22 July 2014

TO: fmdumbe@armscomm.org.za

pluphondo@armscomm.org.za

Dear Commissioner Seriti and Commissioner Musi

RE: POSITION OF EVIDENCE LEADERS

Further to the events of 21 July 2014 we wish to point out the following :-

1. It was quite apparent that we had been deliberately excluded from what was to take place that morning. At no time did Advocate Mdumbe either indicate to us that for the first time in the history of the hearings he was to play an active role by reading a document or even ask us for a contribution towards such document. He did not attempt to verify that the information contained therein was accurate. It came as a complete surprise when he was called upon to deliver his comments particularly as no regard seems to have been to our memo of 10 July 2014 setting out fully the position. Further, the entire approach consisted of an attack on Dr Young and completely ignored the fact that he had suffered a physical impediment which seriously affected the most recent consultations and preparing his evidence and witness statement.

2. We must also point out that certain of the comments are inaccurate as set out hereafter.

(a) The mention in the letter from Dr Young's attorneys of Dr Young enquiring from ourselves about travel arrangements and not receiving a response was an error by the attorneys which we pointed out to Dr Young during the consultation. The evidence leaders played no role in the travel arrangements as Advocate Mdumbe was well aware. In fact on 12 July 2014 Advocate Mdumbe stated "*I will ask the team to make the necessary arrangements [*for Dr Young's travel*] on Monday. What do you make of Dr Young's response to my query about travel time and date? I am not sure I quite understand his response*".

For Advocate Mdumbe not to point out that it was at all times the Commission who was making travel arrangements has created in the mind of the public the impression that the evidence leaders were dilatory or failing in their duty to bring an enquiry by Dr Young to the attention of the Commission.

(b) The response further glosses over the fact that the Commission only made the travel arrangements for Dr Young very late on Friday 17 July 2014 at a time when it had already been advised repeatedly by Dr Young, his attorneys and ourselves that he would not be attending in Pretoria on 21 July 2014.

(c) The response is further incorrect when it indicates that *"shuttle vouchers"* were forwarded to Dr Young. Despite the letters from Dr Young's attorneys and specific statements by the evidence leaders both to the Chair and Advocate Mdumbe that Dr Young would not be able to drive at night (and the instruction by the Chair to Advocate Mdumbe that a shuttle should be arranged) the voucher which was forwarded to Dr Young late in the evening of Friday 18 July 2014, was for the hire of a vehicle and not for a shuttle.

(d) The response regarding the dates allocated to the hearing of Dr Young's evidence makes no mention of the fact that when we as evidence leaders were informed for the first time (on 17 June 2014) that the Commission had decided to commence with the evidence of Dr Young, we immediately indicated that Dr Young had already explained his unavailability at certain periods. It accordingly was not a case where the Commission allocated dates and then Dr Young indicated he was not available but that the Commission took the decision to allocate dates to him knowing full well that he would not be available.

(e) The estimate of time from Dr Young's evidence was based on our knowledge at the time. The transcripts of Admiral Kamerman's evidence were only available at about the time the Commission

informed us of the decision to call Dr Young first. Although we have been repeatedly told that his evidence is of a very limited nature and will not take too long, we disagree and we believe Dr Young has been unfairly criticised in this regard when he states his evidence could not have been completed in the time allocated.

(f) It is a gross miss-statement to state *"Consultations with Dr Young never stopped"*. Paragraphs 9 and 10 of Advocate Mdumbe's response indicate that there were no consultations between 5 June 2013 and 8 July 2014. The clear implication of this is that consultations had stopped because all the evidence leaders were focussing on the witnesses to be called in Phase 1.

(g) The response further does not indicate that Advocate Mdumbe specifically informed Dr Young that the evidence leaders would prepare a witness statement for him – in fact Advocate Mdumbe went so far as to specify that this would be done within the course of less than a month and made such statement without ever making an enquiry from ourselves. As Dr Young has repeatedly pointed out, if in the course of 2013 he had been asked to prepare his own witness statement, he would have had more than sufficient time to do so. He was however entitled to rely on the fact that he had been informed that a statement would be prepared for him. As we have explained, it is correct that it was

only very recently (after the meeting of 17 June 2014) that we recommenced urgently preparing Dr Young's statement.

(h) The statement that *"no other witness has been consulted with as extensively as the team has with Dr Young"* carries with it a clear suggestion that we as his allocated evidence leaders are being dilatory and spending too much time consulting. This is not the first time this allegation has been made by the Commission. We note that Advocate Mdumbe distances himself from the fact that he attended certain of the initial consultations himself. He is accordingly well aware that those were preliminary consultations to obtain an overview of Dr Young's information and were not part of actually taking/drafting a statement. We were employed as experienced independent advocates but our assessment of the time needed to properly prepare a witness (rather than proffer "half-baked" evidence) is continually disregarded.

