Right. Now who has been investigating that?

MR SADIK: There was a firm called Dentons.

ADV KENNEDY SC: Right.

MR SADIK: Dentons Forensic Investigators had investigated that acquisition.

ADV KENNEDY SC: Now you mention Dentons right in the beginning offer evidence when will refer to the reports all various entities and you mentioned that Dentons had given an interim report or a draft report and that that has now been supplanted by final report. Is that the Reporter received on the Tuesday?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Right. So your affidavit, as I understand it, reflects a summary that you have made of the
10 broad findings and recommendations of Dentons in the interim draught report.

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Is that right?

MR SADIK: Yes.

ADV KENNEDY SC: Now are you willing to make available to the Commission if it requires it, the final report of Dentons?

MR SADIK: Yes, Chair. The Board at its review session on
20 Tuesday agreed that a final report should be forwarded to the Commission.

ADV KENNEDY SC: Right. If you could please arrange for that to be done if it hasn't been done yet.

MR SADIK: [No audible reply]

ADV KENNEDY SC: Now we don't have that report in front of us now. I do not think we necessarily have to because

hopefully you can assist the Commission. have you been through that final report?

MR SADIK: Yes, I have been through the final report Chair.

ADV KENNEDY SC: And had you previously gone through the interim report which is summarised in your affidavit?

MR SADIK: That is correct, Chair. I have, yes.

ADV KENNEDY SC: Right. We are going to look at the.. We are going to ask you in a moment for you to summarise the broad findings and recommendations from the interim report. Are you able to tell the chair whether the final report
10 in substantial material ways differs from the interim report?

MR SADIK: Chair, It does not. Probably 95% is what was in the final report. Sorry. That was in the draft.

ADV KENNEDY SC: Yes. Is there anything in the final report that deviates in any material way from your summary of the interim report in your affidavit?

MR SADIK: Not in a material way Chair.

ADV KENNEDY SC: Right. Now can you please summarise for the chair please the broad findings and recommendations
20 that come out from both the interim and the final report of Dentons?

MR SADIK: Chair, this Investigation dealt with the acquisition of Land System South Africa by Denel. the shareholding based in Land System South Africa was BAE, which on the majority stake.

And there was a local consortium called DG BGD Technologies that owned a minority stake. Denel Acquired this company for about R 855 million.

And the findings from the Dentons report is that we have not fully complied with the approvals that we have received from the minister in terms of the conditions and in one particular condition related to the funding arrangements off the transactions become more onerous will become onerous to Denel.

10 Denel had to revert to the minister to inform the minister on the changing of the funding mechanism And that did not happen. So the big part of the Dentons Report focused around compliance issues to the PFMA.

They also looked at the strategic rationale of the acquisition and they looked at the evaluation of the business. Under compliance at the time Minister Brown was the Public Enterprises Minister and her view – and Minister Nene, I think was the Finance Minister at the time and the condition that was put on is that we were – Denel
20 had acquired Land Systems South Africa through two loans that were arranged.

One was with Nedbank and the other was with ABSA and in the original PFMA application the PFMA application process stated that the loan with Nedbank will be a five year loan but in fact once the acquisition was busy being

concluded Nedbank had changed the loan terms to five months, as a bridging finance.

So that was quite a substantial change in the funding arrangement and in terms of the conditions that Denel had received in the PFMA we had revert to the ministers on the change, which we had not done.

ADV KENNEDY SC: Now did – if I can take you to page 59, paragraph 68.18. You refer in your summary of the Dentons’ – the interim Dentons’ report to a finding by
10 Dentons that Mr Saloojee and Mr Mhlontlo were responsible for these nondisclosures and in particular Mr Mhlontlo as the then Group CFO appears to have been primarily responsible for that.

Now has any action been taken against Mr Saloojee or Mr Mhlontlo in that regard?

MR SADIK: So Chair, now that we have seen – we have noted the report at the board, it has been referred to audit and risk committee for the remedial action to be taken. We have instructed senior counsel to review the report and to
20 advise the board accordingly.

ADV KENNEDY SC: They, of course, we know have left the employ of Denel some time back after they were charged but ultimately no disciplined for various other allegations, so they cannot be disciplined now because they have long since left, correct?

MR SADIK: They are no longer in the organisation.

ADV KENNEDY SC: Yes. You have mentioned that you were taking senior counsel’s advice. You refer at page 60 in your paragraph 682, right at the end of your affidavit, just above where you signed it, you say:

10 “The board has taken legal advice about recovery of any financial prejudice suffered as a result of the conduct of the officials identified. Denel is yet to determine whether and if so how much financial prejudice has been caused to Denel. It is when it is determined what amounts are recoverable from the implicated individuals that Denel will institute such recovery legal process as is appropriate.”

Now that, of course, was your affidavit as at the 9 February 2020. Has there been any update to report to the Chair of this Commission as to whether Denel has since determined whether you have suffered financial prejudice and if so, how much?

20 **MR SADIK:** Chair, in the final Dentons’ report it highlights the interest differential during the bridging loan duration so that has been included in the final report but we are - we are going to be engaging with senior counsel who right now has been instructed and to go through – some of it has been reputational damage that Denel has suffered especially with the bankers that were providing the loans

to the company and also the way we funded the transactions. So we will go through that process, so it is still in progress.

ADV KENNEDY SC: My attention is directed to an aspect which I went through quite quickly to do with the LMT prepayment. If I can take you back to page 11. What you have said in your affidavit at page 11 paragraph 214 is:

10 “The decision to make an advance payment to LMT was made in recognition of cash liquidity challenges that LMT was experiencing at the time and taking into account the importance of LMT, the localised partner of Patria, the timeous delivery of Hoefyster milestones.”

I would just like to clarify, you used the term earlier that it was the norm at Denel and in the industry for advance payments to be made such as this. Presumably if it was truly a norm that was uniformly applied it would not depend on whether LMT had financial challenges whether you might be vulnerable if they were delayed by anything, you
20 would automatically give them an advance payment.

Am I right in understanding that it happened frequently, as you told the Chair earlier, but not automatically? Is that right?

MR SADIK: It generally would have happened automatically because in the conditions one would say a

percentage as an advance payment to a contract and the reason why this is highlighted in the way it is, is that we had made available the advance payment without a proper bank guarantee. That was outside of the norm.

ADV KENNEDY SC: Right. And then in 217, at the foot of this page:

10 “The payment to LMT was intended to pay its business critical creditors to ensure LMT continued to operate as a going-concern. To that end DLS put in place measures that monitored the application or use of cash by LMT with a view to ensuring that the money was not applied other than for the intended purpose.”

Is that correct?

MR SADIK: That is correct.

CHAIRPERSON: I am sorry, that seems to convey to me something a little different from what I believe you said earlier on. The payment to LMT, that is still a reference to the advance payment, is it not? Or not?

20 **MR SADIK:** It is the advance payment, Chair.

CHAIRPERSON: Yes.

“...was intended to pay its business critical creditors to ensure LMT continued to operate as a going-concern.”

That seems to me to say the purpose of the advance

payment was to enable LMT to address its financial difficulties involving its creditors.

MR SADIK: Chair it was on the back of a contract that we had entered into with LMT and we had paid them a 25%. What we used to – what we did not do, Chair, is we did not specify when we gave a company a contract to use it for the particular contract. So generally the funds of the supplier would have been pooled into the overall cash resources.

10 **CHAIRPERSON:** When you say what you have just said now, are you talking in general that whenever you made advance payments to any supplier it was not specified in the contract for what purpose that payment was to be made?

MR SADIK: That is correct, Chair.

CHAIRPERSON: That is what you say?

MR SADIK: Yes.

CHAIRPERSON: Which in one way at one level could be interpreted as meaning that the supplier was free to use it
20 in whatever way. Is that a fair interpretation? Could that be a fair interpretation?

MR SADIK: That is correct, Chair.

CHAIRPERSON: Now that is rather strange to me because whenever one talks of an advance payment in the context of two parties doing business such as would be the

case, I would imagine, with an SOE and a supplier, I have always thought that the advance payment – the purpose of the advance payment is to assist the supplier in carrying out or honouring its obligations under the contract.

An example, the supplier undertakes in terms of the contract it concludes with Denel to deliver a certain product to acquire and deliver certain product to Denel by a certain date. That product is very expensive and therefore it is agreed between Denel and the supplier that
10 at least give me so much in advance, an advance payment, not the whole amount, but it is going to – the intention is to assist it, the supplier, in buying the product or making the product, if they are supposed to manufacture a product, it is not supposed to – that advance payment is not meant to be used by the supplier for other things and then fail to deliver in terms of the contract so that that would be my – that is my understanding of what the purpose of an advance payment is in those cases where it takes place but from what you say, with Denel, with regard to the
20 advance payments that it used to be involved in that, that was not necessarily the purpose, is that correct?

MR SADIK: That is correct, Chair, and just to expand of that. It was a similar policy with the advance payments that we received from our customers where we had put it into a pool account and then we will decide how to use the

cash and that has been one of the lessons we have now learnt, you know, because if you look at where Denel finds itself today, we have used advance payments that we have received from our customers for other purposes as well to fund our general working capital or to fund acquisitions, etcetera.

So, for instance, if you look at the LSSA acquisition, there we had used an advanced payment under Hoefyster project to fund that transaction, to repay the
10 loan that the bank had provided. So that is the lessons learnt in terms of the turnaround that we are busy with right now, is to put in more stronger measures around that.

CHAIRPERSON: Well, it seems to – and you must tell me whether you do not agree, it seems to me that it should be illegitimate to make an advance payment on the understanding that the supplier can use that money for whatever they like.

MR SADIK: Ja.

CHAIRPERSON: If I am going – if you are Denel and we
20 enter into contract, I must manufacture something for you and you give me an advance payment and I go and buy a nice Porsche or BMW with that money, does not look legitimate.

MR SADIK: Yes.

CHAIRPERSON: Would you agree? Why must I – I must

wait and work for my money, get paid, then I can buy my Porsche or whatever.

MR SADIK: Ja, I absolutely agree with you, Chair. I stand to be corrected but I think legislatively we probably need to tighten that up a bit more.

CHAIRPERSON: Yes. Because imagine if you take taxpayers' money and give me an advance payment and I do exactly that, go and buy a Porsche or whatever expensive car, the next thing, when I am supposed to
10 deliver, in terms of the contract I cannot deliver because I do not have money anymore or that kind of – and yet you had given me advance payment. You understand?

MR SADIK: I fully agree with you, Chair, and this is one of the issues that our current board has.

CHAIRPERSON: yes.

MR SADIK: You know, in terms of turning around. It is not only advance payments that we receive, Chair, or make, it is also payments that we received from our cuss right now.

20 **CHAIRPERSON:** Yes.

MR SADIK: So what we have recently done, Chair, is that we have said - for instance, one of our – an essential service we provide is to the air force. So the air force pays us on a regular basis. So we have now ring fenced the cash that we have received from the air force to use it

or resources that is required to execute the air force's contract. Until recently we did not do that. We were pooling the funds. So now we are also – we are going further than just advance payments, it is also regular payments that we received from our customers to ensure that they are being used for the contract of that customer.

CHAIRPERSON: Yes, okay. Mr Kennedy?

ADV KENNEDY SC: Thank you, Chair. If I may, Mr Sadik, conclude your evidence by raising an issue which is
10 not deal with in your affidavit, it was only raised in the affidavits of others, in particular Mr Burger and he has referred to the fact that you participated in television interviews I believe on two occasions, is that correct?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Just identify for the Chair please what the two TV stations were?

MR SADIK: One was on eNCA and the other was on the SABC Morning Live. On the eNCA it was a programme called The Fix.

20 **ADV KENNEDY SC:** The Fix, is that with the journalist Karima Brown?

MR SADIK: That is correct, Chair.

ADV KENNEDY SC: Now Mr Burger has complained about those interviews and particularly the one on the fix. Just tell the Chair please how it came about that you were

interviewed?

MR SADIK: Chair, we had made a parliamentary presentation providing an update on all of the investigations that we were busy with and this in particular dealt with the creation of Denel Asia and the VR Laser Group as well.

ADV KENNEDY SC: Did you solicit the interview or did the TV stations contact you?

MR SADIK: We were contacted by the media.

10 **ADV KENNEDY SC:** Right, now what essentially did you say on eNCA?

MR SADIK: On eNCA, Chair, the focus of the discussions was around the transactions with the VR Laser Group and Denel Asia and the point we had stated as that based on the investigations we had completed which was the BDO investigation. Those contracts with Denel were found to be irregular and the recommendation from BDO, one of it was to pursue – a couple, was to pursue civil and criminal actions against the individuals and that is what I had
20 stated in that interview and then the other question I was asked later on in the interview was who was on the board of Denel Asia and on the board of Denel Asia I made the comment that there were from the Denel side it was Mr Burger and Mr Ntshepe. At the time Mr Burger was the CEO of DLS and Mr Ntshepe was the Group CEO at the

time and on the Denel Asia side representing the other shareholder in Denel Asia it was Mr van der Merwe and Mr Singhala.

I made the point that Mr van der Merwe was – I was not sure whether he was still the current or former legal adviser of the Gupta family and I had also stated in that interview that the other shareholder in Denel Asia was a company called VR Laser Asia and these were Hong Kong based companies and the hundred percent shareholder of
10 VR Laser Asia was Mr Salim Essa.

ADV KENNEDY SC: Now Mr Burger has in two sections of his affidavit alleged that you were misleading and defamatory in what you said in these interviews, that it was untrue. He has explained at some length in his affidavit and he is going to be giving evidence as our next witness, so we will be dealing with that, but he has given his version as to why he says the various transactions dealing with VR Laser both locally in the DLS agreements and also the VR Laser Asia and the Denel Asia venture, why all of
20 those were above board and lawful. But what he has said is, not only that you were defaming him by saying that he had improperly and unlawfully, that one of the main points he seems to make is this. I am not going to take you to the affidavit, I am just going to read out a few words that he uses, that he says these allegations – he considers

these allegations to be defamatory misleading albeit part of a popular and yet irresponsible narrative in which it is suggested that Denel was the subject of state capture. If I may just have a moment, Chair?

Just for the record may I just place on record that allegation is made in Mr Burger's affidavit in Denel bundle, volume 10, page 611, paragraph 11 and later in his affidavit at page 642 of the same bundle, Mr Burger says again:

10 "I have previously averted to the statement made by Mr Sadik..."

And that, in its context, is the statement you made in the television interviews.

"...that Denel has decided to law criminal charges against certain individuals and will also institute civil action in order to..."

Sorry, record, it says, presumably means recover.

"...monies and losses suffered by Denel."

And this is the point I want to raise for your attention and
20 reply please, Mr Sadik. He says:

"It is no small coincidence that Mr Saloojee was not mentioned by name during the interview with Ms Karima Brown on the television programme The Fix on the 4 August 2019. This is, of course, because Saloojee trumpets the popular narrative."

Now, Mr Sadik, I am going to ask you to comment on that but before I give you that opportunity I just want to indicate to the overall thread of Mr Burger's affidavit in this regard, as we understand it. He effectively is saying to the Chair of this Commission that the allegations of state capture relating to Denel Land Systems in which he was CEO and he also had some role in relation to DVS, to a limited extent as well, but all of these allegations that had been raised about irregularity have got nothing to do with state capture, it has nothing to do with any improper relationship between VR Laser and the Guptas and improper relationship between them and anybody at Denel, including himself, and in fact, as I understand his evidence – and we will be asking him questions about this – he seems to be suggesting this, that the allegations of state capture are raised as a stratagem, as a ruse, as a pretext to try and deflect attention from the real reasons for Denel being in such a serious operational and financial crisis and that was bad decision-making and bad management of Denel by those responsible other than Mr Burger and that people are trying to avoid responsibility, people such as Mr Saloojee himself.

So he saying that when you made these statements on television in the interviews and referred particularly to the Gupta connection that you were part of a campaign by

people at Denel to try wrongly to blame the problems being faced by Denel relating to non-completion of projects such as Hoefyster, serious financial problems in which you have been, and still are, seeking bailouts from government, that all of this is just a pretext and it seems that he is suggesting that you are a part of this and suggesting in particular that you are protecting Mr Saloojee by the fact that you did not refer to him by name but you referred to others.

10 Now that is fairly long question but I think you understand it was necessary for me to put that in context. Can you please tell the Chair whether the criticism of you is valid or not?

MR SADIK: Ja. I think, Chair, it is really unfortunate to hear these point being made by a senior executive of the company. I mean, quite clearly, looking at the thoroughness of the BDO report, which we regard as being very thorough and you would see there was a blatant disregard, not only the company policies within Denel but
20 for the broader South African legislative environment as well. And, as a state owned company, we should have been far more responsible. So it is really very unfortunate and it is really sad to be hearing these sort of comments, you know, because when one is in a leadership position you actually need to take accountability for your actions

around that.

And, as you know, Chair, I mean the plight of Denel right now is very public, you know, we are losing a lot of skills in the company and it is because of the financial challenges we find ourselves and really, it is the financial challenges that as a result of the poor leadership that we have had in place, that we are not strong enough.

State capture definitely made a contribution, a significant contribution to the reputation issues that we are
10 suffering, not only locally but globally as well because we operate in many countries across the globe. And also locally with our lenders because it has made them very nervous to be associated with Denel and to be providing funding as one stakeholder. There has been a range of stakeholders.

So coming back to the interview on eNCA, the question that I was asked at the beginning is that can I name individuals and at that stage because it was in a public platform and these reports were still in process, we
20 did not disclose any names and I did not. But the direct question I was asked, Chair, is that who was on the board of Denel Asia at the time and that is a clear black and white answer, so – and one could see who was on the board of the company and that was the response I gave and our view around the creation of Denel Asia is that it

was illegal because it was prior to receiving all of the ministerial approvals. A partner that Denel chose to partner with had no experience and this comes out from the BDO report in the Asian market, in particular with India.

The person that was on the board of Denel Asia representing VR Laser, one was a Mr van der Merwe, who was a South African citizen, a lawyer by profession and we had another individual named Mr Singhala and he was – at the time he was about a 22 year individual. So he had no
10 credibility in the Indian market which is where they were aiming to go into. That was the one.

The other, is that during this era of state capture, we had also – there were some opportunities we were busy with elsewhere in the broader market of Asia and with state capture we were then – we were affecting the relationships we have with some of our advisers in those markets, we were sending confusing messages to our customer base. Just for the sensitivity of those countries I would not mention the names here, Chair. So I do not know whether
20 I answer your question.

ADV KENNEDY SC: Thank you, Mr Sadik, is there anything else that you want to raise with the Chairperson that arises from your affidavit or the last issue that you want to add or are you happy with completing your evidence at this stage?

MR SADIK: I think, Chair, the one pint that was raised by your legal adviser was around the interview on Morning Live on the SABC and that was with Leanne Manas at the Morning Live show and the purpose of that interview was to discuss the contract that Denel entered into with the government of Chad which was to supply vehicles that were going to be used for peacekeeping services and Denel at the time had received R100 million and we had not executed on the contract. So we were – there were
10 media reports over the weekend and then based on that we were then invited to be on the interview and I, as Chairman of the audit committee, I then attended – I led that interview and the point we had made in that interview is that we, at the time, the current board, which I was part of, was that it was a significantly loss-making contract and also the timeline to execute that contract was reduced by 50%. So as a result of those two – and Denel did not have the financial resources to complete the project within that
20 specified time and the management at the time had acted contrary to the mandate that was provided by the divisional management would have responsible to execute that contract. So that was the purpose of that interview.

ADV KENNEDY SC: Thank you, Mr Sadik, we have no further questions of this witness. Thank you, Chair.

CHAIRPERSON: Thank you very much, Mr Sadik, for

making yourself available to give evidence. We appreciate it and if we need you to come back, we will ask you. Thank you very much.

MR SADIK: Thank you, Chair.

CHAIRPERSON: You are now excused.

MR SADIK: Thank you.

ADV KENNEDY SC: Chair, I see that we have exceeded the normal time before the tea adjournment.

CHAIRPERSON: Yes.

10 **ADV KENNEDY SC:** Our next witness I assume is present and ready to take the witness box. May I suggest that it may be appropriate to take a brief adjournment now?

CHAIRPERSON: Yes, let us take the tea adjournment now, it is twenty five past eleven, let us resume at twenty to twelve.

ADV KENNEDY SC: Twenty to twelve. Thank you, Chair.

CHAIRPERSON: Thank you, we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

20 **CHAIRPERSON:** Are you ready Mr Kennedy?

ADV KENNEDY SC: We are thank you Chair, and with your leave may we now call as our next witness Mr Abraham Stephanus Burger.

CHAIRPERSON: Yes, thank you, please administer the oath or affirmation.

REGISTRAR: Please state your full names for the record.

MR BURGER: Abraham Stephanus Burger.

REGISTRAR: Do you have any objection to taking the prescribed affirmation?

MR BURGER: I do not have any problem.

REGISTRAR: Do you solemnly affirm that the evidence you will give shall be the truth, the whole truth and nothing else but the truth, if so please raise your right hand and say I truly affirm.

10 **ABRAHAM STEPHANUS BURGER:** [Affirmed]

ADV KENNEDY SC: Thank you Chair. Before I ask questions of this witness may I just mention something, just for the record and for your reassurance.

CHAIRPERSON: Yes.

ADV KENNEDY SC: In relation to the last witness, Mr Sadik's evidence, he indicated that he was willing to provide to the Commission a copy of the final Denton's report that they received on Tuesday. His attorney, Mr Pillay, who's just left has, again, kindly assisted us, and
20 just made available a copy, already, of that final report. So, it now already in our hands and we will make the necessary arrangements to have it done through the formal channels to bring it before you Chair.

CHAIRPERSON: Okay, no that's fine.

ADV KENNEDY SC: Good morning Mr Burger, thank you

for coming to assist the Commission.

MR BURGER: Good morning Mr Kennedy, good morning Chair.

CHAIRPERSON: Good morning Mr Burger.

ADV KENNEDY SC: Chair, Mr Burger's affidavit appears in Denel Bundle 10 from page 607. Mr Burger you should have that Bundle, hopefully, in front of you and if I can ask you please, you will know by now the references to page numbers is a reference to the top left in black ink rather
10 than the red that you see on the right and I'm not going to give you the full number, it's quite long, I'm just going to refer to the last three digits, so it's 607 is the beginning of your affidavit, is that correct?

MR BURGER: I've got it thank you, Chair.

ADV KENNEDY SC: Right, now, this is your main affidavit you've also provided a supplementary affidavit, is that right?

MR BURGER: That's correct Chair.

ADV KENNEDY SC: Right, let's deal with the main one
20 first. If I can ask you, please to turn to the signature page on page 744.

MR BURGER: Sorry page?

ADV KENNEDY SC: Page 744.

MR BURGER: 744, yes Chair.

ADV KENNEDY SC: Is that your signature at the foot?

MR BURGER: I confirm that's my signature.

ADV KENNEDY SC: And you swore this affidavit, or affirmed this affidavit, rather, in front of a Commissioner whose details and signature appear on the following page 745?

MR BURGER: That is correct.

ADV KENNEDY SC: Right, now, Mr Burger you've mentioned to me in consultation and again this morning that there are some typographical errors in your affidavit.

10 **MR BURGER:** As I understand it, they are merely typo errors, there's no difference in substance, is that correct?

MR BURGER: That is absolutely correct, Chair.

ADV KENNEDY SC: Right, so you've indicated to me you don't think it's necessary for you to take the Chair through every typo error and it seems to us that, that makes sense, unless the Chair wants otherwise.

MR BURGER: That is correct, Chair.

ADV KENNEDY SC: Now, have you been through this affidavit, are you familiar with its contents?

20 **MR BURGER:** I am familiar with it, Chair.

ADV KENNEDY SC: And are you able, under the affirmation that you have now taken, to confirm that the contents this affidavit are true and correct?

MR BURGER: I confirm that it is true and correct.

ADV KENNEDY SC: Thank you. We'll take you, in a

moment to some of the points that you raise in your affidavit but just for completeness, may I take you to the supplementary affidavit that you have provided us. Of course, the main affidavit, we've seen was signed some time ago, I think it was in February, is that right?

MR BURGER: That's correct, Chair.

ADV KENNEDY SC: And since then, is it correct that the investigators of the Commission have asked you to respond to certain questions and in response to that you've
10 provided a supplementary affidavit?

MR BURGER: No, Chair, I did respond to certain questions in my original affidavit, the second affidavit is to answer or to respond to certain Rule 3.3 that I present.

ADV KENNEDY SC: Right, and if I can ask you please to turn to page 746.

MR BURGER: I'm there, Chair.

ADV KENNEDY SC: Is that the first page of your supplementary affidavit?

MR BURGER: Correct Chair.

20 **ADV KENNEDY SC:** And if I can ask you please, to turn to the signature page, 788?

MR BURGER: I'm there, Chair.

ADV KENNEDY SC: Is that your signature?

MR BURGER: That is my signature.

ADV KENNEDY SC: And is it correct that you took the

affirmation before a Commissioner of Oaths as appears on page 789?

MR BURGER: That is correct.

ADV KENNEDY SC: And that was a very recently supplied affidavit and we thank you for your assistance, that's dated the 4th of November 2020, is that correct?

MR BURGER: That is correct, Chair.

ADV KENNEDY SC: Chair at this stage, may I just apologise for a lapse on my part of professional etiquette and that is, Mr Burger, in fact, is assisted by his legal representative, Mr Rudi Krause and I do apologise to Mr Krause and Mr Burger for my failure to mention to you, his presence, I should have done it at the outset, I beg your pardon.

CHAIRPERSON: Yes, no that's fine, let him just place himself on record properly.

MR KRAUSE: Thank you, Mr Chairman. My initials are R.C and my surname is Krause and no apology necessary.

CHAIRPERSON: Thank you very much.

20 **ADV KENNEDY SC:** Thank you Chair. Mr Burger the supplementary affidavit, the same question there, are you familiar with its contents?

MR BURGER: I'm familiar with it Chair.

ADV KENNEDY SC: And you confirm the correctness of those contents?

MR BURGER: I confirm the correctness.

ADV KENNEDY SC: Alright, Chair, may we then ask your leave please to have, formally admitted, into the evidence of the Commission, the two affidavits. The one starts at page 607 and we would ask that, that be admitted as Exhibit W25.1.

CHAIRPERSON: The affidavit of Mr Abraham Stephanus Burger starting at page 607 is admitted as Exhibit W25.1.

ADV KENNEDY SC: Thank you Chair, and may we ask
10 that the supplementary affidavit that starts at page 746 of Bundle 10 be admitted as Exhibit W25.2.

CHAIRPERSON: The supplementary affidavit of Mr Abraham Stephanus Burger starting at page 746 is admitted as Exhibit W25.2.

ADV KENNEDY SC: Thank you Chair. Mr Burger your affidavit – your main affidavit, particularly gives a very detailed account of your version. I'm obviously going to focus only on some aspects that appear to require particular attention but you can have the assurance that
20 the Chairperson has the full affidavit and the supplementary affidavit before him and it will, in its entirety and in its full detail be taken into account. Your background, I believe is summarised in your affidavit at page 618, is that right?

MR BURGER: That is correct.

ADV KENNEDY SC: With your leave, Chair, may I lead him on what appears to be uncontroversial aspects?

CHAIRPERSON: Ja.

ADV KENNEDY SC: Thank you. You have a degree in Mechanical Engineering, correct?

MR BURGER: That's correct.

ADV KENNEDY SC: And then you joined – after your academic education you joined a company, Lyttelton Engineering Works, in Pretoria, as an Engineer, which was
10 a subsidiary of Armscor and that later became known as Denel, is that correct?

MR BURGER: That's correct, Chair.

ADV KENNEDY SC: So, when did you first start, in Denel under its previous name?

MR BURGER: As it's stated there, Chair, LIW was Denel Land Systems as we know it today. So, my very first work was at Denel Lands Systems and I've spent my entire career there.

ADV KENNEDY SC: Yes, I'm asking when did that
20 actually start?

MR BURGER: In 1981.

ADV KENNEDY SC: 1981...[intervenes].

MR BURGER: The beginning of 1981.

ADV KENNEDY SC: So, your entire career has been spent at Denel under its previous name and then under its

current name?

MR BURGER: Correct.

ADV KENNEDY SC: And when did you leave Denel?

MR BURGER: I left Denel at the latter part of March 2018.

ADV KENNEDY SC: And you were, at that stage, the Chief Executive Officer of a division of Denel, known as Denel Land Systems or DLS, is that right?

MR BURGER: That is correct, Chair.

10 **ADV KENNEDY SC:** And you indicate that you held that position for about 13 years before your resignation.

MR BURGER: That is correct, Chair.

ADV KENNEDY SC: Right, now, the affidavit deals with a number of transactions that have been of interest to the Commission and we're going to get to some of those transactions in a moment and particularly your own role in relation to that. Now, I'd like you start please, though, with the general theme, as I understand it of your affidavit. I assume you were present earlier when Mr Sadik gave
20 evidence, you got here nice and early.

MR BURGER: I was here, Chair.

ADV KENNEDY SC: Right, and you heard that I put my understanding of the overall theme of your affidavit to Mr Sadik but I'd like you to put the overall theme in your own words to the Chairperson, if you would please, as to your

concern raised in the affidavit that Denel has problems but their problems had been misrepresented, as it were, as if they're all due to – or primarily due to corruption and the involvement of the Guptas with VR Laser and the contracts that you were involved in at DLS with VR Laser. Can I let you please, express in your own terms, your overall feeling?

MR BURGER: Chair, I've got a very proud history at Denel Land Systems. I was in various positions as the
10 years went by but in principle, in the 13 years I was the CEO at Denel Land Systems I inherited a business that was bankrupt at this stage, it was approximately R280million turnover and it had a huge overdraft and it had very little order cover. I – we went through a process of refocusing the company, the intent of LMT had a role to play in refocusing the company, I'm sure we're going to get to that point as well but in principle year on year, growth was seen through all those years. To a point that in 2016 and 2017 the turnover of that business was just under
20 R3billion per year and it was profitable every year. Now, that performance, in my opinion, is unprecedented, that performance does not happen by itself, it happens through people that are extremely dedicated, that are not afraid to take decisions, that think out of the box and think like business people. Hopefully – that was true for me but I

want to state it categorically that the whole team at Denel Land Systems were in my mind businessmen and when they got to Denel in the mornings they did not go to work they went to their business. So, with that as a background I passionately felt that the decision to give a contract to VR Laser was the right decision because I felt, at the time, it was the best company to do the job. Similarly when a decision was taken to go for a single source agreement, although that was not my idea or my proposal, I supported
10 that because as I state, elsewhere in the affidavit, the big gurus of the world that understand quality issues of complex fabrication like Bennie said the best way to ensure reduction in total cost is to form single source supply agreements with suppliers rather than go out on tender. So, when this proposal was made to me, I only saw the benefit in that, and I supported it passionately.

The point – or the theme of this document is that if there were people that benefited from irregularities because of my support for those actions, I cannot stand in
20 for that. I took a business decision and so the overall theme of these reports were, I will not deny if I sometimes fell over my own feet in applying policies and I stand to be corrected and I will take the accountability for that but those things were all done with the best interest of the division at heart, firstly and secondly the best interest of

Denel at heart. So, when anybody comes and says those decisions were made because of State Capture or to enhance State Capture I really, really get upset about it. So, the overall thread of this is, we tried to make good business decisions, we tried to continue the growth of the business and the profitability of the business and to the benefit of Denel. So, if those decisions misrepresented to say they were because of State Capture, then I don't think it is fair, Chair. So, that is more or less the theme of the
10 document.

ADV KENNEDY SC: Thank you.

CHAIRPERSON: Ja, before Mr Kennedy proceeds there's a part that I didn't hear well in your remarks, Mr Burger. You said, if there were people who benefited from decisions you made and then you said something, I don't know whether you said you can't stand that, but I didn't hear what you said.

MR BURGER: No...[intervenes].

CHAIRPERSON: You said if there were people who
20 benefited either from decisions you made or from irregularities or something and then you said something, then I didn't hear that part.

MR BURGER: Yes...[intervenes].

CHAIRPERSON: Have you forgotten what you said?

MR BURGER: I cannot remember verbatim what I said but

what I meant to say was, I supported business decisions. If those business decisions were in line with objectives – with objectives people had that were not business decisions I cannot stand in for that, I was unaware of anything of that nature. So, I'm just trying to say that the decisions we made were purely, purely made on the grounds on what is best for the company and what's the best for the business.

CHAIRPERSON: Well, I know you are going to give your
10 evidence and some of the things will come up as you proceed but I want to raise something upfront. One, the Commission doesn't operate on the basis that we want only evidence that might show that there was State Capture and we don't want evidence that might show that there was no State Capture, we want all evidence that may tend to show that there was State Capture and evidence that might tend to show that there was no State Capture.

So, as a result we want to hear from witnesses who have different perspectives about that, we want to hear –
20 to benefit from all those perspectives. So that's the first point but I want to say to you, in relation to State Capture and what you said in your remarks, when I was hearing evidence relating to the suspensions at Eskom a few weeks ago, one of the things I said to some of the witnesses was, that, it is possible that when the Board of Eskom made the

decisions that it made, I don't know how much might have followed that evidence, you might not have okay I won't go into it but when the Board of Eskom made the decision that it made on the 11th of March 2015, which were to decide that there should be an enquiry into the affairs of Eskom and that certain Executives at Eskom should be suspended. I said, it is possible that other people outside of Eskom had made the decision that the Board should make these two decisions, should appoint – or establish an
10 enquiry and should suspend certain Executives. I said that, in part, because according to the evidence I heard, in a meeting that happened prior to the Board meeting, and a meeting that was not a Board meeting, in Durban where the Chairperson of the Board was invited to that meeting, the issue of an enquiry at Eskom and the suspension of Executives was raised there with the – in the presence of the Chairperson of the Board of Eskom and then I heard evidence that somebody who was not part of Eskom and was not part of Government, Mr Salim Essa appears to,
20 according to some evidence that I've heard, appears to have known about the Executives who were going to be suspended already on the 10th of March which was before the date of the meeting and if the evidence I've heard to the effect that, he knew and he told one or more of Eskom employees, the names, he got it right. Those were the

people who were suspended the following day.

I said, well it is possible that in the Board of Eskom at that time, there may have been people who might have known about some agenda decided upon, outside of Eskom involving the suspension, the Executives but it is possible that some members of the Board, in making these decisions, knew nothing about any such agenda and simply made decisions and contributed in the *bone fide* belief that they thought these were the decisions that were in the
10 interests of Eskom and then some might have opposed these decisions, not because they knew of any agenda by people outside of Eskom but because on the facts they didn't think the decisions were the right decisions. So, I'm making this example of something I've already said before, to say to you, even within Denel, it may be possible that some people – if there was some agenda from people outside of Denel, maybe some people within Denel knew, it may be that some other people didn't know but believe that they were making decisions that were in the interest of
20 Denel but it is possible that unbeknown to them there were people outside of Denel who may have been pushing a certain agenda that might not have been known to some people within Denel. They make certain decisions but there are people who are pushing a certain agenda and they believe they are just making business decision but

actually there is an agenda that they might not be aware of and that agenda may well be, State Capture. So, I just thought I'd mention this, I don't know if you would like to comment about this analysis?

MR BURGER: Chair other than I fully accept your point, yes, I take your point.

CHAIRPERSON: Okay, Mr Kennedy?

ADV KENNEDY SC: Thank you Chair. Now, you indicated earlier that you are quite prepared to accept accountability
10 if you've done something that may have been wrong, as you put it, I think you said, if you tripped yourself up or fell over your own feet, I think is the expression you used, then you're quite happy to acknowledge that and be accountable for that but it's unfair to tar you with a brush of being associated with State Capture or corruption or anything, if I understand you correctly, that's your point?

MR BURGER: One hundred percent, Chair.

ADV KENNEDY SC: Right, now you have also criticised, and I don't want to go into this in any detail, you've
20 criticised the media for playing along to an agenda of trying to attach State Capture corruption type allegations to what may be legitimately explained in another way. I'd like you to just touch on an aspect that I raised at the table end of Mr Sadik's evidence when you were present, and that is that he appeared on two television interviews and

he stated that certain actions taken were unlawful within Denel and that criminal charges and civil claims were being brought against certain individuals. Now, you have criticised him for that as defaming you and playing along with this overall wrong, as you would see it, of trying to dress up something that you say can, legitimately, be explained as if it were corruption, do you stand by that accusation?

MR BURGER: I do, Chair, to give context, that opinion
10 cannot be seen on its own merit. I attach a media article
in my second affidavit that was written in 2016, stating
various things that I've told colleagues which were
blatantly, blatantly untrue and I truly believe that is where
this image started and as a matter of fact, many witnesses
used that as a departure point for their opinion about me
and Chair, I don't know if we're going to get back to that
article but the fact of the matter is, if one takes cognisance
of Denel Asia and the BDO report, the accusation against
me was that I – the Board of Denel only approved the
20 concept of Denel Asia, I don't know when it was, but let's
say in December of 2015 and we – I started interacting
with potential clients or potential partners in September.
That is true, I did but I had no way of knowing what
decisions were taken in the Board and whether, indeed, the
Board took a resolution or not. I was given an instruction

that the Board did decide to enter into this opportunity, and we should start to see if there were any business opportunities. So - and based on that it is recommended that criminal and civil action is taken against me. It sounds unfair to me Chair I – it just does not make sense to me in any way or terms. So that is the reason for when it was then put to the – into the news that I was on the board that criminal civil action should be taken against me. I just thought it was unfair. And that is the long and the short of it

10 Chair.

ADV KENNEDY SC: Right thank you. Of course as the Chairperson has indicated he is keen as the Chairperson to hear evidence both as to whether there was state capture which would include allegations of corruption and wrongdoing and also evidence whether there was not state capture and corruption and particularly in relation to yourself and your own role and that is why we have asked you to come and give evidence.

20 Firstly to assist the Chairperson so that he can have all the facts before him before he writes his report and makes his findings and recommendations and submits them to the State President.

But secondly also to give you a chance as a matter of fairness to be able to put your version out and as I have indicated you have put in – you have helped the commission

with a very detailed and thorough main affidavit as well as a detailed supplementary affidavit and all of that will be taken into account.

The purpose of the hearing today is to hear you further in addition to what is down in writing so that you can give your own perspective and answer questions just as we have done in relation to the other witnesses.

MR BURGER: Thank you Chair.

ADV KENNEDY SC: Now Mr Burger.

10 **CHAIRPERSON:** Maybe I can just add this Mr Burger. I am particularly interested in hearing all those against whom there are serious allegations of involvement in state capture and corruption.

Firstly because my decisions and my findings would be much better if they were informed by all sides. But two to give them an opportunity to put their side of the story openly in a forum like this.

20 Even the Gupta's if they were willing I would have wanted to hear their side of the story. Indeed when I gave my judgment last year in their application for leave to cross-examine certain witnesses I made it clear that if they were to come back into the country I would give – I would have no hesitation in giving them an opportunity to cross-examine if they meet the requirements of the rules witnesses and to hear their side of the story.

So I just want to emphasise that throughout the idea has been we must hear all sides. But if there are serious allegations of corruption or involvement in state capture against you; against certain people I particularly want to hear their side of the story.

So that applies to you.

MR BURGER: Thank you Chair.

CHAIRPERSON: Okay.

ADV KENNEDY SC: Thank you. Chair may we just touch on
10 an issue to get that out of the way. Likewise before we deal with the meat of the – of these specific transactions and so forth. Mr Burger you have – you have raised your concern about the media.

You have also raised your concern about some of the witnesses as distorting the facts and playing to an overall agenda of trying to dress up problems as if they were all attributable to state capture and corruption whereas in fact there were legitimate reasons.

We have dealt with that and the Chairperson has
20 given you the assurance that he wants to hear your evidence and it is important that he does to hear everything.

You have also criticised the investigating team of the commission and particularly an individual investigator and you have alleged that you have a – had – or have a perception that there was not a complete neutrality on the

part of the investigator and you felt that he acted inappropriately and in an intimidating way.

Now what I am going to suggest to you but subject to the guidance of the Chair is this. The Chair has already requested he has conveyed to me that the investigator concerned provide a proper affidavit to deal properly and seriously with all the allegations that you have made against him personally and we are still awaiting the affidavit. We have been told it is on the way.

10 I do not have anything though to put to you at this stage as to his – his version but may I say this subject to the Chair's guidance because ultimately it is – it is for his decision as to how this – this sort of matter as with everything needs to be handled.

What I can give you is an undertaking as the legal team subject to the direction of the Chair is that once that affidavit comes to hand that will be furnished to you and your legal team and you will then have an opportunity to respond to that by way of affidavit and if the Chair considers it
20 appropriate in the interest of fairness and transparency to hold – to give you a further opportunity to give oral evidence in that regard and that is also for the investigator to give oral evidence. That will be something that the Chair will consider and decide once that process of affidavits has been undertaken.

MR BURGER: Thank you Chair.

ADV KENNEDY SC: Would you be comfortable with that approach?

MR BURGER: Very comfortable.

ADV KENNEDY SC: Thank you Chair.

CHAIRPERSON: And I do want to say Mr Burger there is nothing wrong you have done by raising your concerns about a member of the investigation team in terms of how you felt treated. So we will look into those concerns.

10 **MR BURGER**: Thank you Chair.

CHAIRPERSON: Okay.

ADV KENNEDY SC: May I also in case there is any question mark about it may I also on behalf of our legal team dealing with the Denel stream just convey to you our assurance that we have been appointed and in fact have taken an oath before the Deputy Chief Justice to act impartially and honestly and lawfully and we have no agenda in this matter at all and we are also concerned just as the learned Chairperson has indicated that he is concerned we are
20 concerned that everybody gets a fair opportunity to be heard and give their perspective.

That is why we have been – we have asked you to come today and have allocated some considerable time for you in the – in the midst of a very busy schedule with many witnesses to give you that opportunity which you are fully

entitled to use now.

MR BURGER: I truly appreciate Chair thank you very much.

ADV KENNEDY SC: Are you happy to proceed on that basis?

MR BURGER: Happy to proceed.

ADV KENNEDY SC: Right thank you very much. Now you have referred in your affidavit particularly from page 618 to what you call a general background and I would like to just pick up a thread which you touched on earlier and that is the
10 – the achievements that you made while at Denel particularly and DLS.

The success as you see it of DLS and then you deal on from page 619 with the present status of Denel as a business and you have referred to your perspective as to why Denel – as to what extent Denel is suffering – has been suffering serious financial and other issues and what you attribute that to.

Would you just in brief terms please summarise your overall evidence in that regard?

20 **MR BURGER**: Yes Chair. The – the problems with Denel started in the early 2000 and it started after also Denel Land Systems were very successful in promoting an artillery system in India.

It went through three iterations of demonstration and with each iteration the gun had to be upgraded and modified

because it was a unique system for India.

The negotiating a deal in India is extraordinary difficult as one might imagine. We got to the point where this deal was negotiated, agreed, the contract was signed by South Africa – on South African side and it was for 280 artillery systems. Today artillery systems costs about 5.5 million Dollars. So with all the support, equipment it is – in today's rand value about R30 billion. The biggest contract one can imagine.

10 A single newspaper article appeared around 2003 I think it was thereabouts – maybe 2 where – where Denel in South Africa – where Denel was accused of wrongdoing and illegally using technical advisors.

 Now I am cognisant of the time but this is – it is extremely important point because at that – at that time India was in the middle of general elections. Sonia Gandhi was about to be the new Prime Minister of India and there was a Minister of Defence his name was George Fernandes and when that article appeared in the papers it was like throwing
20 petrol on a political time bomb. And that was used as part of various allegations against Mr George Fernandes because he was opposing Ms Sonia Gandhi in her campaign to with the contract – to win the elections.

 She subsequently was – became the Prime Minister and Denel was labelled as corrupt. It was treated as being

blacklisted. It never by the way was proven that there black – well they were never officially blacklisted but they were treated the whole time and nothing was ever proven. There was no wrongdoing found and here 12/13 years later the ban is lifted.

That – that single newspaper article in my mind almost broke Denel. It was necessary for government to give a bailout and then it started to rebuild itself.

But in principle that was the biggest financial blow
10 because we had contracts ammunition and anti-material
weapon contracts which were cancelled and R30 billion
worth of business never materialised – it never happened.

So that is in my mind where the problems started with Denel. I – if I can then continue to – when after that happened the – the idea was to save Denel by decentralising the business. Getting equity partners from abroad and continue their [00:13:31]. And I personally felt that was the way to go for Denel and that is when the RDN deal happened with Rheinmetall buying into the ammunition plant and that is
20 when VAE systems the very same VAE systems which we talk later on about also made an offer to purchase DLS.

And I can later get to that point. But what I thought was that was the right direction for Denel to go. And Denel on the back of that structure Denel started going forward and started building the foundation for a good business. Getting

the accountabilities at the right position, getting quick decision making and moving forward.

And that was for me the foundation of the growth everybody talks about in 2015/16 that happened 14. That is when the foundations happened. Later on in the timeframe of when Mr Saloojee joined Denel that strategy was stopped. The idea of selling equity, the idea of having decentralised decision making, decentralised accountability and more centralised decision making were taken and I go into my
10 affidavit about the problems with decentr... – with centralised decision making.

Now I was never really in favour of centralised decision making because of how complex and how vastly different the processes, the clients, the technologies and so on of the different divisions were.

There were certain divisions that were similar and I said those divisions should be put together. But I was always a supporter of decentralised accountability and decision making.

20 But I have also said that if you want to centralise the business no problem. Centralise the business. Centralise decision making but then please also centralise accountability. You cannot have centralised decision making and decentralised accountability.

And I talk about that process and that is – that was

my concern then with the direction the management was going. It is very interesting and I listened to Mr Sadik this morning. It is very interesting to note that what I have now said throughout this affidavit a year ago is exactly what Denel decided to do. Is now to go with decentralised decision making, decentralised accountability. Decentralised cash flow management even. And I believe that is the only way. It is a little bit late for them to make that decision but that I believe was the right decision. That was for me the
10 whole decentralised – decentralisation model.

ADV KENNEDY SC: Sorry before you move on from that. I am sorry to interrupt but it seems to be relevant for me to raise this. I can understand your frustration with an approach that did not equate with what you saw as the best business model. The best business model in your view was decentralisation. In other words there would be a strong level of independence as it were of you as the Head of DLS to be able to take decisions and so forth without having to be – to get approval from head office or be overridden by them.

20 Is that right? That was [00:17:27]

MR BURGER: Correct Chair. But it was not an ego thing. It was – Denel Land Systems were exporting 80% of its business. It was competing against other suppliers that were in the private industry but which had very strong governmental support in terms of marketing and financially.

And we had to compete with them and we had to export – or we were exporting about 80% of our revenue. So to compete in that arena.

ADV KENNEDY SC: Yes.

MR BURGER: You have got to be quick on your feet. You cannot have a big bureaucracy which takes forever to take decisions and a big centralised model does unfortunately do that. But that was not my criticism.

My criticism really was about if you want to centralise
10 then also take the accountability.

ADV KENNEDY SC: I understand your approach and I understand your point that – that you felt that there was a lot of advantage to decentralise so that you can be nimble and quick and so forth.

MR BURGER: Correct.

ADV KENNEDY SC: What I just want to ask you though is this. You say that your understanding and Mr Sadik's evidence suggests that Denel have actually eventually after you went – after you left have come round to your way of
20 thinking to decentralise.

What I just want you to confirm though is that the time that you were at DLS as a CEO particularly around 2014 to 2016 when many of these transactions took place it was still relatively centralised and you – and in terms of the company policies, the group policies and so forth you still

had to get approval. You were - find that frustrating not so? But you still did – you were still subject to a policy and rules and regulations and processes, correct?

MR BURGER: Correct.

ADV KENNEDY SC: And you were frustrated by that?

MR BURGER: I was?

ADV KENNEDY SC: Yes.

MR BURGER: I was but those were the rules and we played by those rules. No problem.

10 o problem.

ADV KENNEDY SC: That – so I – we going to deal later with whether you did play by the rules and if you did not play by the rules whether you accept accountability for that and so forth. We will give you a full opportunity on that.

MR BURGER: Sure.

ADV KENNEDY SC: But are we in agreement then that you accepted that the more centralised model was then enforced and that applied to you whether you liked it or not.

MR BURGER: Correct. And I was not ignoring the model.

20 **ADV KENNEDY SC**: Yes.

MR BURGER: Not in – Chair sorry I just need to add. This centralisation did not happen in one go from one day to the next. It was a gradual process that started in 2013 that were running at a fairly efficient way in about – in 2015 and from 2015 to 2018 when I left – when I left it just was at a point

where no decisions were my decisions anymore. And I recorded that it was untenable.

I went through a period of eight months of saying I cannot work under those conditions and I left the company – I resigned under the auspices of a constructive dismissal. It was for me impossible to operate in – and be held accountable and that is the reason. And it was a process of eight months from where I started to say it is impossible to work like this to where I eventually just left.

10 **ADV KENNEDY SC:** Thank you I apologised earlier for having interrupted you because I thought it was an important question I had to raise. Is there anything else that you want to add?

MR BURGER: Sorry, sorry, sorry on the problems?

ADV KENNEDY SC: On the overall problems.

MR BURGER: Yes there is just....

ADV KENNEDY SC: Can I ask you please if you would – if you would just please be very brief because obviously the commission's time is limited and it needs to focus on in
20 considerable detail later.

MR BURGER: Okay.

ADV KENNEDY SC: On some of the individual transactions.

MR BURGER: I will do that.

ADV KENNEDY SC: Thank you.

MR BURGER: Okay I am not going to go into the very

conservative and lack of decision making which just stifled the program is the whole – the whole bundle on that. I just want to – I just want to mention the LSASA deal which I – which probably is not such a big issue Chair but it is the proverbial straw that in my mind broke the camel's back from a cash flow perspective.

ADV KENNEDY SC: Again with apologies to interrupt your flow but page 629 is where you deal with what you refer to the disaster of the LSSA acquisition.

10 **MR BURGER:** Correct.

ADV KENNEDY SC: Alright just summarise very briefly why you call it a disaster and why you feel it was significant?

MR BURGER: Chair in my mind I was part of the acquisition – the proposed acquisition of BAE wanting the buy Denel Land Systems. Denel Land Systems at the time had very strong, very huge – big opportunities but it lacked orders. It did not have orders a couple of 100 million probably and I was part of the team that negotiated with BAE and they were very hard negotiators and they said you know you cannot
20 expect us to pay anything for this company for a majority share if you have not got orders.

Orders determine the value of the company and they quoted the phrase 'a business without any business is not a business.' And they offered more or less nothing for that business but what they offered was we going to give you new

business structures, we going to put people in place that can make this place profitable and we will make sure you will get orders. We will turn the company around. The decision was taken not to go there because the – I think the political appetite at that stage for selling shares stopped.

However when Denel approached BAE Systems for the acquisition of LSSA I was part of that in [00:24:08]. I thought they had no orders. Then why would you pay anything unless it is for strategic value for a company with
10 no orders or they had a R100 odd million orders and they needed about a billion per year to sustain.

So my proposal was in recollection of what happened in the past with BAE Systems offer them very little. I – it then so happened that I was not part of the team and it was bought for R855 million. In my view it was too much. In my personal view one can do due diligences, they evaluate the strategic value of the IP whatever the case may be but it did not have orders. And I thought it was too much.

Ms Martie Janse van Rensburg gave evidence that
20 said but they had a plan to sell half of those shares for R450 million and they were far progressed with getting potential partners in. Now at the end of the day the best potential partner there was was for R224 million for half of the company. And for that reason I say they paid firstly too much for the business. It could have at best been double

the 224 the value of the company.

Secondly Denel did not have money and I only found out when I read Mr Sadik's affidavit that the Hoefyster pre-payments were used to finance this deal. And no wonder were suffering so much at the time to make ends meet.

So Chair not to go in too deep into this I thought it was the timing was wrong to buy this – the place for – from a financial perspective the amount that was paid was too much and it turned in my opinion it was a disaster and it broke the
10 camel's back in terms of cash flow management.

And from that point onwards really nothing happened in Denel anymore because all we were doing is speak to suppliers to beg them please stay with us we cannot pay you.

ADV KENNEDY SC: Now I would like you to – I would like to take you back to a remark you made earlier which was to say it is wrong and unfair to criticise you for any involvement in state capture and state capture was not the real thing – the real reason for the difficulties and that you can be held
20 accountable if you have slipped – tripped yourself up in relation to compliance and so forth. You prepared to be accountable on that but not to be accountable if you had to be criticised for being involved in anything corrupt or anything involved in state capture.

MR BURGER: Correct Chair.

ADV KENNEDY SC: Now the first part of that I would like to peruse with you. To your credit you say you will be prepared to be accountable for anything that may have done wrongly if you had tripped yourself up in relation to compliance of processes.

As I understand it though your overall points that is apparent from the affidavit is that that was done with the best – if there was anything done at all that may have been not in compliance with processes throughout you had a
10 genuine and good faith intent to advance the interests of Denel's business and nobody else.

MR BURGER: Correct Chair.

ADV KENNEDY SC: Right. Now you have been following the evidence as one would expect of the commission in fact you mentioned to me when we greeted this morning that you like we had been up till fairly late last night. You had seen in the media coverage of the proceedings that we finished around about 9:30 last night you mentioned that and – so that is to your credit that you have been following with
20 interest the evidence of other witnesses.

You no doubt have heard Mr Burger and you have also been sent these Rule 3.3 Notices to indicate that the commission wanted you to give your answer to some of the things that had been said about you and the processes by other witnesses.

You no doubt are aware that other witnesses not all some have defended you but others have criticised you or your processes. You are aware that there has been evidence in the spotlight before the commission that processes were not always followed correctly.

Now I want you before we look at the detail of individual transactions just to indicate so we can know up front what your overall attitude is. Do you in fact say to the Chairperson of the commission now that everything you did
10 in relation to every process for every transaction was actually compliant with every rule and requirement and regulation or do you say at least with the benefit of hindsight I acknowledge that I may have or I did breach any particular – some particular rule or whatever and I can explain how that came about. Which one is it?

MR BURGER: The second one Chair.

ADV KENNEDY SC: Right.

MR BURGER: But I want to add the at the time we took the decision, I was not aware that I was transgressing any policy
20 or National Treasury Regulation. As time went on, I got to realise: *Oeps*, we might have done something wrong here in terms of processes.

But at the time, it was not purposefully done to circumvent the process. It was done in good faith at the time and...

But your second point, that I do acknowledge, having listened to everybody that things should have been done differently.

ADV KENNEDY SC: Yes. Could you just identify if you are able to, without going into detail, what specifically you – what transaction you specifically acknowledge was not done correctly?

And I accept your point, the qualification that you have added that if you breached anything, you did not do it
10 intentionally.

Now that is a separate question the Commission may or may not want to deal with that and make findings on that. But what is your own version as to what you may unintentionally have breached? For which transactions are we talking?

MR BURGER: I think ...[intervenes]

CHAIRPERSON: Or maybe, let me add this to what Mr Kennedy says. If you are able to, you might deal with this like in two or three categories. You might say, having
20 heard some of the evidence that has been led before the Commission and maybe having read some investigation reports about things that happened at Denel.

I have been able to identify the following transactions in which I was involved where I accept that we did not do things correctly or I was, I did not do things correctly.

It is this one. It is that one. It is that one. And this is where I think we went wrong. Then there may be a category where you are not sure.

To say, there are these – there is category of transactions where I accept that we may have been wrong but I have not reached a point where I say we were wrong or I was wrong.

And then there may be a third category where you say. On these ones, my position is clear that I say those were in
10 order. I did not do anything wrong. We did not do anything wrong.

So if you are able to do them like that, that would be very helpful but I accept that might not be possible, in which case, you just do the best that you can.

MR BURGER: Let me try and play it as it goes Chair, if you do not mind?

CHAIRPERSON: Yes-no, that is fine. Ja.

MR BURGER: Let me start off with the first one and that was the whole deal and I hope we can get to the reason
20 behind the whole deal Chair. But at that time, I...

CHAIRPERSON: Which is that one now?

MR BURGER: The hull deal, the Hoefyster Hulls.

CHAIRPERSON: Oh, yes. Oh, yes.

MR BURGER: The Hoefyster Hulls in 2014.

CHAIRPERSON: Ja.

ADV KENNEDY SC: I am sorry to interrupt you. That is the Platform Hulls?

MR BURGER: The Platform Hulls, yes.

ADV KENNEDY SC: For the armoured vehicles?

MR BURGER: Correct, Chair.

CHAIRPERSON: Yes, yes, yes.

ADV KENNEDY SC: Was that not always called a badger, is that right?

MR BURGER: It is a badger.

10 **ADV KENNEDY SC:** Right.

MR BURGER: Or the product name, Hoefyster. It was the project name.

ADV KENNEDY SC: Right.

MR BURGER: So it is the same thing. At the time we went out into multi tender. The allegation today is, we should have gone out to open tender. Chair, I still maintain today that in the defence industry with confidentiality issues, with the IT issues and so on.

20 It is very difficult, extremely difficult, if not impossible, to take something like that to the open market and publish it and says, there is a drawing. Anybody wants to quote, quote on that.

How it worked is, we had something what we called LIW-100. So if you are – and for you to be able to tender on something, you first have to be an accepted potential

supplier, you have to sign these LIW-100's. It is a whole lot of confidentiality agreements and so.

And then you – then only can you get the drawings and you get sign it. So I ...[intervenes]

ADV KENNEDY SC: Mr Burger, I am sorry to interrupt. And again, I do not mean to be rude. May I suggest, so we can just bring some sort of structure to the evidence and interest of time and focus that you start with you identifying for each of the transactions, whether you say, following the
10 Chairperson's guidance as to which category it is.

For example, when you deal with the whole contract that was awarded by DLS to VR Laser, you say that nothing was done wrong or that you acknowledge that something was done wrong or do you say in the middle category, I am not sure?

Can we just identify transaction by transaction? And then we can go into detail. Because may I just suggest to you why it may be in the interest of yourself, avoiding lengthy evidence and questioning from me and so forth.

20 If at the end of a long section that you may say, at the end, to the Chairperson, in fact, I acknowledge that this was wrong. Then I do not need to go through the long process of putting to you various documents and saying is this correct or not.

If you say, I agree and I accept that unintentionally I did

something, then at least we know that. If, on the other hand, you say that particular contract was awarded. Absolutely, it was squeaky clean. There is nothing to accept was irregular. Then we know that that may require a bit more detail.

If there is something in the middle category, then we know that too. So if you do not mind, subject to the guidance of the Chair, I would like to start with that and then we are going to go into deal with each contract to the extent
10 that we need to.

MR BURGER: Okay.

ADV KENNEDY SC: Was there in relation to the Hoefyster Platform Hulls Contract – what is the bottom-line there? Do you accept that there was anything wrong about it or that there was nothing wrong about it or you are not sure?

MR BURGER: I will give a little bit more detail. I think when it came to the whole evaluation, my opinion was the fact that we went out on multi-tender and not open tender, I do not think there was anything wrong with that. I could not
20 see any other way of doing that.

ADV KENNEDY SC: So that is for the request for office? The three suppliers being asked to ...[intervenes]

MR BURGER: The three ...[intervenes]

ADV KENNEDY SC: ...to submit bids.

MR BURGER: The three suppliers ...[intervenes]

ADV KENNEDY SC: Instead of asking the entire nation, an advertisement in the ...[intervenes]

MR BURGER: Exactly.

ADV KENNEDY SC: Right. So that was acceptable, you say?

MR BURGER: That I think was correct. Through that process – you are going to get there – but I did inform VR Laser that their price is ridiculous. They are not serious about business, you know.

10 And they did submit an unsolicited offer, at the time I did not have group approval. It was – it went through the process. It was decided but I thought at the time, that is the only way to reduce the price but I do accept that that should not have been done.

But if I did not do that, the price would not have been acceptable. I am sure of that. So I accept that that was wrong.

When it comes the Single Source Agreement. I, and I hope, just to state, that I – as time went on, I started
20 realising the process given the new legislation and the new policies at Denel, the process was not hundred percent correct.

Only recently, I started realising that there could have even been a legislative issue but at the time, I did not know that at all. So those were the only two, I think, were really

substantial to talk about.

ADV KENNEDY SC: The Denel Asia Project and transaction?

MR BURGER: I do not know. I was not involved Chair in the decision, in the motivation thereof, in the logic thereof and in the final application. My legal person did support head office to write papers but I was not intimately involved in that. So I do not know. I do not know.

ADV KENNEDY SC: Alright. Let us – and there are some
10 other transaction we may have to come back to but I agree that these are the primary area of focus as will be apparent from the evidence that the Chair and you have already heard from other witnesses.

So let us go back to the Platform Hulls deal. That related to 217 or perhaps a few less than of these particular armoured vehicles and that was a contract supplied by...

Sorry, those were products to be supplied by VR Laser to DLS. Is that correct?

MR BURGER: That is correct, Chair.

20 **ADV KENNEDY SC:** Right. And you have indicated that you feel that there was nothing irregular about going out for simple three bidders rather than going out into the open marketplace. And you have said that you have explained the reason that the defence industry is not appropriate to go out with this sort of product in an open tender process. Now

...[intervenes]

MR BURGER: That is correct, Chair.

ADV KENNEDY SC: Now there are different schools of thought about that and there could be a debate about that from a legal point of view. I am not going to spend any time on that with you.

CHAIRPERSON: Sorry, Mr Kennedy. But I do want him to enlighten me on his thinking with regard to what he has said, namely in the defence industry you cannot invite the whole
10 world.

Is the question not whether the Supply Chain Policy, the procurement policy, whether it allows you to do that or not?

In other words, if the procurement policy does not do what you think is the way this thing should be done, you are not free to do things your own way. You must comply with the rules.

So, is the question not whether it was permitted to do it that way, namely just go for certain quotations from certain identified suppliers or whether it was not permitted?

20 **MR BURGER**: Point taken, Chair.

CHAIRPERSON: Yes.

MR BURGER: You are right. But in my mind, the Denel Procurement Policies allowed for multi-tender and not for open tender. So in my mind, it was allowed. Whether that was constitutionally correct, that is another matter.

CHAIRPERSON: Yes.

MR BURGER: And I cannot comment on that.

CHAIRPERSON: Yes, yes.

MR BURGER: But in my mind, it was from a Denel perspective allowed.

CHAIRPERSON: Okay. I take it that you – that must mean you did have – you have had a look at Denel’s policy and there is something there that made you think it is allowed. So in other words, you can point me to specific areas in the
10 policy to say, this is what made me think this was allowed. Or are you basing it on practise?

Because I just need to know whether your view that it was allowed is based on you having applied your mind to the policy and seen something that you interpreted as allowing this.

Or whether it is because you know of a certain practise at Denel that things were done in this way and that gave you the impression that it was allowed, which may not necessarily be what the policy said.

20 **MR BURGER**: Chair, I did not study the policy to that effect to be an expert on exactly what it says. It was my perception based on how things were done and who complaint and who did not complain. So that was my opinion at the time.

CHAIRPERSON: With regard to that answer. It also

becomes important to establish whether there was a practise in which this is – things were done this way and that is part of what may have influenced your view.

Or whether there was no practise of doing things that way but in your own thinking, maybe because this was the defence industry and it has certain dynamics.

Based on your own thinking you though there should be nothing wrong with doing things this way. Which one is it?

MR BURGER: Chair, I based my opinion, then and now, on
10 the fact that we should have gone out on multi-tenders. Whenever we went out on multi-tender, it was accepted by all.

And if we do not go out on multi-tender and went for single source, there needed to be very compelling reasons and/or a single source agreement or whatever the case may be.

But that is from my perspective and speaking for myself, was influenced by how it was done and the advice I was given and not sitting down and studying the policy myself.
20 That I did not do.

CHAIRPERSON: Okay alright. Thank you.

ADV KENNEDY SC: If I can take you Mr Burger to the actual SCM Policy of Denel. Just put aside for a moment the file that contains your affidavit. And if you just refer to the box behind you of volumes? If you can please look for Denel

Bundle 1?

MR BURGER: [Speaker away from microphone – unclear]

CHAIRPERSON: Mr Kennedy, I do not know whether it might be a good idea to adjourn and you direct him to whatever you want him to read.

ADV KENNEDY SC: Thank you.

CHAIRPERSON: And then he can read it during the lunch break.

ADV KENNEDY SC: Thank you, Chair.

10 **CHAIRPERSON:** And when we come back, he knows exactly. Is that fine?

ADV KENNEDY SC: I am happy to do that Chair.

CHAIRPERSON: Then let us do it that way. It is about half a minute to one. So we will resume at two.

ADV KENNEDY SC: Thank you, Chair.

CHAIRPERSON: We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Let us continue.

20 **ADV KENNEDY SC:** Thank you, Chair. Chair, during the lunch adjournment I drew the attention of Mr Burger to two versions of the procurement policy of Denel. Mr Burger, do you have available there the first bundle, bundle 1?

MR BURGER: I do have, Chair.

ADV KENNEDY SC: I referred you first to page 735.

MR BURGER: I have got it, Chair.

ADV KENNEDY SC: And that is the company policy on procurement of - the effective date you will see on page 735, the 25 August 2008 and the other one that I drew your attention to is at page – in the same bundle, page 827.

MR BURGER: I have got it, Chair.

ADV KENNEDY SC: That seems to be the next version of the supply chain management policy that became – that was effective from 19 November 2014.

10 **MR BURGER:** That is correct, Chair.

ADV KENNEDY SC: Now, I as I understand it, the second policy coming into effect only in November 2014 did not apply to the procurement of the platform hulls that took place earlier in 2014, is that correct?

MR BURGER: That is correct, Chair.

ADV KENNEDY SC: So if we go back to page 735 it seems to me that there was nothing too specific as to whether it should be a public tender, an open tender advertised in the media for anybody and everybody to
20 tender ...[intervenes]

CHAIRPERSON: One second, Mr Kennedy, I have not got yet where you are.

ADV KENNEDY SC: Page 735, bundle 1.

CHAIRPERSON: Is it in another bundle, not the one that has got ...[intervenes]

ADV KENNEDY SC: I am sorry, Chair, I indicated it is bundle 1.

CHAIRPERSON: Ja.

ADV KENNEDY SC: Perhaps your registrar has not – does not have it. It looks like he is still trying to find it. I beg your pardon, Chair, I did not notice.

CHAIRPERSON: No, that is fine.

ADV KENNEDY SC: So, Mr Burger, are we agreed that the policy at page 735 is the one that applied at the time?

10 **MR BURGER:** That is correct, Chair.

ADV KENNEDY SC: That is at the time of the platform hull contract and it appears to us that there was nothing specific to say whether you had to go out on a publicly advertised tender, an open tender or whether three quotes in an RFQ process was required.

MR BURGER: That is correct, Chair.

ADV KENNEDY SC: Right. Now you made an important point ...[intervenes]

20 **CHAIRPERSON:** Are you able to tell me which particular clause or clauses appear to be the relevant ones?

ADV KENNEDY SC: With respect, there does not appear to be anything that deals with ...[intervenes]

CHAIRPERSON: Oh, is there nothing that talks about how tenders are supposed to be handled?

ADV KENNEDY SC: No, not in this ...[intervenes]

CHAIRPERSON: Not on this one.

ADV KENNEDY SC: No.

CHAIRPERSON: Oh.

ADV KENNEDY SC: In the later version there is but that was not applicable at the time.

CHAIRPERSON: Oh, okay.

ADV KENNEDY SC: Now Mr Burger you made an important point earlier that, of course, you cannot say whether this particular policy or any of the policies of
10 Denel necessarily, as you put it, complied with the Constitution and presumably also you mean with the PFMA and the Treasury regulations, is that right?

MR BURGER: That is right, Chair.

ADV KENNEDY SC: That is not your area of expertise, you have areas of expertise elsewhere and presumably you would rely on your colleagues at Denel to ensure your supply chain management colleagues and your finance colleagues, etcetera, to deal with that.

MR BURGER: If I may add, Chair, we also had our own
20 legal department and these were collective decisions.

ADV KENNEDY SC: Sorry, these were?

MR BURGER: Collective decisions.

ADV KENNEDY SC: Right.

CHAIRPERSON: Well, you see, my expectation is that people who occupy positions within the public service,

SOEs, government departments, from a certain level of seniority they would at least have an idea of what kind of legislation or regulations apply to their business or to what they have to do. They might not be experts or specialists but they would have some idea and would know who to consult if they were not sure or if they wanted to know what the position is. That is, to consult somebody some people like those who are in the supply chain management department in the organisation or the legal department in
10 the organisation or even outside, lawyers, you know, where it is deemed necessary.

Now I would have expected that somebody occupying the position of CEO in DLS, such as yourself, would have an idea that well, PFMA or maybe even Treasury instructions, you know, this is what it says but whether it – how and when it applies in certain situations you might need advice from the experts or specialist but I would expect that you would have an idea. Is that an unfair expectation?

20 **MR BURGER:** Chair, it is not an unfair expectation at all. I think you are right. The problem here, however, was that this was in a transition period, things – the National Treasury and its relations changed and we were running at 300 kilometres an hour and in all honesty, that was not the focus of a person like me but your point that a person

working in an SOC should have a fair opinion, I have got no argument about that, I think it is a fair comment.

CHAIRPERSON: Yes. And I would think that by, you know, 2010, 2014 that would have been a period by which particular people at certain senior positions in SOEs would know that there are always issues about compliance with PFMA and procurement policies and so on in regard to government departments and SOEs so that they would be, I would think, much more careful to say, you know, we do not
10 want to do anything wrong, therefore, if we are not sure, let us call in supply chain management people or legal department, tell us, are we going the right direction, are we are not going to be in breach of anything? That would be also another expectation I would have. What would you say about that part of the expectation?

MR BURGER: Chair, I repeat, your comments are valid but we were running not a department, we are running a business.

CHAIRPERSON: Yes.

20 **MR BURGER:** And in all honesty, the fires ...[intervenes]

CHAIRPERSON: The focus was ...[intervenes]

MR BURGER: Ja, the focus was on different areas.

CHAIRPERSON: Yes.

MR BURGER: Try to deliver the – to get an order, to keep the client satisfied and so on.

CHAIRPERSON: Yes.

MR BURGER: Those were the issues that kept me awake at night.

CHAIRPERSON: Yes. Yes, yes.

MR BURGER: It was not procurement policy.

CHAIRPERSON: Yes, ja.

MR BURGER: And I understand it is wrong, I understand that.

CHAIRPERSON: Yes, yes.

10 **MR BURGER:** But that was not my focus.

CHAIRPERSON: Ja. Okay, alright. Thank you. Mr Kennedy? Switch on your mic, Mr Kennedy. Ja.

ADV KENNEDY SC: I am sorry, Chair. I understand your concern that things were going - were having to move fast and one of your objectives from a business point of view to develop the business of Denel and advance the interests of its shareholder was to achieve business opportunities not lose them and not get bogged down. But would you accept that it still had to be done lawfully?

20 **MR BURGER:** I do, Chair.

ADV KENNEDY SC: Yes.

MR BURGER: I do.

ADV KENNEDY SC: Now – so, if I may, I would like to move away from the issue as to whether it was appropriate for you to go out for more than just the three bids that

were invited. You indicated that you feel with the benefit of hindsight and having hear the other witnesses that it was inappropriate for you to have conducted negotiations with VR Laser after it submitted its price to negotiate a reduction in the price, is that correct?

MR BURGER: I accept that under rules it was incorrect.

ADV KENNEDY SC: Yes. Now have you heard the evidence and seen the documents that show that when the RFQ process was followed and the quotations or the bids
10 were received from the three entities, the two of particular relevance, being VR Laser and LMT, were very far apart. The cost of the items in question that LMT was bidding for would have involved approximately 150 million, is that correct?

MR BURGER: I cannot recall, I thought it was a little bit higher than 150, but I will not argue.

ADV KENNEDY SC: And the amount for VR Laser was approximately 260 million.

MR BURGER: Correct, Chair.

20 **ADV KENNEDY SC:** Yes. And we will look at, in a moment, at the memorandums that came from Ms Malahlela's office but what was then decided, as I understand it, by your management committee at the regional level, the DLS level, was that you should approach VR Laser to negotiate a reduction in price, is that

right?

MR BURGER: Not exactly correct, Chair. What happened was – and I accept by saying this that we are going to get to the point why I was so adamant about VR Laser but accepting that for a moment, I was approached by both Mr Reenen Teubes and Ms Malahlela to say – and at that time both of them supported VR Laser. They however said that the price is a real problem for the budget. My question was, did they win the competition fairly and squarely
10 regardless of the price and they said yes and I said well, leave it to me, I will see what I can do.

So it was not an initiative that came from me, it was an initiative that said this is the preferred supplier, the price is high and what I then did is I did not get in my car take people and drove there and go and sit down and negotiate. Originally it was so unimportant that I did not even really remembered it but hearing all the evidence, I recollect that I phoned VR Laser and I cannot remember my words but I said something to the effect of you are
20 obviously not serious about doing business with us, I mean, your price is ridiculous, goodbye.

That was the extent of my negotiation. So I was hoping, I must be honest with you, I was hoping that they will see the light and do something proper and get – and what subsequently happened was they did solicit another

proposal.

Chair, at the time I was convinced if I did not take the opportunity then and if I waited until after the process was completed and everybody that was involved said no, it is okay, let us contract VR Laser, that they would have known about that long before it. It is just how people talk too much. And I would have had no basis of negotiating a proper price. The price was unacceptable.

So the policy – and I did not know it then because
10 what I thought at the time was because they were the number one supplier, I had the right - and I thought they were going to win and I had the right, they were the recommended one, to negotiate with them. But I did not negotiate, I just said your price is ridiculous and that formed the basis to negotiate later on. I had - as a matter of fact, it is not that I even argued with Ms Malahlela about not putting that, I supported it, to not in the motivation put the reduced price in. But if we did not do that, Chair, there
20 Why would they if they knew that they were going to get the work?

So that was the reasoning but I accept that policy states first award, then negotiate, I understand that.

CHAIRPERSON: So would it be correct to say you accept that you may have or you did do something that was not

appropriate but you believe that ultimately you were doing it for the good of Denel?

MR BURGER: We saved millions of that single phone call, Chair. So I truly believe that. I still believe that if I did not do that, the price would have been much more. So I honestly believed it was for the best of Denel.

CHAIRPERSON: Well, of course the whole framework, if one uses the procurement processes, they are meant to ultimately achieve what is in the interests of the company, working within the framework and not outside. And not
10 outside, so you accept that?

MR BURGER: I understood. I understood, Chair.

CHAIRPERSON: Yes, yes.

MR BURGER: I am not arguing.

CHAIRPERSON: And that there is a reason for, so to speak, banning any outside role other than within the framework. In other words, the framework, what did the company expect? Is that all role players will work within the framework and not outside and it would discourage
20 anybody from going outside to say whatever your suspicions or whatever, work within the framework because those who have put the framework together believe that that is the best way of handling these matters. You would accept that?

MR BURGER: I will accept that, Chair.

CHAIRPERSON: Yes.

MR BURGER: But I want to add that when we had that discussion – and I said let me do something about this, I will try outside the procurement policy, nobody said oi, you cannot do this.

CHAIRPERSON: Yes.

MR BURGER: This is a problem.

CHAIRPERSON: Yes.

MR BURGER: Everybody around that table wanted to see
10 the price reduced, so and - but your point is taken, Chair, one hundred percent, no argument.

CHAIRPERSON: Yes, Mr Kennedy?

ADV KENNEDY SC: Thank you, Chair. I want to go back to a point that the learned Chair raised with you earlier and that is what is expected of a CEO such as yourself at DLS. Let us accept for a moment that your colleagues also wanted VR Laser and let us accept for a moment that nobody raised any objection to your going to negotiate and let us accept for a moment that you were simply genuinely
20 wanting to benefit Denel by getting a reduction in price, surely as part of your functions and responsibilities and duties as CEO, was not simply to get the best price for Denel but also to comply with the rules, the law and the rules internally within Denel as to how prices would be achieved and they were to be achieved in terms of

prescribe procedure. Now whether you liked the rules or not, you were bound by those procedures, not so?

MR BURGER: Chair, I have conceded to this point, yes.

ADV KENNEDY SC: Yes, yes. It just seems to me, Mr Burger, is that it may have been irresponsible of you not to go – sorry, to go ahead and negotiate with them when in fact the rules did not permit it, as you now acknowledge. Why did you not take the trouble to find out the rules beforehand or ask people who might have had a bit more
10 expertise, for example Ms Malahlela or Mr Mlambo at head office level?

MR BURGER: I repeat, Ms Malahlela was in that meeting. When I made that phone call I did not believe that I was transgressing at the time. I can now see by the – but at the time...

ADV KENNEDY SC: Yes.

MR BURGER: And, Chair, yes, I have conceded to that point, I should have taken the trouble.

CHAIRPERSON: Yes, yes.

20 **ADV KENNEDY SC:** Now one of the problems was that you had a limited budget for these items, not so?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Can you recall what that budget was?

MR BURGER: I cannot recall exactly, it was around a million rand per hull.

ADV KENNEDY SC: A million rand per hull and there were about 200 of them, so it was about 200 million. In fact that is roughly the figure as we have seen in earlier evidence.

MR BURGER: Correct.

ADV KENNEDY SC: Now was there not also another issue that you had to consider and that is in terms of the delegation of authority, you only had authority up to a certain point, not so?

MR BURGER: Correct, Chair.

10 **ADV KENNEDY SC:** At divisional level. You may have wanted a lot more because of the decentralisation advantages that you have argued for earlier before the Chair but you had to live with the fact that the delegation of authority then limited your authority, not so?

MR BURGER: Correct, Chair, but I did not have a problem with the delegations at that point. I was not complaining about the delegation.

ADV KENNEDY SC: Okay, just hear me out, if you would? Now, as it happens, the limit of authority in relation to a
20 contract of this sort of order, in fact there was a difference between contracts under 200 million and contracts of or above 200 million and in the case of contracts above 200 million you would have required the full board of Denel head office to approve this, not so?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Anything above a certain limit but below 200 million would be subject to approval by the GCEO, the Group CEO.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Was the negotiation to bring down the price, did that have anything to do with any attempt to try and avoid having to put the matter before the whole board, perhaps in the interest of being quick so you did not have to wait for the next board or whatever?

10 **MR BURGER:** Chair, I want to reject that notion totally. That was not even remotely in our minds at the time.

ADV KENNEDY SC: Were you even aware of the 200 million limit?

MR BURGER: Probably. Probably at the time, Chair.

ADV KENNEDY SC: Do you accept now that at least with the benefit of hindsight that if you are going to follow some sort of competitive process as you did here to a limited extent by inviting three bids and whether that was enough or whether you wanted - a full tender we have already
20 dealt with, I am not going to go back on that, but do you now accept with benefit of hindsight that if a process is in fact competitive such as a three entity bidder process where you go out with a request for quotes from three bidders, do you accept that you have to be fair as between all three bidders?

MR BURGER: Absolutely, Chair.

ADV KENNEDY SC: Yes. Now what happened here was that you or your staff went out with an RFQ, presumably not you, you did not issue it yourself, is that right?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: But you were aware of the process, not so, that it went out on an RFQ to three bidders.

MR BURGER: I was aware, Chair.

ADV KENNEDY SC: And each of them submitted bids?

10 **MR BURGER:** I was aware of it, Chair.

ADV KENNEDY SC: And you are aware that it was about 160 million for LMT, a little bit less, in fact, and around 260 million from VR Laser?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: We have already dealt with that. Now was it not – do you accept now the wisdom and the need to – if you are going to allow any party to revise its price, if you are allowed to do that at all, you cannot select one party to have that opportunity where the others are not
20 selected, not so?

MR BURGER: Chair, the reasoning at the time was, in our minds they fairly won the competition at their original price. That and for that reason alone did I have the guts or the inclination to contact them. If they did not win and if they were second in the scale, there would have been no

way that I would have phoned just them to try and get them at number one and that was the reason why we – why I did not even argue - as a matter fact I supported the fact that we cannot use those improved prices as part of the evaluation. My thinking at the time was there was a recommendation, there was a multidisciplinary team that was part of that recommendation. They came up to an answer, they came to me and I was fairly certain that that recommendation would be approved by Denel so I took that
10 opportunity to say can we not squeeze the for a better price.

ADV KENNEDY SC: My question – I am sorry, have you finished?

MR BURGER: No, I think I have finished.

ADV KENNEDY SC: My question is – and we will come back to the justification for going to VR Laser to get a price and I understand your point that you were aiming to get a better price so that Denel would land up paying less and you would then achieve the objective of getting an
20 acceptable product at an acceptable price but at the moment I am dealing with something different and that is this. There is a competition on the go in this RFQ process, not so?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Yes and Denel has to undertake the

decision at the end of that competition process by comparing the three quotes, not so?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Yes. Now you did in fact allow VR Laser to change its price and it went down from about 260 million to 195 million, correct?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And that was achieved, you say, just through a phone call.

10 **MR BURGER:** Correct, Chair.

ADV KENNEDY SC: Well, either you have the most remarkable ability to be persuasive in a phone call or the other possibility is that VR Laser had just put in their 260-odd million tender recklessly and very casually because they thought this is going to be easy, let us make fat profits out of Denel. Which one is it or is there a [indistinct] 27.12 that I have missed?

MR BURGER: I will be speculating on their behalf if I would give an opinion but what I think happened was that
20 there was a first round in 2012, I think it was, and in that first round it was fairly clear that VR Laser was the most competitive one.

ADV KENNEDY SC: Most competitive in what sense?

MR BURGER: In terms of price.

ADV KENNEDY SC: In terms of price?

MR BURGER: The price, yes. And I think they were probably a little bit resting on their laurels in terms of price. I think they thought we have got this in the bag. I think.

ADV KENNEDY SC: Mr Burger, I am not trying to be difficult or to catch you out, I am just trying to understand your evidence. I understand that there was an earlier process in which they were asked to give some sort of indicative prices but that did not lead to an actual award,
10 is that what you are saying?

MR BURGER: No, it did not. No, it did not.

ADV KENNEDY SC: It did not lead to that. And you say you think that they knew that they were probably going to get it and you think they then exploited that by pushing up the price. How would they have thought that they were probably going to get an award of a contract that only took place two years later? And how – where would they have got that information from?

MR BURGER: I do not know, I do not know and I say
20 again, I am speculating, I do not know that happened. I know I gave a very angry call to VR Laser and yes, I think they had to sharpen their pencils.

CHAIRPERSON: Did you say lengthy call?

MR BURGER: Angry call, Chair.

CHAIRPERSON: Oh, angry call.

MR BURGER: Angry call.

CHAIRPERSON: Ja.

ADV KENNEDY SC: So you were angry that they had abused their situation and come in with a rather cheeky high price?

MR BURGER: I thought the price was too high, Chair.

ADV KENNEDY SC: Yes. Now I just want to go back as to your speculation. Obviously you are not stating this as a matter of fact and I appreciate that.

10 **MR BURGER:** Ja, I do not know.

ADV KENNEDY SC: You do not have facts to back this up.

MR BURGER: No.

ADV KENNEDY SC: But, you see, I think – but do you appreciate that when Denel is an entity that was in some financial difficulty that required bailouts from government to get it out of its financial difficulties, where you are dealing with vast amounts of public money and where there may have been, even on your own admission, some
20 breaches of the law of procurement policies which are binding, and where as it happens later it turns out that one of the – that the supplier in question actually has controversial links. Do you accept that it is appropriate for the public and for this Commission to be entitled to look into how it comes about that a supplier gets business?

MR BURGER: No argument Chair.

ADV KENNEDY SC: Right, so when we look at this it is important to understand whether this was a genuinely fair and legal and honest competitive process, not one in which there may have been funny business.

Now I am not saying that there was funny business here, it is for the Chairperson to decide at a later stage whether there was and to what extent but the Chair is entitled to look into whether then – whether there is a
10 proper justification for business decisions.

Now there is a controversy that is raging in the media and in the public debate and so forth, as to whether VR Laser was getting this and a number of other lucrative contracts that we will deal with in a moment, at least the DLS contract you know about and the DVS contract that you were not directly involved in.

There is concern as to well how was this justified? Now if there is a proper justification then one may be satisfied but as you have suggested earlier the Gupta link,
20 the State Capture allegations that actually had nothing to do with it. As you said this was a genuine *bona fide* lawful up to a point transaction.

MR BURGER: Correct Chair.

ADV KENNEDY SC: And if it was unlawful that was *bona fide* it was an oversight it was not intended to favour

anybody. Do you understand where we...[intervene]

MR BURGER: I understand.

ADV KENNEDY SC: ...what the gravity of this and the objective is. Now it just seems to me and in fact some of the other witnesses such as Mr Mlambo have commented on this, it just seems to me as an outsider although Mr Mlambo was an insider with expertise in supply chain management in the Denel context.

He expressed real concern as to whether in fact this
10 was a genuine transaction at all and one of the points that he raised in his evidence before the learned Chair was can one take seriously a supply that comes in with R260 odd million as its initial price and then after a negotiation process happily brings it down or maybe feels that it should do but it ultimately voluntarily brings its price down to a R195million.

Now you tell us that took a brief conversation admittedly one in which you expressed a tone of anger but it just seems to me that when you talking about such a
20 massive difference in price something looks wrong, something smells a bit fishy. Do you understand the problem?

MR BURGER: Chair if you look at the first iteration of prices the LMT price was double the one they quoted so we were use to a little bit of fluctuations in the price that is

so. It is – that was a substantial saving and I was very happy. So I think the supplier were pushing the envelope, I think so. I think that R260million was not warranted.

The issue here for me is what did we use to evaluate them and in my mind that was post the evaluation they did come out number one and therefore I had to do something to get the price down. But Chair that is what happened and the intention was to help Denel – otherwise why would I want to get the price down, what other reason
10 can there be to get the price down.

ADV KENNEDY SC: Well that is the problem if I may interrupt and I apologise for doing so I do not mean to be rude. Is that not the problem?

The public and the Commission need really to know whether this was a genuine reduction in price not only your own *bona fide's* but whether VR Laser were acting *bona fide* or whether your colleagues in Denel were and so even if one accepts that you were in good faith and simply acting in the interest of Denel's trying to bring down the
20 price.

Do you not agree that this is a disturbing feature of those events that VR Laser came in with what you have said is an unacceptably high price and then magically just from a short or be it angry conversation you managed to cause them to bring down their price massively.

MR BURGER: Chair I was under the impression that they after my discussion with them that they were not going to get the business and I think they wanted to make sure...[intervene]

CHAIRPERSON: That they were not?

MR BURGER: That they were not going to get the business.

CHAIRPERSON: Oh, yes.

MR BURGER: And that is why the reason why I thought
10 they came down substantially.

ADV KENNEDY SC: Yes, now you have mentioned that they were clearly so suited and they had been evaluated on the basis that they were better than LMT.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Are you aware that the scoring that was done not by you but an evaluation team that was appointed in terms of the Denel policy evaluation team assessed the technical side the BBEE side and the price and LMT came within a whisker in terms of scoring of the
20 scoring given by the evaluation team to VR Laser. It was less than one percent it was about zero point six percent...[intervene]

MR BURGER: Zero point seven percent.

ADV KENNEDY SC: ...in the scoring.

MR BURGER: I am aware of it Chair.

ADV KENNEDY SC: Yes, and one of the main reasons why LMT did so well in relation to that issue was because their price was so much better, correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Yes, now why did...

CHAIRPERSON: Well...[intervene]

MR BURGER: Sorry Chair.

CHAIRPERSON: Okay continue.

MR BURGER: Why did you then not take this approach?

10 If you were looking at this with your colleagues and a decision has to be made as to who as the party to whom the tender should be awarded. Does this not sound a logical approach; we have two tenderers that have an absolutely marginal difference less than one percent a negligible difference I am suggesting to you.

But what is hugely significant is that if we go LMT rather than VR Laser we going to save about R100million. Now does that make sense to you? That could have been an approach that you could have adopted, no so?

20 **MR BURGER:** If we used the original price, if we contracted VR Laser at the original price there would have been but the dilemma was there was not a R100million. I was not prepared to pay R260million...[intervene]

ADV KENNEDY SC: Correct.

MR BURGER: ...because there was not a R100million

laying available to do certain things with.

ADV KENNEDY SC: You had a budget and you had to work within that budget.

MR BURGER: Correct.

ADV KENNEDY SC: R260million would have brought them way out of the budget.

MR BURGER: Correct.

ADV KENNEDY SC: Right, but there was another reason why you were not prepared to accept the R260million and
10 that is even if you had the kitty of money, even if you had the budget of maybe R500million you would not have done it because you thought it was an exorbitant price, not so?

MR BURGER: Correct Chair.

ADV KENNEDY SC: And one of the reasons that it seems to you to be exorbitant and I think everybody would agree with you is that it is a R100million more than one of their competitors LMT.

MR BURGER: Correct.

ADV KENNEDY SC: Correct?

20 **MR BURGER:** Sorry Chair there is two reasons we had a fairly good idea of how much it should cost because we had our tariffs, we had process times, we had material costs. So we knew what is a fair price and not a fair price.

ADV KENNEDY SC: Right, so you knew it was not in the R260million ball park a fair price would have been more

like a R160million.

MR BURGER: R200million.

ADV KENNEDY SC: R200million?

MR BURGER: I thought R200million was a ballpark.

ADV KENNEDY SC: You thought R200million but is it not a whole point of a competitive procurement process that whatever you may think well we can – R200million would be a fair price if you can get it for a R150million that would be good news. You should not say well let us pay
10 R200million while we at it, not so?

MR BURGER: Absolutely not Chair if we could get it for R150million I would take it with a smile.

ADV KENNEDY SC: But the point is Mr Burger you could have got it for a R150million approximately because that is exactly what LMT was offering you and that is my point.

MR BURGER: Chair at this point can I please say why I was not supporting LMT.

ADV KENNEDY SC: Yes, I thought I had asked you that question about ten minutes ago.

20 **MR BURGER:** LMT.

CHAIRPERSON: LMT, but before you do that I am sorry Mr Kennedy before you do that I want you to go back to Mr Kennedy's question that you have not answered. He asked you whether you accept that it would have been an approach open to you or to Denel to take to say and Mr

Kennedy you must listen carefully I do not want to misrepresent what you were saying.

ADV KENNEDY SC: Thank you.

CHAIRPERSON: To say this two companies were so close to each other in terms of score if the price of the one is so way above the one for the other company we should go with the one with the lower price. Now I may have misrepresented what you were just saying.

ADV KENNEDY SC: No the spec is spot on Chair.

10 **CHAIRPERSON:** Yes, so do you accept that that was an approach you could have taken or Denel could have taken with justification but you may have preferred a different one but it is an approach that could have been legitimate.

MR BURGER: It is an approach that could have been legitimate I think it would have been irresponsible but I it's a legitimate...[intervene]

CHAIRPERSON: But I don't know if it would have been legitimate if you would have been irresponsible.

20 **MR BURGER:** My honest opinion at the time was it would not have been in the best interest of Denel and this is why...[intervene]

CHAIRPERSON: Ja, and I guess that will come out when you say why you did not support LMT.

MR BURGER: Correct.

CHAIRPERSON: Okay deal with that then.

ADV KENNEDY SC: Yes, if you can deal with that.

MR BURGER: Chair I will try and make it quick. Firstly, I just want to get the reason for the LMT acquisition off the table it will take me two seconds. I was the biggest promoter of buying LMT and I was very concerned when LMT was in a financial crises and the reason for that was they were busy with development work.

There designs were not fixed yet, the design would have hung in the air nobody would have been there to
10 finish the landmine protection and Chair I want to place on record a couple of defamatory things was said about me yesterday by Dr Stephan Nell but be that as it may he is – I always respected him for his engineering capability and his marketing capability. I think I really thought and I still believe his one of the brightest engineers I have ever met and that is what drew me to LMT.

So we - also contrary to what was said earlier, what was then done was we gave LMT an order on risk, it was a risk order with a pre-payment with an objective to help
20 them. It was transparent, it was discussed with the Board with everybody. So the first step was we made sure that they did not go under. So the second step was to exercise our options to acquire LMT. The first and most important reason and this is what people do not understand was we did not acquire them for their production capability as a

matter of fact the reason why they went bankrupt in the first place was because they went from a design house, a design capability to a production capability. That is why they ran into trouble in the first place.

So we were as Denel we were on the level four system supply level which means we were supplying turrets to the client. They were buying a tarot and then they would buy a different product like the vehicle, the weapon platform from another supplier. Then they would buy
10 ammunition from another supplier and then they would buy simulators from yet another supplier and Armscor then had the accountability, responsibility to do just exist twenty screws and then the tarot is on top of the vehicle and you put the ammunition in the car and then everything is fine.

And then as long as it works it is fine but if you missed the target and especially on a complex system we find moving to moving systems. If you miss who's to blame and what then happened was and this is why Armscor went out, first they went out for a tarot and vehicle and then
20 they decided no we are going to go out on a level five product system which is inclusive of all these things. So we knew that if we wanted to compete in that area we needed to team up with somebody and we teamed up with EADS that did not work and we had to grow our own capability. So what we – combat system consists of three

technical areas. It is fire power which sits in the gun and the tarot, it is protection and it is mobility. Those are the three technological areas you need to understand if you want to play in the area of a level five.

We thought they will bring that to us it did not work out and at that time I saw LMT with the design capability of vehicles and especially the design capability to give protection. The flat bottom design technologies as an ideal area to strengthen Denel Land Systems not Denel, Denel
10 Land Systems.

On the contrary I thought that what is lacking at LMT were they did not have proper process engineers, process design. Their quality processes were lacking, there general management skills I thought was lacking, there financial management system was not in my mind proper and I thought that is exactly what Denel Land Systems had.

So if we could manage LMT as an extension of Denel Land Systems then it would be the best of both
20 worlds and then so the reason the main drive for LMT was there strategic capability to ensure a proper level five system capability. I do concede and I was the first to say if we implement now all these things in LMT and strengthen their capabilities then they can also be a supplier of fabricated stuff, they can even make build vehicles or

whatever the case may be. I was really convinced of the fact that we can grow LMT into a supplier of substance and I believe that with my whole heart.

Why did LMT fail? Those processes were never implemented in – we started off like that Stephan Nell was part of my executive team, my quality people and my process engineers and so on were in their facilities working there. I was at the Board of LMT I was working there, it was even announced publically that they will be part of
10 Denel Land Systems and then they got a big contract from Saudi Arabia and I was called in to the office of the then Group CEO Mr Saloojee and he said it is a conflict of interest for me to be so close to LMT.

Henceforth you should no longer be on the Board, your people should exit LMT and you should contract LMT at an arm's length and from that moment on LMT was left to their own devices and Denel managed through the Board or tried to manage through the Board LMT.

So what happened then I made a commitment and I
20 kept to my commitment by giving them all this. I gave them seven substantial orders in those years leading up to 2014. The one was and this was – sorry I just need to address the court because that is a point that was made from a capacity capability and a financial perspective. So from a capability perspective I gave them all this, all of those

orders had problems I heard Dr Nell say it was exaggerated it did not happen. Let me give you two examples Chair...[intervene]

ADV KENNEDY SC: Do you need to Mr Burger?

MR BURGER: Yes I think it is important, Chair.

ADV KENNEDY SC: Well please try and keep it brief because I am afraid we going into all sorts of terrain that does not really seem to have direct relevance to the question that you have been asked to focus on.

10 **MR BURGER:** I think it has got all the relevant.

ADV KENNEDY SC: Alright finish your points then please and then may I just develop my questioning with you please.

MR BURGER: Correct two projects that I want to focus on. The first one was the ambulances, the ambulances went through a process where we went through various iterations and at the end of the day I begged the client to accept them even though they did not comply to specification and I made a personal promise that I will
20 ensure that if they ever give problems we will be happy to replace.

The second thing that happened fifteen Casper's that were delivered to the United Nations started cracking. I did not have a big problem with the fact that they cracked because people make mistakes the problem was when I

asked to rectify those Casper's they came and they just weld the plates over the cracks and obviously it is armour steel they crack next to where they were welded. So what then happened was we were a single source or preferred not single source a preferred supplier to the United Nations at that point. So what then happened is the United Nations threatened to blacklist us.

Denel Land Systems brought fifteen Casper's back had them rebuilt and sent fifteen Casper's back to them.
10 Now my dilemma was not so much that there was a problem my problem was that LMT never admitted to say maybe there was a problem from my side how can I fix this problem.

Denel Land Systems from a financial perspective ended up paying to bring the vehicles here and send them back and rebuild them it was just shy of R30million tab that Denel Land Systems and Denel picked up.

This is a safety critical item Chair a hull for a Casper is a simple thing it has been built for the last 60
20 years it is a simple thing to compare that with the Hoefyster Hull is like chalk and cheese.

So that is the first point the second point I want to make is they had a capacity problem they just got the biggest order of their life to Saudi Arabia by the way also for turrets which they did not place on us and I want to put

on record...[intervene]

ADV KENNEDY SC: Sorry which they didn't?

MR BURGER: Place on Denel Land Systems we were the tarot house in South Africa. They preferred not to buy the turrets from us, I went to Stephan Nell and said please this is irresponsible let me just then help you to do the design for that turrets then somebody else can make the money out of the production to ensure that we have got a safety tarot system which we then did.

10 So with that as background when somebody came to me and said – and that just happened I mean that was fresh in our minds to say here is LMT they have halved their price from their previous quote. I just knew that the previous mistakes or my burden financially and otherwise and they halved their price, I said I do not believe this. The cost of that thing is going to increase and it is going to be for my burden.

ADV KENNEDY SC: You did not believe the R160million there was a genuine price?

20 **MR BURGER:** The sums that...[intervene]

ADV KENNEDY SC: So is that what you're saying?

MR BURGER: I am saying that, I am saying at the time the people in Denel Land Systems were sceptical that they would be able to do that and if they did it at that price it would probably be at a loss which again would have been

for Denel's. So to come back if we had to place money in LMT to bring them up to standard as one of the suggestions. It is not as simple as that Chair because we were only 31% shareholder. So if we brought R50million to the table you have to dilute the other shareholders or do something. You cannot just bring in money from nowhere and to be honest Chair it is a long way I have calmed down a lot since then but if somebody ask me then please give some more money to LMT so that they can be up to
10 standard I would have aggressively fought that notion.

So that was the reason Chair which I said you know I would rather somebody that I – oh by the way I wanted to say this as well. We had a scoring system how we rate suppliers and at the time VR Laser was in the top sector of suppliers and LMT was right at the bottom.

ADV KENNEDY SC: Sorry in terms of what?

MR BURGER: In terms of customer satisfaction.

ADV KENNEDY SC: So in customer satisfaction.

MR BURGER: So it is quality, it is on time delivery, it is
20 do you accept that you have made a mistake, are you going to fix your mistake. Those sort of things.

ADV KENNEDY SC: And was that reflected in the criteria for the scoring of the...[intervene]

MR BURGER: Not at all it was not but it was the engineers I was not part of that but...[intervene]

ADV KENNEDY SC: Yes, but sorry to interrupt Mr Burger and you must please allow me to question you at appropriate stages rather than going on and on and giving us a long session which makes it very difficult to unpack. The evaluation was done in terms of the criteria that was laid down in terms of the policy.

MR BURGER: Correct Chair.

ADV KENNEDY SC: You thought that customer satisfaction was something that should have been in the
10 criteria but it was not. You could not reinvent the criteria you were bound by them whether you liked it or not, whether you think it was a good idea or not, whether the Chair of this Commission thinks it is a good idea or not is with respect irrelevant.

MR BURGER: Agreed Chair.

ADV KENNEDY SC: That is what was laid down.

MR BURGER: Agreed Chair.

ADV KENNEDY SC: So once again rather like the decentralisation type of argument is this not something you
20 wished it had been a certain way but it was not and you have already conceded rightly that you were bound by the situation that you were facing.

MR BURGER: Supported and agreed Chair but...[intervene]

ADV KENNEDY SC: Now, sorry yes.

MR BURGER: But the point being those criteria's were followed and VR Laser won the competition.

ADV KENNEDY SC: But by point six of a percent.

MR BURGER: True.

ADV KENNEDY SC: Are you seriously suggesting that because they got the higher score are you suggesting that you were bound to give them the contract because of that?

MR BURGER: Yes, Chair.

ADV KENNEDY SC: Yes?

10 **MR BURGER:** Yes, Chair they won the competition.

ADV KENNEDY SC: Sorry they won the competition?

MR BURGER: They won the competition.

ADV KENNEDY SC: But in terms of procurement policies you are not necessarily bound to award a contract to a particular supplier where it has a score and better than its nearest rivals. There is a measure of discretion allowed and particularly with point six percent. So it cannot be right that you were bound to give it because it scored the highest.

20 You may have felt you were bound to give it because you thought only it could provide the best service and in fact many passages in your affidavit I am not going to take you to them but many passages seem to suggest exactly that that you Mr Burger maybe for very good reason thought that VR Laser were a wonderful supplier and that

LMT was not a wonderful supplier in fact it had problems but that therefore come what may VR Laser should get the contract.

It was not because they scored zero point six percent better it is because you felt that they were way above LMT and that LMT in fact should not really be considered at all, not so?

MR BURGER: Chair I stated it in writing in emails that I was not prepared to support VR Laser if they did not win
10 the criteria based on the original proposals made, that is so.

ADV KENNEDY SC: Yes, well we know that they had won but they won by a marginal difference we went through all of that already.

MR BURGER: Correct.

ADV KENNEDY SC: So can I just go back to your earlier evidence effectively if I understand your evidence correctly and if I have got the wrong understanding please correct that for the benefit of the Chair.

20 You seem to be saying whatever difference in price there may have been between LMT and VR Laser only VR Laser should have got that contract firstly because you could not believe the price of a R160million of LMT you thought that was a bit of nonsense it had reduced from their previous price dramatically and you felt that was

suspicious.

MR BURGER: Correct Chair.

ADV KENNEDY SC: VR Laser you managed to get down their price but you felt that that was acceptable.

MR BURGER: Correct Chair.

ADV KENNEDY SC: That was a massive reduction on their part but that you felt was all in order and then on top of it you felt LMT just could not do the job. Is that not really what you saying here?

10 **MR BURGER:** Chair at the time if the pain of paying R30million of looking a client in the face was very fresh in my mind that is true, firstly. Secondly I dispute the fact that LMT can do a lot of work. And it is difficult to answer these questions without elaborating, but like a gun barrel which Denel Land Systems manufactures, after that decided to, to outsource more or less everything because it is a safety critical item. I thought the hole was a safety critical item.

20 My problem was not so much that at all cost VR Laser must did the work. That was no my argument. My argument was this is a safety critical item. It is – we just gone through a whole set for whatever reason that cracked and if we have something like that on Hoefyster, it will be catastrophic.

ADV KENNEDY SC: So Mr Burger are you saying this and I

go back to my last question. Are saying that you were not impressed by LMT's price partly because that they had dramatically reduced it. But secondly because you felt that they could not provide a sufficiently safe product, correctly saying?

MR BURGER: Correct yes, under those circumstances.

ADV KENNEDY SC: Now then I have a further difficulty. Why on earth does DLS go through the trouble of asking LMT to submit a price, a bid in the first place if you know so suit
10 some as you are now that LMT is not going to be able to supply a safe price?

This was not an open tender where somebody sees in the Sunday Times or Citizen Newspaper advertisement request for proposals from Denel. Not so? You did not invite the market to submit tenders and you might have got tenders if you done that from all sorts of people who did not a turret from a bar of soap. But here you were, your company went out and decided we are not going to go out on an open tender; we are going to go out as we normally do,
20 on an RFQ.

And we are going to go out to people to submit bids in order presumably to get the best price. And who are we going to select? We are going to select VR Laser, LMT and DRD. Presumably because we think that they are people who can do it and we want them to compete against each

other to see who is going to be the best price. And so what happens, LMT tenders a price. VR Laser tenders a price and lo and behold it is 100 million difference.

Now you seem to be saying, well you cannot accept the genuineness of their price, so it is not a true comparison between 150 million and 260 million. So it is not a true price. But most important LMT could not be relied on to do the job. Why on earth go through the whole process of asking them all to submit quotes against each other?

10 Why go through a process of having a committee that evaluates them and tests all sorts of things and works out a score and so forth? If Mr Burger behind the scenes has already decided long ago, well LMT is, is, should not be considered. This does not make sense to me.

MR BURGER: Fair comment Chair. I think it is a fair comment at that point, but please remember the decision to go through those three suppliers was not my decision.

ADV KENNEDY SC: Right.

20 **MR BURGER:** That was a decision taken in 20 – before 2012. So by 2012 these problems, I was still sitting on the board of LMT by at that stage I thought that I was told to contract them. But at arm's length but I thought that they had more than fair probability of getting the work and we went out with three tenderers. These problems I am talking right now was not on the table.

ADV KENNEDY SC: But they were on the table that their value, at the time at the Evaluation Committee did its scoring. An Evaluation Committee had to score, not only the price where obviously LMT had a huge advantage.

MR BURGER: Correct.

ADV KENNEDY SC: But also technical capability.

MR BURGER: Correct.

ADV KENNEDY SC: Surely your colleagues who were involved in the technical evaluation for purposes of scoring
10 could and should have taken into account exactly the problems that are raising. And despite that they say, well we are giving them some points. They gave them less points than VR Laser, presumably because there had been problems.

MR BURGER: Correct yes. Sorry the first question was ...

ADV KENNEDY SC: Yes.

MR BURGER: Why did, why did we even consider LMT at the time?

ADV KENNEDY SC: Yes.

20 **MR BURGER:** So, so I am just saying it is, this process started already in 2012.

ADV KENNEDY SC: Yes you made that ...

MR BURGER: And in 2014 it was basically a continuation of that process.

ADV KENNEDY SC: (00:05:00).

MR BURGER: That is why they were scored. I am, I am binking(?) my personal frustration at the time, but that I do not believe influenced the scoring system, because I was not interacting with the people doing the scoring for that. They made up their own minds. They evaluated and on that they, VR Laser won.

So when they brought it to me I, I wanted to make sure that they win and if they won I wanted, I had all these, these things passed their capacity problem with Saudi Arabia
10 at LMT. I just said it will be irresponsible. And I again, Saudi Arabia did not successful – was not successfully concluded for these very same reasons.

So, so Chair I really think it would have been irresponsible. That was my point at the time, but having said all of that and I want to, I want to make that point, I accepted and I put it in writing that it was not my decision. I said it is Denel Head Office decision. I have given them my reasons, please make your decision, but in the mean time the technology transfer to be able to do welder training, that slot
20 is passing us by.

And I decided at Denel Land Systems Cost to send both LMT and VR Laser personnel to Finland to get their training. So I was, I was, it is not that I said I will not do that and I will walk away. I was prepared to implement the decision of Denel, but I was making a point. This is a safety

critical item, it would have been irresponsible.

COMMISSIONER: Well I think you said and maybe other witness also said that the price, original price that the other (00:07:17) are had quoted.

MR BURGER: Yes Chair.

COMMISSIONER: Was, I do not know whether is that out of budget or far too high.

MR BURGER: It was double the second price Chair.

COMMISSIONER: Yes. I got the impression and you must
10 tell me if it is the wrong impression. I got the impression that the way that price was hiked, there was no way Denel would approve that price as, as it was. Is my impression correct?

MR BURGER: It is correct Chair.

COMMISSIONER: Now the question that arises for me is, how do you take the decision that VR Laser is the entity that wins above another or the others when realistically you know that you cannot appoint them on the price they quoted as is? Because my thinking is that you should only say this is the,
20 the bidder or the entity that wins if you can afford that price.

But if you cannot afford that price, you should let, you should not appoint that entity. You should, that entity should lose some points or, for that kind of price. And, and if that approach is correct, then LMT could easily have won if the VR Laser some points because they were so close in

terms of scoring.

And therefore when you make a call to VR Laser and get them to reduce the price, you are in a way depriving LMT of a chance to win, because if their price is so high you cannot afford it, they should not win. The next entity that should win is LMT. What do you say to that?

MR BURGER: Hindsight is a wonderful thing Chair. Maybe that could have been an argument. The way it worked was that we had a total budget or for suppliers, for the whole
10 system. And there were big things and rounded up in certain areas, because this was not something that was manufactured before. We did not have a cost Chair that was in time and accurate.

So we had a budget, an allocated amounts of money and, and, and on top of that we also had a risk provision because we knew in some instances we will be wrong. So, so what we did was, every supplier, every opportunity where we placed an order we looked at what was the budgeted price and what was the, the amount left in our slush fund, in
20 our risk provision.

And it did happen that people were over the budget. And but they did win the competition and it was a good supplier and everybody agree with that was the best decision taking transformation, taking capability and price into account that that, the one, the person that won, even though

they are over budget.

Then we did place orders on them, taking account of what is, what is the total budget of the system. Can we afford it, we cannot. And obviously as a businessman I, I try to get the prices down as low as possible in all cases. And then also would send the bid people back and say, go and renegotiate.

But, but that was what you say Chair might have been an approach. Could have been a good approach. I am
10 not arguing that. But it was not the approach, it was not the way we did it. (00:12:32) nobody.

COMMISSIONER: Of course the question is going, goes to the issue of fairness. That is where it goes to.

MR BURGER: Correct.

COMMISSIONER: To say LMT may be justified, may have been justified to say because VR Laser quoted you a price that was too high, that was unacceptable to you, you should not have asked them to reduce their price. You should have gone to the next, next competitor whose price you could
20 afford. And that was me. Therefore by getting them to reduce the way it was done, you deprived me of getting this job. You deprived me of the opportunity to get this job. You understand?

MR BURGER: I understand 100%.

COMMISSIONER: Yes. Okay. Mr Kennedy.

ADV KENNEDY SC: Thank you Chair. And that was not done.

MR BURGER: No, that was not done, that was never done and it was not the process that we followed.

ADV KENNEDY SC: Yes. Now what was also not done was to go back to LMT and to say to them that you, Mr Burger and maybe some of the colleagues who agreed with you were of the view that LMT should not be given this contract, even though their price was so low compared with VR Laser,
10 because they could not be relied on.

Because of the United Nations Casspir which were different, where there could have been an opportunity for LMT to, to have a debate with you. You heard did you not Dr Nell's evidence where he said, well firstly Casspirs are different from this Badger type of vehicle. Secondly we had a valid excuse which was verified by an independent outside agency that put in a report, who say that we were not to blame. It was steel that was corroded from a supplier that we were not, that we could not be blamed for.

20 Now it may well be that ultimately you would not be persuaded by that. But would it not be appropriate to at least ask them? Give them that opportunity before you effectively disqualify them. Is that not actually the, the bottom line? In effect you disqualified them. When they put a very seemingly attractive price of R150 million, well we not

interested in that price, we are not impressed by that price, because we do not think that – you cannot do it seriously. But you would have been able to hold them to that price if you had awarded them the contract, not so?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Yes.

MR BURGER: But again the Casspir incident showed that that holding them to something eventually becomes Denel's problem in any case.

10 **ADV KENNEDY SC:** I understand that Mr Burger, that that rational. But before you come to that decision, is it not appropriate to be fair? You see the Chairperson has reminded you a couple of times now that it is not just a question of what, what would have gotten you a good price from VR Laser and you were satisfied that VR Laser was, was an excellent supplier at the technical side. But also what is fair.

MR BURGER: Correct Chair.

20 **ADV KENNEDY SC:** Because fairness is not just something that is a nice to do if you can concept, it is what the constitution says. The lawyers know it is in Section 2017. Every state entity such as Denel shall have a procurement system for the procurement of goods and services that is lawfully, fair, competitive, cost effective, transparent and equitable. Fairness comes into it not just in the expressed

word of fair, but also equitable and so forth. Now it just seems that you do not, you do not at least at that time did not seem to appreciate that.

MR BURGER: Chair ...

ADV KENNEDY SC: You appreciate it now.

MR BURGER: I do. I do and absolutely no argument. In my mind the fairness came in that we went through a process where we used, we had a closing date. We used the information for the closing date. And that is what we used to
10 do the evaluation. And VR Laser won. So that was where the fairness came in. The question about ...

ADV KENNEDY SC: Sorry Mr Burger. It has been put to you a couple of times, both by myself and the learned Chair that, that fairness does not depend on who gets 0,6% superiority in score. It is a little more complicated than that. And even if the score was to the advantage of VR Laser, as a matter of law and fairness, it is not automatically required of an entity to grant it, come what may.

It makes perfect rational sense for a state entity that
20 says, well I see my Evaluation Committee has come up with a total score that gives X a score that is 0,6% better than Y. But if it is going to cost me a half or a third less of, of the price from Y, I should rather go that way. That is perfectly lawful and fair.

MR BURGER: I accept that.

ADV KENNEDY SC: You accept that.

MR BURGER: Accept that.

ADV KENNEDY SC: Okay. Alright, now may we move from this aspect of the deal of the platform hulls contract to another issue that has been raised in evidence? You dealt in your early stage when I asked you to indicate which category the hull platform, hulls contract fell into. Completely compliant or not compliant? Or do not know?

You raised the two issues. The one is the, that you
10 went out on RFO for – RFQ for bids, three bids, we have dealt with that. We have now dealt with the negotiation with VR Laser to reduce their price. You have conceded through your credit that that was the benefit of hindsight was not permissible in terms of the policy.

MR BURGER: Correct Chair.

ADV KENNEDY SC: But there is another aspect. In fact there are quite a few aspects that one could deal with. But I am going to focus on what seems to be the most relevant. And that is Mr Mlambo's concern. And that is that he had
20 not approved this. And his approval was required under Denel policy. Now Mr Mlambo was initially consulted about this, not so?

MR BURGER: Not that I am aware of Chair.

ADV KENNEDY SC: Okay, can I ask you, I am not sure which bundle you had now in front of you. It is Bundle 1.

The same one we looked at for the procurement policy earlier.

MR BURGER: Sorry, sorry Chair, prior to me going to Denel, Dennis Mlambo was not consulted. I know from my (00:19:40).

ADV KENNEDY SC: Sorry just say that again.

MR BURGER: Prior to me going to Head Office to say, I did not go, we did not take it to Mlambo for approval. But I know there was a lot of consultation within, within the executives
10 and in Head Office and they did speak to him.

ADV KENNEDY SC: Did they speak to him?

MR BURGER: Ja, that much I know.

ADV KENNEDY SC: Then let us look at some examples of that in Bundle 1.

COMMISSIONER: Oh I am sorry, let us clear that. Are you saying they did speak to him or are you saying they might have spoken to him?

MR BURGER: No, I know they did.

COMMISSIONER: They did?

20 **MR BURGER**: They did speak to him, yes.

COMMISSIONER: Okay.

MR BURGER: I know there were discussions between Mr Jan Wessels, Mr Mlambo and Mr Fikile Mhlontlo.

COMMISSIONER: Okay, alright. Do you know whether the discussions were aimed at getting his approval or not

necessarily?

MR BURGER: I was not party to those discussions.

COMMISSIONER: You are not sure of that?

MR BURGER: I do not know.

COMMISSIONER: Okay.

MR BURGER: And I know there were ...

COMMISSIONER: Okay.

MR BURGER: Serious discussions, but I was never party to those discussions.

10 **COMMISSIONER**: Okay, no that is fine.

ADV KENNEDY SC: Alright, may I take you to the email correspondence that seems to be relevant, in Bundle 1. I do not know if you have been, if you still have Bundle 1 access.

COMMISSIONER: Ja, I have got it ja.

ADV KENNEDY SC: Thank you. If I can start at page 788.

COMMISSIONER: What is the page number?

ADV KENNEDY SC: 788.

COMMISSIONER: Okay.

ADV KENNEDY SC: You have it?

20 **MR BURGER**: Yes.

ADV KENNEDY SC: Right, now the, the – there is an email right at the bottom dated the 22nd of July. It is not clear what the actual content that email may have been, because it just has a disclaimer. But be that as it may, the email about halfway down the page, 2nd of September 2014, comes

from Dennis Mlambo. And is addressed to Celia/Reenen.
You see that?

MR BURGER: I see that Chair.

ADV KENNEDY SC: Alright, so what Mr Mlambo says:

10 “I have just established that LMT does have a valid
triple BEE certificate, see attached. I am baffled as
to why it was not submitted as per your claim at this
evening’s meeting. I will request details from
Stephan Nel about the pricing and proof of
shareholding of VR Laser as discussed.”

Now this appears to bare out the evidence of Ms
Malahlela as well as Mr Mlambo that there was interaction
between officials, maybe not yourself, but officials at DLS
with Mr Mlambo at Head Office there. Correct?

MR BURGER: I see that.

ADV KENNEDY SC: And that included Celia, Ms Malahlela
from your procurement supply chain section, the head of
that. Correct?

MR BURGER: Yes, I see that too.

20 **ADV KENNEDY SC:** And Reenen Teubes, what was, what
was his position at the time?

MR BURGER: He was COO of Combat Systems.

ADV KENNEDY SC: Yes. And one of the issues that was
raised in discussion with Mr Mlambo was the triple BEE
certificate, because there was concern about whether the

scoring of the triple BEE was done correctly. And whether it may have favoured VR Laser and prejudiced LMT. Are you aware that there were such discussions?

MR BURGER: I can see I was copied on an email. I am, I cannot, I cannot recall this.

ADV KENNEDY SC: Yes. And then Reenen Teubes at the top of the page, in the email that you have rightly referred to as having copied you in, take this further and he says:

10 “As explained in this meeting a formal process was followed to evaluate the proposals, etcetera.”

And then he refers further to, to all the bidders being given an opportunity seven days to submit additional information. All this additional information that was received, was within the seven day period was then taken into account to finalise the scores. So the parties were allowed to, to give more information that what had originally been submitted in respect of triple BEE accreditation. You see that?

MR BURGER: I see that Chair.

20 **ADV KENNEDY SC:** And we know that VR Laser was allowed to submit a changed quote for price, but LMT was not.

MR BURGER: I accept, I have already said that.

ADV KENNEDY SC: You have explained that earlier. Yes. Then Mr Mlambo who certainly does not seem to like to leave

thing unattended, replies on the 3rd of September, on the previous page 787. He addresses it to Mr Teubes and again copied, copies in Celia Malahlela and Fikile Mhlontlo. He was the group CFO at that stage. Correct?

MR BURGER: Correct and he was also reporting to Fikile.

ADV KENNEDY SC: Yes, exactly. So he had a direct reporting line, Mr Mlambo to Mhlontlo?

MR BURGER: Correct.

ADV KENNEDY SC: Would I be correct in inferring from this
10 that Mr Mlambo was here making sure that his concerns were not just dealt with, within the division, DLS that were now being brought to the attention of his boss at Head Office deal. Correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Yes. And not only your procurement people like Ms Malahlela, but of course in divisional level, but also Jan Wessels. He was then COO of the group, correct?

MR BURGER: Correct Chair.

20 **ADV KENNEDY SC:** And also that you were kept informed, Mr Burger, as CEO of the division?

MR BURGER: Correct Chair.

ADV KENNEDY SC: And then he, he sets out a number of issues that he describes as key issues in, in – he says:

“As I did not have an opportunity to do a thorough

study of all the tender submissions I cannot categorically claim that the process was sufficiently objective and the confidence level is high enough to place it beyond reproach.”

He seems to be raising, ringing an alarm bell here. Not so? He is saying, I am not satisfied on the basis of what I have been sent that this is necessarily compliant. Correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Did that, do you remember actually
10 seeing this email that was addressed to you?

MR BURGER: Chair I must have seen it at the time, I cannot remember.

ADV KENNEDY SC: Yes.

MR BURGER: I cannot remember the content or I cannot remember this.

ADV KENNEDY SC: Yes. Should you not remember it
though Mr Burger? In this sense, as CEO you are having
your juniors in the, in the division, Ms Malahlela who is your
most – in fact she is the most senior person in the
20 procurement section. Not so? So she has been dealing with
various issues such as triple BEE certificates and so forth.
And Mr Mlambo is saying, I have got queries about the triple
BEE certificate.

And then there is a response that is then provided to him, that we have seen on the previous page from Reenen

Teubes. He then responds and does not simply confine himself to triple BEE, where it is clear he is not completely satisfied on that either. But he is saying as I read to you now:

“Nonetheless the following are key issues that merit a serious review of the adjudication process and outcome.”

This must have been a serious alarm bell that should have triggered your interest and made you remember this
10 sort of thing if you took it seriously.

MR BURGER: Yes. The, the process there, we were at that stage in the middle of the process. I was instructed by my boss which was Mr Saloojee to have two signatures on the motivation that was Fikile Mhlontlo and, and Mr Jan Wessels to make the recommendation. At that time during September I was not interacting with Dennis Mlambo. And I was aware of the fact that both Jan and Fikile were, were constantly interacting with him.

So, so I took this as, as obvious that they were
20 considering his inputs. I say again Chair, this I raised my in writing in meetings my opinion about the direction to go. I would have supported any decision that was made and this was not part of the process. This was now already laying at Head Office for months when this happened, when this, this issue arose.

So, so for me this was, should have been – if this was the problem and I had, I was Fikile was reporting to me, and speaking to him weekly about this program, I would, I would think that he took cognisance of that before signing the recommendation. So, so yes.

ADV KENNEDY SC: But your feeling of comfort surely would not have been justified, because you are here being copied in and you say you must have received it. You have been copied in by the most senior person in the group, is the
10 Group Executive of Supply Chain. One of the witnesses Mr Ntshepe has said that the term executive was wrong, that he was only a Manager.

But in fact the delegation or authority approved by the Board in fact calls him the Group Supply Chain Executive. But let us leave aside the label. He was the most senior official, specifically tasked with supply chain management within the entire group. Not so?

MR BURGER: True Chair.

ADV KENNEDY SC: And he is now flagging methodically,
20 point by point. I am not going to take you through all of them, but he is raising serious concerns that he is saying ...

END OF AUDIO

10

INQUIRY RESUMES

ADV KENNEDY SC: “These are key issues that merit a serious review of the adjudication process and outcome.”

Did you undertake, did you accept the advice you were getting or perhaps even instruction you were getting from Mr Mlambo that these are keys issues that merit a serious review? Did you undertake that or do you know if anybody else did?

10 **ADV KENNEDY SC:** I am not aware of it Chair.

MR BURGER: No.

ADV KENNEDY SC: No. And then he deals with capability. And one of the points he makes in the first paragraph is that LMT was the only one of the three tenders that manufacture the same hulls under contract for Patria, that had obtained the lowest score on capability. DCD has never manufactured the same hulls and yet it obtained the highest score.

20 Now I am not wanting to go into a lengthy debate about whether Mr Mlambo was right or wrong, he seems to be saying, why does LMT get such a low score when it has got, when it has actually got experience of this? How can it get such a low score on capability and DCD gets a high score even though it has never manufactured this thing?

So how could it be given that? Now your answer could conceivably be, well LMT although it has manufactured

this sort of thing cannot be relied on. But whatever the outcome of that debate might be, seems to me to be unnecessary to go into. Mr Mlambo is raising serious questions.

There may have been good answers like the one I am speculating that you might give. But the point is he is saying these need to be answered. And that these three reviewed, and yet that does not seem to have been done.

MR BURGER: No Chair. And I say again, at that point in
10 time this argument was escalated to DCO. So between Fikile, Jan and Mr Mlambo they, they were discussing this on a regular basis.

ADV KENNEDY SC: Yes. And ultimately who signed it? It was Mr Saloojee?

MR BURGER: Koert?

ADV KENNEDY SC: Yes. But are you saying that you just left it to Head Office and even when you were alerted by Head Office Mr Mlambo to the fact that he was raising rightly or wrongly, that he was raising issues that he was entitled to
20 raise as Group Executive for Supply Chain. That needed this to be resolved, that you did, you did nothing about it. Why did that (00:02:24)

MR BURGER: I did nothing about this. Sorry Chair, I did nothing about this email, correct.

ADV KENNEDY SC: Yes. And then he deals with the price

difference. And the points ...

COMMISSIONER: I am sorry Mr Kennedy. You say you are clear that you did nothing about it? Why was that in circumstances where Mr Mlambo was raising a number of issues of concern?

MR BURGER: The reason, the reason for that is I was under the impression that there was a difference of opinion. And because there was a difference of opinion, this discussion escalated to a level higher than Mr Mlambo. That was in my
10 mind what was happening. So and for that reason I said, there are these unhappiness.

We thought we gave a good answer, he now comes with different, different issues and, and I have to admit Chair that and I state that in my affidavit as well, that at that time maybe I did not enough patience with, with the situation. I was getting grumpy and I was a little bit irritable. So, so and I am not saying that justifies it. I am just saying that was ...

COMMISSIONER: Just explain how?

20 **MR BURGER:** Ja that was the scenario.

COMMISSIONER: (00:04:08).

MR BURGER: And my mind was for a person like Mr Dennis Mlambo to stay, guarantee could make this thing high. I think he did not understand the challenges that, that or I just sat with where a supplier like the – ag the client like the

United Nations formally told us we will never ever ever buy from you again if you make hulls at LMT. So those were the, those were the issues I was dealing with at the time.

COMMISSIONER: It seems to me that in a situation such as this where the entities have been told, these are the criteria that will be used to decide this competition between the two of you or three of you. It seems to me that you can only make the decision as to who gets the job on the basis of those criteria.

10 And that it should not be something outside of that. Now I want to hear what your comment is because it seems to me that you knew certain things about LMT and maybe a lot of other people within Denel knew certain things. But and those things were influencing your attitude towards LMT as to whether they should be given this job or not.

MR BURGER: True Chair.

COMMISSIONER: Now to the extent that those were things that may have been outside the criteria that had been used by the scoring team or whatever they are called. Would it
20 not have, would it not have been illegitimate to use factors that were may not have been part of the factors that the criteria that you were announced as the criteria that would decide who wins?

MR BURGER: Chair the criteria that was, was set down by policy was, was new for us. It was not, we were not used to

implementing those criteria. So we, we basically followed those criteria and we came to an answer. I, I, my opinion at the time was and I take note of Mr Kennedy's position that it was a small variance. I take note of that. But my position at the time was, we strictly followed the prescribed rules. It gave a winner.

And, and we did not use a reduced price, we did not use anything else. It gave a winner. Now accept that, it was by a small margin. The arguments that were put to me was, 10 let us bend the rules to rather favour LMT. That was what the impression that I got. Let us bend the rules to rather favour LMT, because for various reasons. They part of us so we can – it is in-house and all those things.

And, and those arguments I tried to counter by saying, hang on. If you want to do that understand the risk you are putting Denel into. And, and that was my position at the time and, and but Chair and I say this and I put it in writing then on emails, if Denel decide we are not going to because of all these good reasons, the delegation lies with 20 Jan – above me, three people above me for all these good reasons, let us go with LMT. We would have tried our best to make it work. No argument.

COMMISSIONER: Okay.

ADV KENNEDY SC: Thank you Commissioner. I just want to raise one brief question on a point that you raised earlier.

And that is that the reduction in price would not have made any difference in the sense that they already had the advantage in terms of the scoring, so ...

MR BURGER: Yes.

ADV KENNEDY SC: So this was at it were a bonsella(?).

MR BURGER: That was my impression too.

ADV KENNEDY SC: Yes. What I suggest is that that is not a correct impression. Because in fact if you had not allowed them to or asked them and urged them in your angry
10 conversation to reduce their price, then they would not have reduced their price and then they would not have got the contract. That seems to me to be absolutely crucial, a reduction in price. By reducing their price to 195 from about 260 million, that was pivotal in the decision. It was not any relevancy.

MR BURGER: Shu Chair, I am not sure if I am following. The issue here was we made a recommendation based on the previous price, with the expectation to come down. Now if they at that stage they made an unsolicited proposal, they
20 had all the right not to say, no, no, no, we made a mistake it was the original 280 or 260.

So from my perspective then we would have been forced probably if it would have been above the delegations to come back and say, this needs to go to the board but the recommendation remains the same. So I, in my mind, in my

mind it would not have been a difference in supplier. It would have, the delegations would have changed.

ADV KENNEDY SC: Right. Now let us complete our reference to this email. As I said I am not going to go through it point by point because it can be read in due course. And I do not think it needs to be debated. But one of the points Mr Mlambo raised, raises is price. The price difference of about 100 million, that is the price between VR Laser and LMT. Now that of course is their original quote
10 price.

MR BURGER: Correct.

ADV KENNEDY SC: Of 360 million. And she says:

“The price difference between VR Laser and LMT Ops is almost 100 million. In my investigation I was informed by Stephan.”

Now it is apparent from Mr Mlambo’s evidence that the Stephan there is not yourself. It is Dr Stephan Nel.

MR BURGER: Correct.

ADV KENNEDY SC: Right.

20 “That the LMT quote was based on factual figures since LMT has manufactured the hull before. If Stephan is right, it would not make business sense to pay so much more.”

So he does not simply accept it necessarily as well Stephan Nel has said it therefore I accept it as the gospel

truth. He just says this is what I have been told, if he is right it would be crazy to go to VR Laser if you can get it for 100 million cheaper. So in other words if Stephan is right, that would be an answer to your concern that the 150, 160 million that LMT offered in fact is a bit of a joke. It cannot be taken seriously. Correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Right. And then he says:

“You agree it would not make business sense.”

10 Not so?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Yes. And since LMT is a sister company, now by that he meant by this stage LMT was already owned or subject to the share option. I am not sure which, but it was, it was now being brought into the Denel Group. Correct?

MR BURGER: It was, it was at that stage fully owned.

ADV KENNEDY SC: It was already.

MR BURGER: Owned by Denel.

20 **ADV KENNEDY SC**: Majority owned, not fully owned.

MR BURGER: Majority.

ADV KENNEDY SC: Not fully owned. Yes. But I understand by what you meant by fully. I believe some of the deal, he should have demanded the supporting evidence before assuming that LMT under quoted. Now in fact the belief that

LMT under quoted was, it may have been shared by others in DLS, but it was certainly a feeling that you had. Not so?

MR BURGER: It did not originate from me Chair.

ADV KENNEDY SC: It did not originate from you?

MR BURGER: No it did not.

ADV KENNEDY SC: But it was, you shared that belief.

MR BURGER: I shared that belief.

ADV KENNEDY SC: Right, so you say, he says:

10 ‘I believe some of the DLS should have demanded supporting evidence before assuming that LMT under quoted. I that, this anomaly wants further investigation and validation.’

So again it is a serious alarm bell. He is saying, well you guys in the divisional level seem to be thinking that well MNT’s price that is so much less than VR Laser, that that cannot be assumed in its favour, because they under quoted, it is not a genuine price.

20 He is saying, no I as the Head Office Head of Procurement need to satisfied and you should have been satisfied. Where is your evidence for this? Not just Mr Burger knows these things. Or Mr Teubes knows these things. He needs evidence. Would you agree that it is a responsible attitude on his part to be making sure even if you are right, that decision can only be taken once the facts are established?

MR BURGER: Chair the question here is, what, what is he saying? Should we have increased the price? If they said oops we made a little bit of a mistake, and re-evaluate it, I am not sure what the process would have been if they came back and said, oops it is, it can be a little bit higher than what we thought. What ...

ADV KENNEDY SC: But does that matter?

MR BURGER: No.

ADV KENNEDY SC: It does not answer Mr Mlambo's point,
10 does it? And that is what I am asking you on.

MR BURGER: No it does not.

ADV KENNEDY SC: Right.

MR BURGER: No it does not.

ADV KENNEDY SC: Okay. But then he deals with BEE certificates and he suggest that there was a, there was an unfairness in that. But what I am particularly interested in is paragraph 5. Effectively he is saying that the documents submitted by VR Laser on their ownership and these raise suspicions as they do not specify the individual shareholders
20 in person.

Now Mr Mlambo's affidavit, he also gave oral evidence but not in all its detail, in quite as much detail as the affidavit obviously. He was not aware at that stage, as I understand his evidence that in fact the Guptas were involved or that something that could, could raise potential

media speculation and controversy in the public domain. That was an innocent question, but it was an important question.

He is saying, well they say, VR Laser are saying they are owned by somebody and they say they are owned by a particular companies, but they do not say who owns those companies. So he is concerned. He says, the names Olga Solve(?) and Kreshwe(?) Investments are silent about the identities of the real shareholders. There were no other
10 documents.

Now it seems that Mr Mlambo may well have had some foresight because as it turned out it emerged later that in fact, that there was a Gupta link and so forth. Now I am not saying that that would necessarily have disqualified them or could have disqualified them. But he is not satisfied, he is saying there are all sorts of problems.

Triple BEE certificates, one party has been given treatment to another and so forth. Again I am not going to debate whether his opinion was right or wrong, but he
20 reached this opinion. You do not, you do not dispute that Mr Mlambo was trying to do his job in good faith?

MR BURGER: No, absolutely.

ADV KENNEDY SC: Right.

MR BURGER: Absolutely.

ADV KENNEDY SC: And it fact it was his responsibility to

deal with this.

MR BURGER: Absolutely.

ADV KENNEDY SC: And he has specifically copied in not just Celia and Reenen, Mr Teubes and Ms Malahlela, but also his boss, Mlambo's boss and the COO and of course yourself as DLS CEO.

MR BURGER: Correct.

ADV KENNEDY SC: He escalated it.

MR BURGER: Correct.

10 **ADV KENNEDY SC**: So he had said this is serious. These are key issues and then his final paragraph after the numbered paragraphs he says:

“I trust that the details above clarify my reasons for not supporting the recommendation to a point VR Laser to manufacture the hulls.”

Clearly he was of the belief and it appears that he may well have been right, that he needed to endorse the recommendation. He also had to recommend the appointment of VR Laser before the Group CEO finally
20 approved it. That was part of his job, not so?

MR BURGER: At the time I did not, I did not see his – we have never had his signature for something that went to the Group CEO on something like this prior to this. So, so we saw that as he needed to be consulted. His inputs need to be given and needed to be taken seriously and, and then a

decision was made. I must also say that the decision who to sign on the motivation was not my choice.

ADV KENNEDY SC: Right.

MR BURGER: That was a decision made by the Group CEO Mr Saloojee and he said those are the two people that must sign.

ADV KENNEDY SC: Okay. Then he concludes his last sentence:

10 “Alternatively the entire process must be revisited
and conducted in a fair and objective fashion.”

Now he has given evidence that he felt that this was not objective. He feels that you were subject, that you in fact were as his affidavit indicates and oral evidence that no doubt you listened to. And suggested to the Chair that you were not, you were not objective.

20 You were being subjective, but this was not sufficiently independent and that he wanted the whole thing to be done properly in a fair and objective way. Now obviously you would disagree that you were acting
subjectively. You have already given evidence that you believed this was a good business decision and so ...

MR BURGER: Correct Chair.

ADV KENNEDY SC: But, but it is quite clear from this email that this was a serious matter, not so?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Now this was not simply a matter that was going on at Head Office level between different people at Head Office. Because as we have seen this email was addressed primarily to Mr Teubes at, at your divisional level. Correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: And in fact you then replied to it. Presumably you did not leave it to Mr Teubes to reply to, because you realised the seriousness. If you look at the
10 email, it starts right at the foot of page 785 or 786.

MR BURGER: Correct Chair.

ADV KENNEDY SC: Yes. And you then for an entire page and your email and I do not criticise you for this, set out some reasons why you say that, that VR Laser should get it and LMT should not. And you see the numbered paragraphs 1 to 4?

MR BURGER: Correct Chair.

ADV KENNEDY SC: That sets out a number of your arguments in that regard. You then say:

20 “Nevertheless I am convinced that VR Laser is technically best equipped to execute this program. I also believe given the recent contract performance of LMT, it will be irresponsible to place a contract of such criticality on them, also take into account the affect the KSA order will have on them.”

What is the KSA order?

MR BURGER: Kingdom of Saudi Arabia.

ADV KENNEDY SC: Right. So that is the same Saudi Arabia ...

MR BURGER: That I spoke about.

ADV KENNEDY SC: Order that you mentioned. Now Mr Mlambo comes back to you in an email at the top of page 785, on the 4th of September, later on in the same day. And he says:

10 “We are clearly no aligned in terms of the analysis of the data and information that I saw for the first time on Tuesday at the meeting I had with Reenen and Celia. I think we should not exchange any more emails on the SC in question as the resolution may be easier to find around a table. However the following issues are definitely not been addressed.”

 And so he deals with, with again, four points. Huge price differential, the issue of a conflict of interest, refuted any conflict of interest to the submission of the document
20 etcetera by the capability. He still has reservations in relation to this. And then after his paragraph 4, he says:

 “My contention is that despite being convinced of a fair and objective process that was followed by the adjudication team ...”

 And here his evidence explained that here he was

really saying that he was not convinced, it was more that you were convinced.

“Let us appoint an independent assessor to corroborate your claim. It is also worth mentioning that you flouted the delegation of authority by not presenting a file for review to me before engaging Fikile.”

That is Mr Mhlontlo, CFO, correct?

MR BURGER: Correct.

10 **ADV KENNEDY SC**: And Jan. Jan Wessels, COO, correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: “Any transaction above 20 million must go through my office first. I am beginning to have doubts that this was an oversight.”

Now he there seems to be suggesting not only that you were being subjective and not objective. But also that you were actually manipulating processes. You received this email, did you?

MR BURGER: Ja I remember it.

20 **ADV KENNEDY SC**: Yes. What did you do about it?

MR BURGER: I ...

ADV KENNEDY SC: Did you reply?

MR BURGER: I parked that. No, his opinion was let us resolve this around a table.

ADV KENNEDY SC: Yes.

MR BURGER: That was his suggestion. And I thought at the time there are clearly a difference of opinion. It is beyond my salary of decision making and this should be escalated to the level of Mr Saloojee, Mr Jany Wessels and Mr Mkhlonlo. And they were all party to this and, and for a decision ...

ADV KENNEDY SC: No. Did you – I am sorry.

MR BURGER: No and that was my, that was my view.

ADV KENNEDY SC: Right.

MR BURGER: We had differences of opinion and (00:23:55).

10 **ADV KENNEDY SC**: Did you write back to Mr Mlambo and say that? Say let us not have a round table meeting between us, it is above your and my?

MR BURGER: No I did not, I did not. Not that I can recall.

ADV KENNEDY SC: You see again it is interesting to note that Mr Mlambo has taken the trouble and he gave evidence that he did take this trouble for a good reason. He says he not only responded to you, but he also copied in Celia Malahlela, which was appropriate. She was your junior, but she was the Head of Supply Chain at DLS, correct?

20 **MR BURGER**: Correct.

ADV KENNEDY SC: So it was right that she should be kept in this loop, not so?

MR BURGER: Correct.

ADV KENNEDY SC: And again he copies in Mr Mhlontlo and Mr Wessels and Reenen Teubes and now for the first time Mr

Saloojee.

MR BURGER: Correct.

ADV KENNEDY SC: So he keeps escalating and he keeps saying, I am not satisfied with this process. It does not look objective, it does not look compliant. You have ignored me. Now that I am engaged, I have now picked up these problems and I need answers. Now whether he was right or not to be satisfied with the answers you attempted to give, clearly he was not.

10 Whether or not he was right to, to feel disturbed by your answers, rather than reassured by your answers is neither here nor there. He was not satisfied. Now he was telling his bosses, Mhlontlo and Saloojee, I am not satisfied. You felt well, then he must, it must just be referred to them at Head Office and they must take a decision. Correct?

MR BURGER: I at the time I told we were running out of time, I am prepared and I say again, I said that indeed his emails, I am prepared to accept any decision, but just take a decision. And it was, it was with this very email, it was
20 escalated to a point. So ...

ADV KENNEDY SC: I understand.

MR BURGER: So that, that is how I felt and then there were very, a lot of healthy discussions and arguments that, that happened after this. I was not party to and this is originally why I said I was not, after this I did not really have a lot of

discussions with ...

ADV KENNEDY SC: Mr Mlambo.

MR BURGER: Mr Mlambo.

ADV KENNEDY SC: Yes.

MR BURGER: But I know both Fikile and Mr Jan Wessels did have.

ADV KENNEDY SC: Sorry who and who? Wessels?

MR BURGER: Mr Fikile Mhlontlo and ...

ADV KENNEDY SC: Mhlontlo?

10 **MR BURGER:** Ja.

ADV KENNEDY SC: Right.

MR BURGER: And Mr Jan.

ADV KENNEDY SC: With Mr Mlambo. Yes. Is it not correct that you in fact had the discussion with Mr Saloojee?

MR BURGER: At the end when we had the discussion, all of us, yes.

ADV KENNEDY SC: All of us being who?

MR BURGER: The four of us. Clearly Jan Wessels, myself and ...

20 **ADV KENNEDY SC:** So you and?

MR BURGER: The CFO and the COO and the Group CEO.

ADV KENNEDY SC: So it was Mr Saloojee, Mr Mhlontlo, Mr Wessels and yourself?

MR BURGER: Correct.

ADV KENNEDY SC: Right, but not Mr Mlambo?

MR BURGER: Not yet.

ADV KENNEDY SC: You see this is part of the problem that Mr Mlambo has raised and it seems to be an issue we need to canvass with you. I can fully understand your attitude that well we have got a complication. You have tried to persuade Mr Mlambo. Mr Mlambo is trying to persuade you. And you just cannot see eye to eye on this. Not a personal antagonistic thing, it was ...

MR BURGER: No.

10 **ADV KENNEDY SC:** It was a matter of on both sides you have accepted people being bona fide and trying to do their job. You had not persuaded each other. So now who, how do you break this logjam? You go to the bosses because after all the delegation of authority ultimately rests the final approval in Mr Saloojee.

MR BURGER: Correct Chair.

ADV KENNEDY SC: And now Mr Mlambo regarded his approve – his own approval or recommendation as being vital, but let us leave that debate aside. I think we have
20 touched on that already and the delegations authority can be looked at. But, but so let us, let us accept for a moment that your position, at your level with Mr Mlambo's level you have reached a logjam. It has got to go higher.

MR BURGER: Correct Chair.

ADV KENNEDY SC: Now it seems to me to be significant

that Mr Mlambo was not part of that meeting. Now I am not suggesting that, that you should have told Mr Saloojee, your ultimate boss, how he should run a meeting. But I am just asking you to comment on this because the Chair ultimately has to look at whether this process was, was properly done and carefully considered by management. Particularly where it is in the context of public controversy about State capture and so forth.

The Chair may need to be satisfied that this was a
10 truly genuine, bona fide, good faith type of transaction. Not designed to favour people like the Guptas because of their political connections and so forth, but this was a genuine bona fide thing.

I just want you to comment on my concern. Mr Mlambo has been playing his role, raising all of these concerns and yet he seems to have been left out of the – well we know he was not part of that meeting. You know why not?

MR BURGER: I have got no idea. It was not strange for me
20 that his name was not on the motivation, because that was the way it was done previously.

ADV KENNEDY SC: Yes.

MR BURGER: For orders above 50 million. Obviously orders between 20 and 50 million he, he had to sign off. But orders above 50 it was the CFO and the COO that needed to

recommend and the CFO represented Mr Dennis Mlambo.

ADV KENNEDY SC: Right.

MR BURGER: So I...

ADV KENNEDY SC: Sorry the CEO represented Dennis Mlambo.

MR BURGER: The CFO.

ADV KENNEDY SC: CFO represented Mr Mlambo.

MR BURGER: Correct. Because he was reporting to him.

ADV KENNEDY SC: And the CFO had in fact been copied in
10 on these emails admittedly.

MR BURGER: Ja he – I do not even see his name here.

ADV KENNEDY SC: Certainly – sorry the CFO was Mr Mhlontlo.

MR BURGER: Yes.

ADV KENNEDY SC: Yes on page – the email at the top of page 785 I see Fikile Mhlontlo after Celia Malahlela.

MR BURGER: Oh yes there is sorry that is correct.

ADV KENNEDY SC: So it does seem that Mr Mlambo included him as one of the people to whom this was copied.

20 **MR BURGER:** Correct. But to give him credit Chair that if I was – if this was such a big issue because subsequent to this email there were many meetings at head office which I was not party to.

ADV KENNEDY SC: Right.

MR BURGER: And many visits to LMT and to whoever and I

was not party to that.

ADV KENNEDY SC: Yes.

MR BURGER: And if this was so controversial I would probably have if I was in the shoes of Mr Mhlontlo I would have probably said Dennis come with me. I take that view or that accept that point. But the fact of the matter was this was – it was at a stale mate. It was escalated – everybody that was there were represented by their bosses at least and it was signed off.

10 **ADV KENNEDY SC:** Right. Now can I take you now to a further email at page 791 still in Bundle 1 the same bundle.

MR BURGER: 791

ADV KENNEDY SC: Yes. The correspondence we have just been looking at was dated the 4 September and this one on the – on page 791 is dated a few days later the 9 September 2014, do you see that?

MR BURGER: I see that Chair.

ADV KENNEDY SC: Yes. And this now is sent by Mr Mlambo to Mr Saloojee. He is the actual addressee together
20 with Mr Mhlontlo and Mr Wessels. Now he says:

“I have managed to review DLS’s submission pertaining to the abovementioned subject. The following issues paint an unacceptable picture from a process fairness and objective point of view.”

Now of course those terms have particular relevance when you look at the constitutional requirement that the – that there be a process, that there must be a system and you must comply with your system and it must be done in a lawful fair and objective manner.

And he points out that there are a number of defects in the process which he obviously regards as being serious. In paragraph 4 he say:

10 “In the submission it is claimed that LMT’s quote is too low and unrealistic.”

Now that would be the submission that was prepared by Ms Malahlela that you signed for purpose of submitting to head office to get the GCEO’s approval. Correct.

MR BURGER: Correct Chair.

ADV KENNEDY SC: And in that memorandum that point had been made that the LMT quote of about R150 or 60 million was too low and unrealistic. Correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Right. And then he says:

20 “The difference between LMT’s quote and the VR Laser quote is almost R100 million. After questioning Stephan Nel on the accuracy of his quote he offered to come and present the facts to demonstrate that it is based on realistic quotes. Furthermore he claimed

LMT had made the hull before – before under Patria’s contract.”

Then he says in paragraph 5.

“In my meeting with Stephan Burger yesterday”

So you actually had a meeting with Mr Mlambo.

MR BURGER: Correct I see that now yes.

ADV KENNEDY SC: It was not just emails correct?

MR BURGER: Correct.

10 **ADV KENNEDY SC**: Right.

MR BURGER: As was suggested in that last email of his.

ADV KENNEDY SC: Indeed. You – he says:

“He that is yourself Mr Burge indicated that VR Laser had offered to reduce the quote from around R262.4 million to R195 million!”

That clearly is something that is worthy of emphasis.

He says:

20 “Does that not tell a disturbing story about the initial offer on the basis of these findings and other facts it is my considered opinion that the submission from DLS be rejected since LMT has the capability to make the hull. This issue should have been discussed before going out on tender.”

Now again I cannot expect you to defend Mr Saloojee

or Mr Mhlontlo in their actions but what I would like you to comment on is this. Mr Mlambo's evidence suggested that you effectively put a lot of pressure on Mr Saloojee and made a whole issue about the very point you raised just now urgency, we need this urgently.

And LMT's offer cannot be taken seriously they have under quoted and they have got technical problems and so forth. And all of that you presented to Mr Saloojee and persuaded him a way which had the effect of not only
10 undermining Mr Mlambo's position as head of Supply Chain Management but importantly probably most importantly is saying this as your expert in Supply Chain Management I am telling you that this has not been done fairly, properly, objectively and correct from a process point of view.

And he said I have – I have just smelt a rat he said I do not believe that this was being done objectively. This was being rushed through and arguments about things being so urgent were being put above the importance of procedural compliance, legal compliance. Do you have a comment
20 about that particularly to the extent that that criticism is directed not only at them but at you personally?

MR BURGER: Ja firstly the – Chair the opinion of it being illegal was – is a surprise to me at the time. It never crossed my mind. Secondly this very strong letter I am - I was not party to it, I did not see it and it is news to me. It is

– we were running at a schedule and this was getting late and – in the day for approval of it especially with regards to certain milestones like technology, transfer and so on.

The long and the short is I felt strongly that VR Laser given everything is in all probability the better decision – given everything from a technical and a risk perspective. If – sorry I have got lots of respect for Mr Dennis Mlambo and he understands the processes and the procedures and the National Treasury requirements much better than me for sure. But unfortunately he did not create over years a scenario where it is easy to find compromises. The frustration levels were very high.

ADV KENNEDY SC: Frustration on your part.

MR BURGER: On from the divisional level it was high and it – wrongly and I am not trying to defend it but it – at the time – at that time it was felt that he is being – he is making life difficult for obvious decisions so...

ADV KENNEDY SC: Yes.

MR BURGER: But I take your point I am not going to argue it but the – at that time there was a level of frustration.

ADV KENNEDY SC: Yes.

MR BURGER: And this is why I did not go and see on my own Mr Saloojee and lobby with him if that is the insinuation. There was a discussion. I did put over my points with enthusiasm but both Jan Wessels and the CFO were having

discussions on a regular basis about these matters with him.
And...

ADV KENNEDY SC: That is Mr Saloojee or Mr Mlambo?

MR BURGER: Mr – Mr Mlambo, Mr Wessels and Mr Mhlontlo had regular discussions, regular.

ADV KENNEDY SC: Right.

MR BURGER: And in my – and after this and you can see here this was now escalated. It was no longer on the level of the division and group Supply Chain. These things were
10 discussed and I put my arguments. The very same answers articulated here as I said earlier I put on the table there. And I was prepared to make compromises but I was really scared about the safety critical item like a hull. And that is as simple as it was.

ADV KENNEDY SC: Right and also delays.

MR BURGER: Of course I was concerned about it.

ADV KENNEDY SC: Yes. Can I just debate with you the latter aspect of delays?

MR BURGER: Yes Sir.

20 **ADV KENNEDY SC:** You see I understand from your evidence and in fact the evidence of some of the other witnesses and some of the documents suggests that there was frustration on the part of people like yourself. That there were delays and the delays were unacceptable and should be avoided or minimised. I accept that that could be a

legitimate concern.

MR BURGER: Yes Chair.

ADV KENNEDY SC: What just seems to me to be a bit strange is that in the greater picture whether – if there was a delay in relation to what Mr Mlambo was suggesting as you have accepted in good faith that these issues need to be investigated and possibly a fresh process should be undertaken in order to comply with the requirements of the law and of the procurement processes. If that had taken
10 place it would not have meant a delay of many years, correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Let us – let us assume for a moment and Mr Mlambo has not said that it was necessary in this case that a – particularly under this Supply Chain policy at that time that you had to do anything other than a request for offers – a request for quotes. Was not necessarily going to be a fully open public tender advertised in the media etcetera. It would not have taken all that long.

20 So I can understand when you say that you were frustrated with Mr Mlambo. You accepted he was in good faith. You accepted that he was entitled to come to these opinions. You may have disagreed with them but he and you suggested that he was being difficult but not in bad faith it was just frustrating to your intent to get the ball rolling.

MR BURGER: Correct Chair.

ADV KENNEDY SC: But in the bigger picture if you had humoured Mr Mlambo or complied with Mr Mlambo's request and the same of course applies to Mr Saloojee and Mr Mhlontlo and we have had to deal with those questions with them. It would not have delayed the Hoefyster Project by much in the greater picture.

We have before the commission facts as to the seriously disturbing delay in the project which goes into – we
10 are talking about more than a decade – so I can understand you may be have been frustrated with that as well and that may not have been your responsibility and so forth.

So even if one accepts your desire to expedite things, hurry things along firstly was it not required in terms of the law? Was it not required because your expert within the group Mr Mlambo was saying we need to do this? And surely it would have possible to do it where in the bigger picture any delay was not going to make another decade on top of what was already there. Any comment on that?

20 **MR BURGER:** Yes I would to like put the slip in perspective. A lot has been said about PB or PBLA and PBL1 and they do not know if in the next three years PBL1 will be achieved. How that works is there is not only one PBLA and one PBL1 per variant. There is a build-up of PBL's.

ADV KENNEDY SC: No but why are you raising that in the

midst of my question.

MR BURGER: Sorry hold I will get to that point.

ADV KENNEDY SC: Please.

MR BURGER: Sorry I will get to that point. At – in 2013 we already reached the sub, sub system level PBL where we could go out with the manufacture of the hulls. In 2016 Armscor granted PBL1 on the combat system with certain conditions. That was in 2016 four years ago.

So we were running at a schedule with the
10 expectation PBL has – well in 2016 it was building up to it and it was achieved in 2016. Subsequently to that I am told that Armscor took the decision that those conditions are not – were not met or were not favourable or I do not know what the reason is and there is no longer now a PBL1.

Now this is extraordinary disturbing and I think anybody should be disturbing – disturbed by this. I also want to put it that the Malaysian order was running on – probably more complex than Hoefyster was running on schedule, was running within budget and were running within
20 the technical performance. So we were used to performing according to the program plan.

ADV KENNEDY SC: Right.

MR BURGER: And that is why I was gittery and getting frustrated number 1.

Number 2 the hulls were a separate line item on the

contract which meant that we were selling the hulls. Every hull that was made we would sell - Armscor would come and accept it. Their program management, their quality as well as Denel Land System's quality they would sign it off and Armscor would then buy the hull.

And we would get the money for the hull. So it was in my interest at the time these were one of the very few separate line items. Get the hulls out and get them into production. So Chair it is not correct to say ag but it is – the
10 program is a decade late, what does it matter if there is another three months taken? I just wanted to clear that with – perception.

ADV KENNEDY SC: Right okay.

CHAIRPERSON: Yes but I am not sure that I understand. Mr Kennedy's point is this. When you and other people may have thought or may have taken the view that Mr Mlambo's issues were going to cause a delay or that he was delaying the process.

Mr Kennedy is saying but the truth of the matter is
20 even if you had to redo the process but do it properly. If what was required was to just send out a request for proposals or whatever in regard to two entities or three entities it was not going to cause a delay – the kind of delay that you should really have been concerned about. Because and I am now adding what he did not say. It must have been

possible to do that within I would imagine even two weeks because these were entities which had already worked on this thing. They were not going to start afresh. So how could a period like two weeks really be something to complain about?

MR BURGER: Chair no you are right and this is – this is September it was finally approved in November I think it was there about so you are correct Chair. The time was probably there to do that.

10 **CHAIRPERSON**: Yes.

MR BURGER: In hindsight.

CHAIRPERSON: Yes.

MR BURGER: You are right. The point I was trying to make was it – I could never as a CO of a division acknowledge that schedule is not important. It always was and it always will be but in the greater scheme of things and it was only signed in November it would not have mattered.

CHAIRPERSON: Yes.

MR BURGER: You are correct.

20 **CHAIRPERSON**: Yes. Mr Kennedy.

ADV KENNEDY SC: Thank you Chair. Just to complete my questions on this issue Mr Burger. Of course it is always possible in the real world out there especially in South Africa these days that parties who are unhappy about the outcome of a procurement process could take you on review in a court

process, not so?

MR BURGER: That is true.

ADV KENNEDY SC: Certainly counsel such as myself and my learned juniors in fact have taken...

CHAIRPERSON: Are always ready.

ADV KENNEDY SC: We always ready. Our phones are on. It is a gross industry as it were. Now – and of course the courts are burdened with a huge load of these things. You are aware as a – at the time a Chief Executive Officer that
10 there are risks. If you do something unlawful let alone unconstitutional you can be taken on review. Now this could have happened here not so?

MR BURGER: You are correct Chair I concede to that. But in my mind I – at that time we sat with a – the Group CEO that needed to sign this off.

ADV KENNEDY SC: Yes.

MR BURGER: He was the boss of the organisation, the person that signed the delegations of authority and in my mind I did not have any hesitation that to think that if he
20 signs it off there is something funny.

ADV KENNEDY SC: Alright.

MR BURGER: So in my mind I did not see it as being unlawful. But I listened to the commission and I accept that the rules have changed and...

ADV KENNEDY SC: Well for some time yes long before

2014.

MR BURGER: Ja.

ADV KENNEDY SC: This type of litigation has been going for quite a while. But let us leave that aside I would like to explore briefly if I may Chair with the witness this issue about well if the Group CEO signs it then you are sure that there cannot be anything wrong.

What I suggest to you is that that is a very passive approach to your duties at that stage as CEO. You were
10 CEO of the division. In fact you were very keen to have more powers and authority given to you at division level in terms of the decentralisation that you preferred, not so?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Now I see you smiling are you seeing a bit of a logical inconsistency. But I will give you an opportunity to answer that. May I just complete the question.

CHAIRPERSON: I think he will consider it.

ADV KENNEDY SC: I think so too but what I want to put to
20 him if I may Chair I am not going to belabour the point I hope. What I am suggesting to you is that part of your – and here I am not Mr Saloojee's defence counsel and I know there have been some allegations even in your own affidavit about Mr Saloojee been given special treatment and so on.

I am not going to go down that route. But at a level

of not just law but good management practice when you are the head of a divisional unit in this case DLS and you have to take certain steps in your division and then whether you like it or not you have to send it up for approval to the Group CEO for his approval in this case Mr Saloojee.

Is it not your duty to be ensuring that Mr Saloojee is protected and informed in a sense that you should not send anything to Mr Saloojee for approval unless you have ensured that there has been proper compliance. Rather than
10 saying well let us see if Mr Saloojee approves it?

If he does – as you put it earlier – well he has approved it so I did not see anything wrong with it. Surely it was incumbent on you to see whether there was anything wrong with it before you sent it.

Because you were recommending it to Mr Saloojee for approval, not so?

MR BURGER: Correct Chair and under a normal run of things you absolutely correct.

ADV KENNEDY SC: Yes.

20 **MR BURGER:** It is my responsibility.

ADV KENNEDY SC: Yes.

MR BURGER: But the point is this issue was escalated. Everybody was aware of the issues. It was not news to...

ADV KENNEDY SC: Aware of the?

MR BURGER: The issues that...

ADV KENNEDY SC: The issues.

MR BURGER: The issues that was put under. It was not news to anybody and that is why I say regardless of that both the COO, the CFO as well as the Group CEO decided to accept this.

ADV KENNEDY SC: Yes.

MR BURGER: The – it was – something was not being kept away from him. He knew everything.

ADV KENNEDY SC: Right. Now if we accept your evidence
10 earlier that you were at the time unaware that there was any breach but have since realised that there was a breach at least in respect of negotiating a lower price with VR Laser. Would you accept that Mr Mlambo is entitled to say he raised all of these issues as you say with his bosses as well as with you?

They effectively in his view ignored it. They did not come back to him. They did not say well Mr Burger has said this and what do you say about that? There was none of that. Instead he finds out later that Mr Saloojee has signed
20 despite the fact that Mr Mlambo had raised all of these objections.

And so Mr Mlambo has suggested to this commission is his evidence well I do not understand this. It actually seems to compound my fears and perceptions initially. There is something funny going on here. Mr Burger is acting

subjectively.

Even when I raise with him concerns about compliance with the legal requirements of the procurement process I get vague answers from Mr Burger. That is what he is effectively saying in his email. Whether he is right or wrong leave aside for a moment and he says and then it is escalated to head office.

There is a discussion not involving me Mr Mlambo but Mr Burger then has a fast track to have a meeting with
10 Mlambo's superiors. He is not invited. Mr Saloojee then just accepts it and what has happened to my objections? My being Mr Mlambo's objections. There seems to be something funny about this. You understand?

MR BURGER: I understand.

ADV KENNEDY SC: His perception.

MR BURGER: Understood but he has also in his evidence said that he only found out I think five months after the event.

ADV KENNEDY SC: Yes.

20 **MR BURGER:** That this was done. An email was written, sent to him, the email is at the investigators that informed him of the meeting a day after it was signed.

ADV KENNEDY SC: And its outcome.

MR BURGER: Yes.

ADV KENNEDY SC: Right.

MR BURGER: A day after it was signed. So there was no – we were not trying to hide anything from him. He was informed so ...

ADV KENNEDY SC: But are you suggesting that he is concocting evidence and deliberately telling an untruth to the commission when he said he only found that out later – much later?

MR BURGER: I cannot say that Chair.

ADV KENNEDY SC: Okay.

10 **MR BURGER**: I am – he might have forgotten.

ADV KENNEDY SC: Okay.

MR BURGER: But...

ADV KENNEDY SC: Well that is a generous attitude on your part Mr Burger.

CHAIRPERSON: Okay. Shall we take a short break we are at twenty nine minutes past four.

ADV KENNEDY SC: Yes thank you Char.

CHAIRPERSON: And subject to everybody being happy Mr Burger and your counsel. We – I propose that we continue
20 until maybe about half past five.

ADV KENNEDY SC: Thank you Chair.

CHAIRPERSON: Or there about before we then adjourn. If at that stage the feeling is that justice has not been done to the issues that Mr Burger must cover then another opportunity will be arranged for Mr Burger to come back.

ADV KENNEDY SC: Yes.

CHAIRPERSON: Is that fine with you Mr Burger?

MR BURGER: Hundred percent Chair.

CHAIRPERSON: And your counsel is that fine with – is that fine? Yes okay.

ADV KENNEDY SC: Thank you Chair.

CHAIRPERSON: Let us take a short adjournment now and we will resume in probably say ten to – so a ten minutes break. Not ten to twenty to.

10 **ADV KENNEDY SC:** Twenty to.

CHAIRPERSON: Ja twenty to.

ADV KENNEDY SC: Yes thank you Chair.

CHAIRPERSON: We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES:

CHAIRPERSON: Let us continue.

ADV KENNEDY SC: Thank you, Chair. May I proceed?

CHAIRPERSON: H'm.

20 **ADV KENNEDY SC:** Sorry, I did not quite hear you.

CHAIRPERSON: Oh, let us just continue.

ADV KENNEDY SC: Yes, thank you Chair.

CHAIRPERSON: Okay.

ADV KENNEDY SC: Mr Burger, we have dealt extensively now with the Platform Hulls Contract and I think we have

debated it as far as we from the legal team's perspective. Need to say for one point, if I may just ask? The price reduction by VR Laser that you are able to get to know in a phone call with a bit of angry tone, resulted in a reduction from R 266 million. That is the actual total value of the bid that was put in by VR Laser to R 195 million. Correct?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And you have already commented about why you felt they should not have tendered so much in
10 the first place. It does seem curious that they were persuaded so easily, as I have put to you earlier.

The question that one of my learned colleagues has just asked me to put to you and I do so because I think it is a valid question. You may have a valid answer to it. We would like to give you the opportunity.

Is the reason why they were not – why they were prepared to come down so suddenly and so easily and so substantially in price, that they were told that they could make this up in a Single Source Supplier Contract?

20 **MR BURGER**: I reject that Chair. At that time, there was no inkling about a Single Source Supplier Contract.

ADV KENNEDY SC: Okay. Well, then let us move to that very contract that took place the very next year. Is that right?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: What I would like to find out from you is how it came about that this contract was in fact negotiated and then granted? Who came up with the idea?

MR BURGER: The then Group CEO, Mr Saloojee. He called me to his office one day and informed me that we should supply him with an MOU. I am not sure if the word MOU was used. That looks at single sourcing wherein the rights of Denel is protected.

I then went to the division. I had a discussion with Mr
10 Reenen Teubes. I asked whether he thought this was a good idea. The – his initial response was: Yes, mine also, by the way.

We, however, decided let us within the division check if the engineers also think it is a good idea. There was a study done by the engineers.

And it was also discussed at an – on an executive level. It was minute. It is very clear that in the minutes and I have not got it in front of me but that an MOU must be produced with certain conditions on it for signature by the Group CEO.
20 And so we did that.

The first MOU that came out were from the time with my name at the bottom. I asked that it be changed to Mr Saloojee's name. I had a discussion with Mr Saloojee and he said: No, no, no. He will sign the approval page. And I must sign the document.

He – in the next utterance he said: I know I must add Mr Zwelakhe Ntshepe on the document and then the next utterance he said: No, I must also add Mr Jan Wessels on the motivation. And the document was presented.

ADV KENNEDY SC: The question was, who initiated that? It was not your own suggestion, it was Mr Saloojee's.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Yes.

MR BURGER: Sorry, it is a long-winded answer but correct.

10 **ADV KENNEDY SC:** I am sorry. I am not trying to be sarcastic but... Ja. It is not curious though that this sort of suggestion should have come from head office?

After all, you had been for some time being the CEO of DLS and Mr Saloojee, presumably, would rely, although it was to an extent a centralised model.

There was a measure of decentralisation in that, not every decision within DLS was taken at head-office level. Correct?

MR BURGER: Correct, Chair.

20 **ADV KENNEDY SC:** Yes. Did you find anything curious about the fact that it came from Mr Saloojee rather from within your own division?

MR BURGER: Chair, I write quite a lot about my relationship with Mr Saloojee.

ADV KENNEDY SC: Yes.

MR BURGER: In my affidavit.

ADV KENNEDY SC: You did, yes.

MR BURGER: Mr Saloojee made it very clear that so-called politically decisions and certain marketing decisions is – he is better suited to take those decisions.

ADV KENNEDY SC: Marketing or market decisions?

MR BURGER: Marketing.

ADV KENNEDY SC: Marketing?

MR BURGER: Marketing.

10 **ADV KENNEDY SC**: This was not a marketing decision, correct?

MR BURGER: No, no. Correct. But also certain political decisions. He has, in the past, given me many instructions to say certain suppliers are politically well-placed and we must please support them.

ADV KENNEDY SC: And did you do that?

MR BURGER: One of the suppliers he mentioned was VR Laser during the – before the 2014 approval.

20 **ADV KENNEDY SC**: Even before the 2014 approval for the whole contract.

MR BURGER: For the whole...

ADV KENNEDY SC: Did that have any bearing on your enthusiasm for VR Laser for that contract?

MR BURGER: My answer to him at the time was, VR Laser is one our biggest suppliers. You should not worry. It is

common knowledge that they will get work. So relax.

ADV KENNEDY SC: So you were happy to give him comfort in expecting that you would ensure that VR Laser would get a fair, lot of work?

MR BURGER: I was convinced through normal processes, they would get a fair amount of work.

ADV KENNEDY SC: Yes. Now how did you find that request or instruction from Mr Saloojee even before the 2014 contract was awarded? Did you feel that it was a proper
10 one?

MR BURGER: Chair, our relationship was – although I had a lot of respect for him. He was a very dynamic Group CEO. Our relationship was strained. And I think he had to break the decentralised model and inverting the decentralised model, he probably needed to cut me down to size a little bit.

But our relationship was a tense one. And given his – numerous occasions where he said: You keep your nose out of political matters. That is my domain. Certain things are more important that you will not understand. I did not like it
20 but I accepted it as the normal run of the business.

ADV KENNEDY SC: I assume that you would agree that political matters may have a range of different meaning and interpretations. Correct?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And one narrow one would be, that to

the extent that there is – that this is a state-owned entity where the cabinet member responsible for Public Enterprises is the shareholder in Denel on behalf of the state. And there has to be accountability by the board and the Group CEO to the minister that that would involve legitimate political interaction. Correct?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And in that sense, if Mr Saloojee was saying to you: Leave the politics to me. (Mr Saloojee) That
10 there would be nothing wrong with that. Correct?

MR BURGER: Absolutely not.

ADV KENNEDY SC: Yes. In fact, it would make sense not to have a divisional head like you dealing with the minister, unless there was some reason to report to the minister that there is something seriously wrong going on.

MR BURGER: Correct.

ADV KENNEDY SC: That you could not resolve internally.

MR BURGER: Correct.

ADV KENNEDY SC: Right. But it sounds to me as if he
20 was saying something a bit more than that. Not so?

MR BURGER: *He was* suggesting that certain divisions who are certain suppliers were politically well-positioned.

ADV KENNEDY SC: Well-positioned to what? Get favourable treatment, to get preference in the allocation of awards or contracts for business?

MR BURGER: His opinion was, it would be good for Denel to place contract on there.

ADV KENNEDY SC: Because they were politically connected.

MR BURGER: Correct.

ADV KENNEDY SC: Not because they were necessarily the best supplier to do a good job, not so?

MR BURGER: Yes. Hopefully, both will be true. But yes.

ADV KENNEDY SC: But it certainly was not just the one.

10 As I understand your evidence, your perspective and your contention before the Learned Chair is, you looked at it from a point objectively, although Mr Mlambo questioned that. You have assured the Chair, you were looking at what was in the best interest of Denel, regardless of political connection.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Is that your case?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Right. Now, obviously, if it was simply a question of saying: Well, we want you to do a good job

20 Mr Burger. Make sure that you get the best product from a quality point of view and the best price and so forth. That would have been a legitimate expectation. Correct?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: But you knew that already, that you knew is as your function.

MR BURGER: Obviously, correct Chair.

ADV KENNEDY SC: But again, obviously, he was suggesting something different. He was suggesting that in award of contracts, that VR Laser because they were politically connected, should be given a preference.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: An undue advantage because they were politically connected, not because they were necessarily the best company. Is that how you understood
10 him?

MR BURGER: Correct, Chair. I, however, would not have supported something that did not correlate with my believe in it being the best or and not in the best interest of the business and the operations.

ADV KENNEDY SC: But it is interesting your reaction to Mr Saloojee. It is not to say: I would never do anything that was not in the best interest, boss. It is to say: Do not worry, boss.

And I am paraphrasing you and if I am over-simplifying
20 it, please. You will get an opportunity to correct me. You seem to be saying: Do not worry boss. They have been getting a lot of work already. You do not have to worry. They are still going to get lots of work.

MR BURGER: Sorry. If you read my affidavit, I said I believe that VR Laser is in the best business in their niche

area. From that perspective, I anticipated they will be getting work and therefore, for that reason, your concern is covered.

ADV KENNEDY SC: But Mr Saloojee's concern, it seems was not simply that they should get a lot of work because they are good. We have debated this already.

MR BURGER: Correct.

ADV KENNEDY SC: So what you seem to be saying is, when he was suggesting something improper to you, you
10 came back and you said: Well, do not worry. They are going to get it anyway. For a good reason, not for the reason that you are telling me, boss.

MR BURGER: Yes.

ADV KENNEDY SC: Not so?

MR BURGER: If that was the first incident, then it would have probably liaised(?) more longer. But similar instructions were given with regards to N4 in the past. It was ...[intervenes]

ADV KENNEDY SC: N4?

20 **MR BURGER:** N4, which also manufactured casters for us.

ADV KENNEDY SC: That same remark made that they should be looked after because they are politically connected.

MR BURGER: Correct.

ADV KENNEDY SC: And when was that said to you by

Mr Saloojee?

MR BURGER: Probably – it was before that. Probably 2013. I would imagine.

ADV KENNEDY SC: Right. And did you react to that? Did you respond to him when he told you that?

MR BURGER: I did not officially respond. I ...[intervenes]

ADV KENNEDY SC: And unofficially?

MR BURGER: N4 did get work.

ADV KENNEDY SC: I am sorry? They got work?

10 **MR BURGER**: They got work but ...[intervenes]

ADV KENNEDY SC: But I am asking you about your response to Mr Saloojee, not whether or not they got work.

MR BURGER: I hear you. My response ...[intervenes]

ADV KENNEDY SC: You say you did respond, initially responded. Did you?

MR BURGER: Ja, what I said was: I hear you, sir.

ADV KENNEDY SC: I hear you. You did not say to him: I am sorry Mr Saloojee. I do not mean to disrespect you but I have a real problem with that request or instruction.

20 I am afraid I am going to decide things to the extent I have authority on purely proper grounds. Not because of politically connections.

Now that might reflect a naivety on my part in that you were obviously some ranks below Mr Saloojee. But would that not have been the appropriate response?

MR BURGER: I can answer it in this way Chair. I still today as I sit here, I have got no regrets that I supported the whole manufacture at VR Laser. However, the fact that I just accepted Mr Saloojee's instruction, I do regret. I think the responsible thing would have been that something does not sound right here.

ADV KENNEDY SC: Yes. And you could have done that diplomatically?

MR BURGER: Ja, I could have.

10 **ADV KENNEDY SC**: And hopefully have kept your job. I mean, presumable if you had said something like I have suggested to Mr Saloojee. I am afraid that if you are going to ask me to favour anybody, however good or bad they might be, for a reason not that they are good but because they are politically connected. I am afraid I cannot do that.

If he had then charged you with insubordination or a failure to comply with an instruction, surely you would have been able to say: Well, that was not a reasonable or lawful instruction.

20 **MR BURGER**: Correct, Chair.

ADV KENNEDY SC: And the law, no doubt, would have supported you on that.

MR BURGER: Correct, Chair. My dilemma that I sat with at the time was. The thing he gave me the instruction on was something I wanted and that is the dilemma and

...[intervenes]

ADV KENNEDY SC: Yes.

MR BURGER: And I... You are correct. I am not arguing it. And in hindsight, it would have been so much easier but ...[intervenes]

ADV KENNEDY SC: Well, it might not have been easier but it might have been easier in the sense that you would not have to be facing these questions under the glare of television lights and in a judicial commission chaired by the
10 Deputy Chief Justice.

So in that sense, I accept that. But... Yes. And of course, Mr Saloojee must give his version as to whether or not this was said in the context.

Can I just go back to the other reference that you gave, the other example that you gave? It was N4.

MR BURGER: Correct.

ADV KENNEDY SC: He had asked you to favour for political favouritism reasons.

MR BURGER: H'm.

20 **ADV KENNEDY SC:** In that case, were you also keen to support N4 in business because of them being superior like you regarded VR Laser as being superior?

MR BURGER: Yes. We manufactured Caspir's at many suppliers and they were one of our suppliers. So it was not, in my mind, a big deal and it was not such a substantial

contract in any case. So that was not.. In the years that would have followed, they would have received work in any case. So.

ADV KENNEDY SC: Yes. Can I ask you this? Apart from how you could perhaps any idea and with the benefit of hindsight have responded to Mr Saloojee. Again, with the benefit of hindsight did you – should you not have considered perhaps reporting Mr Saloojee?

You know, that although it may be better on paper that in
10 practise, the law provides considerable protection for whistle-blowers.

And would it not have been possible for you to have reported, for example, to the Minister of Public Enterprises or the Public Protector or parliament or somebody like that or the chairperson of the board, whether or not he may have been amenable to such a report, may be debatable. But did you not consider that possibility?

MR BURGER: It would have been the right thing to do
Chair.

20 **ADV KENNEDY SC:** Yes.

MR BURGER: But the dilemma I was facing was, our Supply Chain processes were horrendously slow. If I took – if I took the numbers of orders that needed to be placed and I divided it with the days available, it would have taken forever under normal processes. So, firstly.

Secondly, I already expressed my opinion about VR Laser and their capabilities and in my mind – and in the past, we used to have a lot of single source suppliers.

So his proposal, even though he said it is – they are important supplier, they are a connected supplier. Please, form a single source agreement. That coincided with my ambition to streamline processes.

ADV KENNEDY SC: Yes.

MR BURGER: So that was the dilemma. And I had reported
10 him, I would have gone against something that I thought was good for the business and would streamlined the business and. So. But in hindsight, I should have done that.

ADV KENNEDY SC: Yes.

MR BURGER: I should have done that.

ADV KENNEDY SC: Yes. Your last argument about how it suited your business objective as you would put it, for good business reason. It does suggest, perhaps, that you are arguing that the end justifies needs.

MR BURGER: Chair, I am not saying that Chair. I am not
20 saying that.

ADV KENNEDY SC: But cannot one read into that – exactly that?

MR BURGER: Ja.

ADV KENNEDY SC: If you are not saying that, what else is it?

MR BURGER: Ja. No, I was naïve.

ADV KENNEDY SC: I am sorry?

MR BURGER: I was naïve Chair.

CHAIRPERSON: And it was the end that you wanted to.

ADV KENNEDY SC: Yes.

MR BURGER: Yes, I was naïve. And I – it was objective. Just to put this into perspective. If this thing came from Denel Land Systems, it would have been a totally different approach. We would have written a position paper, giving
10 the pros and cons, giving all the arguments.

ADV KENNEDY SC: Yes.

MR BURGER: We would have presented it at the Exco of the DCO or the CEO and he would have said: Right, this sounds good. Investigate. Continue. And give me feedback. That is how that would have – if it was initiated by Denel Land Systems.

ADV KENNEDY SC: Yes.

MR BURGER: It was not – it did not happen like that. But I thought it was a good idea. And that I cannot...

20 **ADV KENNEDY SC:** Okay. On the last point. Can we ...[intervenes]

MR BURGER: Sorry.

ADV KENNEDY SC: Yes?

MR BURGER: And this is for me a very important point to make. Sorry, Chair. My apologies for interrupting.

ADV KENNEDY SC: [No audible reply]

MR BURGER: If the insinuation is. I knew, as an example, State Capture or corruption was a play and therefore let us support something that will promote State Capture or corruption.

Then I would have, regardless of what the situation for DLS would have been, I would have said no we cannot do that. I mean, that is...

10 But in my mind at that time was, the – this is a connected supplier and it is important. They are a transformed supplier. It is important to support them. And the way you should do that is get a single source agreement in place.

ADV KENNEDY SC: But Mr Saloojee was not making his requests or giving you his instruction to favour VR Laser simply because they happened to be black-owned and to advance BBEE. As I understand it, the whole point that he was trying to stress, is not that they are black-owned but that they are connected politically and they must therefore
20 be favoured.

MR BURGER: Ja, well politically and an important supplier.

ADV KENNEDY SC: But politically important must mean, they are connected to politicians. They want us as a state entity to do what they expect, which is to give their buddies contracts which they might not get if you follow the normal

processes. Correct?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Right. So I just want to test. I mean, I do not want to go into A definition or a debate about the semantics, about what state captured and so forth means. But you have said you would have reacted - you would have resisted an instruction if you had known if this had actually had elements of state capture and corruption. Correct?

MR BURGER: Yes. If... Yes.

10 **ADV KENNEDY SC**: Yes.

MR BURGER: Yes, Chair.

ADV KENNEDY SC: But of course the term state capture had not been conceived at that stage. It came about much later. And of course, the corruption specific to the Guptas' also only became reveal to only much later.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: At least in the public domain.

MR BURGER: Correct, Chair.

20 **ADV KENNEDY SC**: did you have any idea at that stage who now owned VR Laser? Presumably you did because you are getting a lot of business from them already.

MR BURGER: Yes. By 2015, I think it was already in the public domain.

ADV KENNEDY SC: Right.

MR BURGER: The full extent that came down to me in 2016

when I received the email from Celia Malahlela.

ADV KENNEDY SC: Right.

MR BURGER: That is when everything sort of dawned.

ADV KENNEDY SC: Yes. Now I do not think we can reasonably expect you to have had advanced knowledge of all the facts that have come out overtime.

And in fact, this Commission I served the purpose amongst others of actually revealing a great deal of facts that the public may not have had before and the media may
10 not have had before.

So there are no doubts of the reasons that you president decided to appoint the Commission in the first place. But at the time that you were dealing with the single supply contract in 2015, you knew already that day was concern on the part Mr Mlambo about Denel being satisfied as to - we have - at least having knowledge as to who the truth ultimate shareholders and beneficiaries of VR Laser were. that had already arisen in the Hoefyster Contract, not so?

MR BURGER: During the Hoefyster Contract, I did not
20 particularly pay attention to that.

ADV KENNEDY SC: But no, my question was not whether you paid attention.

MR BURGER: Correct, ja.

ADV KENNEDY SC: He had raised it. we saw that in paragraph five of the one email we saw earlier, not so?

Where he says: all that they have said when you guys at divisional level had requested disclosure of who the shareholders are. all they give is the shareholders and VR Laser auto companies and I do not know who is behind those companies. So already ...[intervenes]

MR BURGER: [Indistinct]

[Parties intervening each other – unclear]

ADV KENNEDY SC: So already then, whether he knew or not that the Gupta connection existed, he was concerned
10 about that as he was entitled to be. Not so?

MR BURGER: True.

ADV KENNEDY SC: Right. Now. so when the Single Source Supplier Contract came up, you must have been away then. You have said, you think that already it Was in the public domain as to who VR Laser – who owned VR Laser, ultimately.

MR BURGER: Yes, Chair.

ADV KENNEDY SC: Being the Guptas’.

MR BURGER: Being Salim Essa.

20 **ADV KENNEDY SC**: Being Salim Essa who was connected to the Guptas’, correct?

MR BURGER: Ja. In 2015, I did not realise the strong association yet.

ADV KENNEDY SC: Okay. Were you aware then or can you not remember that Mr Sinhala was a director of VR Laser

at the time and that he was the son of one of the three Gupta brothers?

MR BURGER: If not then, it must have – I think it was shortly thereafter.

ADV KENNEDY SC: Yes.

MR BURGER: That I started becoming aware of it. I think I started becoming aware of Mr Sinhala around middle of 2015.

ADV KENNEDY SC: Right. So let us accept you earlier
10 indication that if you had known that Mr Saloojee gave this instruction to prepare a motivation to enter into a Single Source Supplier Contract with VR Laser. You, at least, knew that there was a particular shareholding in VR Laser. Correct?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And you also knew that why Mr Saloojee was raising this was precisely because he expected you to be giving business to VR Laser because they were politically connected. Correct?

20 **MR BURGER**: Correct, Chair.

ADV KENNEDY SC: Yes. Did you ask him, did he tell you or did you just guess for yourself who – how the political connection came about? How VR Laser was politically connected and with whom? Could you guess or did he tell you?

MR BURGER: No, no, no. He did not inform me whatsoever.

ADV KENNEDY SC: Yes.

MR BURGER: At the time, it was not – during that discussion, I – I am not sure. I cannot remember exactly if I have met a person like Salim Essa. I think I did at the time but – so I knew about him, I think I started to know a little bit later about Mr Singhala but what was going through my mind at the time was – and that is why I also told the story
10 about what happened in India is that I do not know of any wrongdoing that these guys had done something funny so if a company – sorry and I also did not consider at the time too much focus on who is the owner of a company apart from proper BBEE and so on. What was for me of importance is how good a company is and how good they can perform. I was very sensitive of judging people based on newspaper articles.

ADV KENNEDY SC: Right.

MR BURGER: And that came from the whole India
20 debacle and so my opinion was, if somebody did something wrong, you know, send him to jail. If a company gets blacklisted because of wrongdoing, close the company but do not react on something that is written in the paper about ...[intervenes]

ADV KENNEDY SC: I understand that, Mr Burger. What I

am interested, though, is more than that. I can understand you do not want to take decisions based on rumours and speculation and gossip and so forth and the media.

MR BURGER: Correct.

ADV KENNEDY SC: We know with great respect to the media representatives who are here, who are no doubt doing their job in good faith as well, we know that often the media is either wrong or may carry something because people are feeding them stories that may spread false
10 information out there. I fully understand that but I would like us to focus rather on what you did know from Mr Saloojee. So whether or not you knew exactly who was a director or the owner, ultimate owner of VR Laser at the time and whether they may or may not have been connected particularly to somebody in high position in the country. What I am just interested in is what Mr Saloojee told you and I am particularly raising this question because the Chair - obviously he will determine in due course what is ultimately relevant and how to deal with it in his report.
20 But it does seem an issue that is worthy of consideration, is what the role is of officials at senior level within in state entities and I appreciate that Mr Saloojee was far more senior to you in the hierarchy of the Denel Group, not so?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And obviously he has to answer and

he has answer to an extent and he will still answer when he is called again but I am just interested in your – how you dealt with it and you are not on trial here but the Commission is entitled to hear your evidence as to how these things happened and why they happened.

Now you have acknowledged very fairly early that there are some things with hindsight that you realise should not have been done. You have also said that you were naïve in certain respects. Do you accept, though,
10 that it would not have just been a good thing to have at least said to Mr Saloojee I am sorry but I am not prepared to accept an instruction like that. Instead you just said, do not worry, they are going to get business which seemed to give him assurance, it seemed to show him you are going to comply with the request to favour in a procurement setting VR Laser for a specific contract because they were politically connected not because they were the best supplier. Now did you not have a duty as a responsible state entity official to be taking a stance like that?

20 **MR BURGER:** In hindsight I should have, Chair.

ADV KENNEDY SC: Okay. What I would like now to deal with is the process that was followed for this particular contract and here again we are dealing with a single supplier contract. Just to make sure that I have covered it properly, Mr Saloojee had not said – had not given you a

similar request before the Hoefyster contract was awarded, that was in fact, as I understand your evidence, something that did come from the division DLS itself, correct? The idea to award the Hoefyster platform hulls contract to VR Laser.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: That came from your own internal process.

MR BURGER: Correct, Chair.

10 **ADV KENNEDY SC:** It was ultimately approved by the GCEO but he did not start the whole thing.

MR BURGER: Other than saying before the time that VR Laser is an important supplier.

ADV KENNEDY SC: Yes.

MR BURGER: The initiation came in totality from the division.

ADV KENNEDY SC: So he prior to his raising his requirement that you initiate or that you process a contract awarding the single supplier status from DLS to VR Laser, 20 he had another earlier discussion with you specifically about VR Laser, is that right?

MR BURGER: In February, around about in February 2014 he had a discussion with me in which he said VR Laser is a very important supplier and in that discussion I told him we are busy with the processes, they are a very good supplier

in a niche market, they in all probability will get work, do not worry.

ADV KENNEDY SC: And so that was at the stage that the platform hulls contract was being prepared?

MR BURGER: That was before the platform hulls – it was busy being prepared at divisional level, yes.

ADV KENNEDY SC: Right. Did he raise this in 2014 with specific reference to the platform hulls contract or in general?

10 **MR BURGER:** No. No, Chair, that was not product-specific, it was a general comment.

ADV KENNEDY SC: But in 2015 he made the same request but specific to the contract that he wanted you to award to VR Laser, is that right?

MR BURGER: Correct, Chair, his instruction was – and attempt to verbalise his instruction was put on the minutes of the Exco meeting and it basically said it must be MOU with certain single ...[intervenes]

ADV KENNEDY SC: Right.

20 **MR BURGER:** That aimed to achieve single source status.

ADV KENNEDY SC: Right.

MR BURGER: And that protects obviously Denel's interest.

ADV KENNEDY SC: Yes. Chair, it is getting late in the day and you have understandable limitations on the time

that you have already indicated to us. May we be permitted to use the remaining time to start the questioning relating to the process followed in the award and the difficulties relating to procurement compliance? It is ...[intervenes]

CHAIRPERSON: Ja, no that is fine, we still have about ten, fifteen minutes.

ADV KENNEDY SC: Thank you, Chair.

CHAIRPERSON: Ja.

10 **ADV KENNEDY SC:** Right. Mr Burger, in relation to this contract you have indicated earlier that you came to realise that with the benefit of hindsight that there were some difficulties in relation to the award of this contract, I understand ...[intervenes]

MR BURGER: Which contract is that?

ADV KENNEDY SC: That is the single supplier contract.

MR BURGER: Yes, Chair.

ADV KENNEDY SC: And what do you say was a defect in the award of that agreement?

20 **MR BURGER:** Firstly, at the time I did not see this as a contract, I saw this as a strategic document, agreement. I also did not see this as a document that stops any normal procedures to go through the process to giving a tender and getting the normal approvals. In other words, it does not give me, as a divisional CEO, the carte blanche to just

place orders. It still had to go through all the relevant parties as indicated in the delegations of authority.

So in my mind also in the past, much lower levels than me used to conclude the strategic agreements. So I did not, without studying the policy, I did not think that it is a problem at the time. When it was approved and we went through the negotiation with VR Laser and certain changes were made, I therefore had no hesitancy to sign the document because I felt it was a fair balanced document
10 and it represented the instructions that I got from the CEO. So I did not feel that we did anything wrong at the time.

ADV KENNEDY SC: So that explains why you did not think there was anything at the time.

MR BURGER: Yes.

ADV KENNEDY SC: Now can you please answer the question that I put to you, which is with the benefit of hindsight you have acknowledged earlier today that there was actually something wrong. You did not realise that at the time you say but what is it that you acknowledge now?

20 **MR BURGER:** I did not ...[intervenes]

ADV KENNEDY SC: What was actually wrong?

MR BURGER: I did not realise it – if you will allow me just, it is one sentence. When it – it then came – I came to learn that we should have gone out on open tender and I realised – it only – I only got to know about this problem

almost a year after it was signed. I know it was discussed internally at Denel Land Systems. I was not aware of it. There was – I was told about it literally in the passing and then there was an Exco meeting where it was discussed and I raised the opinion that yes, if we – it is not possible to go out on open tender because the only way to do something like this is to send drawings of complex, fabricated components to potential partners, let them tender on it and give their explanation with regards to their
10 capability, their processes, all that. And just before that, we went through that with the hulls. So we did that.

ADV KENNEDY SC: So you did that with the hulls but not with the single supplier.

MR BURGER: Yes, correct.

ADV KENNEDY SC: Can I just stop you there for a moment, if I may? Did that not actually alert you when you did get the instruction from Mr Saloojee to award it immediately and directly to VR Laser without even going out for three bids, did you not think hold on, last year we
20 awarded a contract, albeit to VR Laser, we did it after at least some sort of process of competition, competitiveness. We at least got three bidders, why are we not doing that here? Did you raise that with Mr Saloojee? Did you raise that in your own mind?

MR BURGER: I did not. I did not. Sorry, maybe I did not

come across clearly, I – the argument that we should have gone out on open tender and my argument was it cannot be open tender, it needs to be closed tender, that argument was raised, to me, became known to me by early 2016.

ADV KENNEDY SC: Yes.

MR BURGER: After the agreement was signed. So at signature of the agreement I thought it was well within the Group CEO's mandate to sign strategic agreements of that nature.

10 **ADV KENNEDY SC:** Yes.

MR BURGER: As the process unfolded and the last couple of weeks I came to realise but how things actually work nowadays is you have to go out on open tender for this. So I, at the time, I really did not realise it and it – and this is why I said well, it is an MOU, let us – or MOA, let us go for it.

ADV KENNEDY SC: Would you explain this – would you attribute this, the fact that you did not know at the time and you have come to realise recently again to naivety on
20 your part?

MR BURGER: Chair, I do not know what the correct word is, I ...[intervenes]

ADV KENNEDY SC: Well, if it is not naivety, what would you ...[intervenes]

MR BURGER: I wanted to see this happening, I thought it

was as good idea for the business. Maybe I did turn a little bit of a blind eye, maybe I thought, you know, why this operational focus but it suited me and I supported it. And naivety, and not knowing what the correct procedures should have been on Treasury level.

ADV KENNEDY SC: Yes and we have already debated whether you should have known those procedures and I think you have acknowledged that you should have.

MR BURGER: Correct.

10 **ADV KENNEDY SC:** But I want to just, if I may, Chair, just in the final few minutes of the time left, just explore this last aspect of the naivety and the lack of knowledge of the processes. You knew that there were some processes that were applicable, that were required, not so?

MR BURGER: At the time I knew of the supplier contract processes, that I did.

ADV KENNEDY SC: Yes. And in fact as I showed you earlier when we took the lunch adjournment and we confirmed this on the record straight after lunch there were
20 two versions of the supply chain management policy. The one was 2013 before the award of the Hoefyster platform hulls contract but the other came into force after that.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And was that not applicable at the time of the award of the single supplier contract in 2015?

MR BURGER: Correct, Chair, it was.

ADV KENNEDY SC: Did you have in your possession – had you been sent or did you have access to the current – the then current SCM policy?

MR BURGER: I had access, I did not have one on my table but I could find access.

ADV KENNEDY SC: Presumably when the board at head office level decided to approve the adoption of the new policy they would have informed you as CEO of a division.

10 **MR BURGER:** It was distributed, Chair.

ADV KENNEDY SC: Yes. Now apart from your knowledge that there was now a new policy, you also had Ms Malahlela in your division who headed the supply chain management there and you also had Mr Mlambo, as we know, at head office who was the head of supply chain management for the whole group.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Now what I want to ask you is this. Even if one assumes in your favour that you were not
20 familiar - even though you had access to it, you were aware that there is a new policy, you were not aware though about the detail that required, for example, a competitive process and you were not aware of the Constitution and the PFMA requirements to that effect and so forth, with the benefit of hindsight are you prepared to

acknowledge here that in fact any ignorance of that must have been dispelled when Ms Malahlela and Mr Mlambo raised serious concerns about the award of this contract, the single supplier contract to VR Laser, and specifically raised these concerns that there had been noncompliance and the contract could not going ahead, what I am suggesting to you, if you were genuinely ignorant before then, you were then – that ignorance was dispelled by them drawing this to your attention despite that you went
10 ahead and recommended the contract in your motivation and then ultimately signed it on behalf of DLS.

MR BURGER: I state again, Chair, although there was, I learnt now, discussions within Denel Land Systems. I only got to know about the unhappiness and consequences in 2016, number one.

Number two, in my mind I also said this is a strategic document ...[intervenes]

ADV KENNEDY SC: Sorry, this is a strictly...?

MR BURGER: It is a strategic ...[intervenes]

20 **ADV KENNEDY SC:** Strategic document.

MR BURGER: I did not – wrongly, but I did not put it in the same category as a supplier contract.

ADV KENNEDY SC: But they were entitled to supply as a single supplier to the exclusion of others unless they were in breach, you had to go to them first.

MR BURGER: Correct.

ADV KENNEDY SC: Not so?

MR BURGER: Correct.

ADV KENNEDY SC: So it was a supplier. So can you just explain this, as a final question, if I may, Chair, can you just explain why you did not see this as a supplier agreement? It was, it was a single supplier *nogal*. To call it a strategic document surely does not detract from the fact that at the end of the day that contract required,
10 maybe not the memorandum of understanding because that is sort of a wish and we might do this and we hope to do it.

MR BURGER: Correct, correct.

ADV KENNEDY SC: But the memorandum of agreement that was signed – by you, not so?

MR BURGER: Correct.

ADV KENNEDY SC: Did actually give them enforceable rights to supply you, Denel Land System, before you can go anywhere else, unless they are in breach, they must be given that business.

20 **MR BURGER:** Correct, Chair.

ADV KENNEDY SC: Not so?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: So how does the label of this being a strategic agreement and therefore not a supply contract, how does that tally?

MR BURGER: The reason – and I state again and my apology for repeating, in the past these sort of agreements, in the distant past, these sort of agreements were regular and that did not mean that if somebody held a single source agreement that there should not be normal processes to give that order to that person. And you are right, it is a single source agreement, but the ...[intervenes]

ADV KENNEDY SC: I am sorry, before I let you carry on,
10 can I just debate that last point with you? Surely every contract has to follow certain processes and you are suggesting it still required those processes but those processes include a competitive process.

MR BURGER: Correct.

ADV KENNEDY SC: For competitive bids.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And the very point of this agreement, that is why Mr Saloojee was wanting you to give it to these politically connected people of VR Laser, was to ensure
20 that you did not have to go through an open tender or, for that matter, for an RFQ as you had done with three bids in the Hoefyster, it was precisely to avoid those processes, not so?

MR BURGER: True, Chair.

ADV KENNEDY SC: Thank you, Chair. Perhaps this – we

obviously cannot finish the witness.

CHAIRPERSON: Yes.

ADV KENNEDY SC: We have a fair number of questions still.

CHAIRPERSON: Ja.

ADV KENNEDY SC: We have made good progress, I believe, but I am afraid we have to take up your indication that we need to have another opportunity.

CHAIRPERSON: Ja.

10 **ADV KENNEDY SC:** I have indicated – taken the liberty of indicating to my learned friend Mr Crouse that the scheduling will be done as far as possible in consultation with him but obviously up to a limit. We cannot, for example, as colleagues say well, I am tied up for the next six months or whatever.

CHAIRPERSON: Well, let me make sure there is no I misunderstanding about that.

ADV KENNEDY SC: Yes.

20 **CHAIRPERSON:** If the date that we are looking at is close there would be consultation with all concerned but if the date gives you a reasonable time we will not negotiate the dates, we will just – as long it gives you reasonable notice then we will just fix the dates but if we are looking at close and we will not be giving you reasonable time, then we will seek to see if we can agree with you on the

dates. Okay, you understand?

MR CROUSE: Mr Chairman, we do.

CHAIRPERSON: Yes.

MR CROUSE: We will obviously ...[intervenes]

CHAIRPERSON: Do your best.

MR CROUSE: Try to accommodate the Commission as best we can.

CHAIRPERSON: Yes.

MR CROUSE: But, for instance, and that is why I
10 welcome the suggestion of Mr Kennedy, for the next week,
for instance, I am not available.

CHAIRPERSON: Yes.

MR CROUSE: But after that Mr Kennedy has also indicated to me that the Commission would probably accommodate Mr Burger's evidence after five o'clock in the afternoon.

CHAIRPERSON: Yes, we have evening sessions, ja.

MR CROUSE: And then we are readily available at any time.

20 **CHAIRPERSON**: Yes, yes, yes.

MR CROUSE: I just have a problem for the next week.

CHAIRPERSON: No, if we are looking at next week we would seek to agree with you on the dates because that is close.

MR CROUSE: Yes.

CHAIRPERSON: Ja, so we are not looking at next week because you are not available. And in all probability we will look at an evening session.

MR CROUSE: Yes.

CHAIRPERSON: And then it enables you in case you were in court during the day to still be available.

MR CROUSE: Thank you, Chair.

CHAIRPERSON: So in all probability – but if it is not an evening session, that is still a possibility, but if we are able
10 to give you reasonable notice, we will simply determine the date. If it is close, we will...

MR CROUSE: We would be grateful for that, thank you.

CHAIRPERSON: Okay, no that is fine.

ADV KENNEDY SC: Thank you, Chair, but we would ask for the proceedings to be adjourned at this stage with the continuation of the questioning of Mr Burger to be postponed to a date to be determined by you, Chair.

CHAIRPERSON: Yes, yes. No, that is fine.

ADV KENNEDY SC: On the basis as indicated but we do
20 have another witness that we propose to call tomorrow morning.

CHAIRPERSON: Yes.

ADV KENNEDY SC: Mr Mantsha, the former Chairperson of the Denel board.

CHAIRPERSON: Yes, what is your estimate of how much

time you still need with – for questioning Mr...

ADV KENNEDY SC: For Mr Burger? I would think probably no more than two hours, Chair.

CHAIRPERSON: Oh, okay, because that can easily fit into an evening session.

ADV KENNEDY SC: I am sorry, Chair?

CHAIRPERSON: Two hours can easily fit into an evening session.

ADV KENNEDY SC: Thank you, Chair.

10 **CHAIRPERSON:** Ja, ja.

ADV KENNEDY SC: Gives new meaning to the term night court, Chair.

CHAIRPERSON: Sorry?

ADV KENNEDY SC: It gives new meaning to the term night court.

CHAIRPERSON: Ja, no, we have to try the best we can to finish the work of the Commission.

ADV KENNEDY SC: Indeed.

20 **CHAIRPERSON:** Okay. So, Mr Burger, you do understand and you have no problem.

MR BURGER: I understand, Chair.

CHAIRPERSON: So we are going to adjourn for the day and tomorrow I will hear the evidence of another witness but arrangements will be made for Mr Burger to come back in order to complete his evidence. We adjourn.

INQUIRY ADJOURNS TO 13 NOVEMBER 2020