(i) The response of Advocate Mdumbe makes no mention of the reasons furnished by Dr Young for withdrawing his application to cross-examine Frits Nortje. This clearly creates the impression that Dr Young was vacillating or being inconsistent.

(j) The section on "Impact on Commission Processes*"* is again in our view misleading. It creates the impression that Dr Young was simply ignoring the directives given by the Commission. No

mention is made of the fact that it would have been extremely difficult for any person wishing to cross-examine a witness to decide to do so until he had seen the full statement of the witness. The very brief summaries which were placed on the Commission's website at a late stage were of no real assistance. It would have meant that Dr Young would have had to attend in Pretoria for both the witnesses Nortje and Kamerman, receive their statement virtually as they commenced evidence, not have an opportunity to consider it and prepare cross-examination and then make an application to do so. In our view this would not have been realistic. Our concern is that the response of Advocate Mdumbe creates the impression that it is Dr Young who had been delaying the hearing. Our understanding is that the delay in Mr Nortje testifying was not caused by Dr Young but by the representatives of Armscor seeking time to peruse the documents which Dr Young had indicated he intended to refer to.

(k) The request on 3 March 2014 to meet with Dr Young was not made by the evidence leaders who had been allocated to Dr Young. We further have a difficulty with the response of the Chair quoted by Advocate Mdumbe. With respect it was not an instance of Mr Nortje's evidence being adjourned *"because he wanted to accommodate Dr Young"* – it was more an instance as set out that the representatives of Armscor wished an adjournment. Further it was not a case that the evidence leaders were *"going to spend*

another four or five months talking to Dr Young before we can call Mr Nortje". For Advocate Mdumbe to have made reference to these passages without setting out the entire context created an extremely adverse impression of Dr Young.

(l) Dr Young has pointed out that he accepts that the Commission ruled on 24 March 2014 that Armscor and the Department of Defence were not required to make discovery. He has however pointed out that his request is different – in the light of the ruling he is not calling upon such entities to make discovery but is seeking documents, which he is aware are in the possession of the Commission or Armscor or the Department of Defence, since such documents are relevant to the evidence which he will give.

(m) While it is correct that Dr Young has yet to submit an application to cross-examine Admiral Kamerman, he has indicated that he intends to make such application. As was pointed out in the letter from his attorneys, nobody has made application to cross-examine Dr Young. The fact that mention is specifically made of Dr Young not submitting an application to cross-examine Admiral Kamerman again places him in an unfavourable light which in our view is unfair.

(n) The concluding remarks are in our view entirely unwarranted. While Dr Young did participate as a witness at the JIT, that was

some 14 years ago. He is not contending that he is *"a total stranger who has still to amass information regarding specific allegations"* – he is merely pointing out that he has a huge number of documents and much information and that the Commission had informed him that he was not required to draft a witness statement. Accordingly his contention is that he has had insufficient time since he was informed of the allocated date for his evidence to meet with the allocated evidence leaders and compile a comprehensive witness statement.

(o) In our view too it is unfair and self-serving to state that *"he who alleges must prove (it's a simple principle of the Law of Evidence)"*. Dr Young does not bear a burden of proof. He has made the averments contained in his evidence at the JIT, his affidavit in the Constitutional Court application by Mr Crawford-Browne and in his draft statements furnished by him to the Commission.

(p) In our view it is by no means unreasonable for him to specify that there are documents in the possession of the Commission which will either prove the correctness and accuracy of his allegations or at least offer support thereto. Without such documents he would be reduced to a position where he would merely be making a bald allegation and under cross-examination would undoubtedly be

challenged and criticized on the basis that he is not advancing any proof but merely making an allegation.

(q) It is accordingly completely unsatisfactory for Advocate Mdumbe to have ended his submission by stating *"all that is needed from him is to repeat such allegations formally at the enquiry"*. This is a gross over-simplification and again creates an entirely incorrect impression.

3. We must also express our strong reservations regarding the entire approach of Advocate Mdumbe's document. It was well-known to the Commission that Dr Young would not be present. The document that was read out constituted a clear attack upon him made in public at a time when he would not be able to respond. This placed us as his evidence leaders in a most uncomfortable and embarrassing position as it was clearly seen as us supporting what was being stated. The issues set out in the previous paragraphs could and should have been properly canvassed with us and the failure to do so has compromised our position as evidence leaders.

4. We also found it significant that copies of the letters from Dr Young's attorneys which were addressed only to the Commission and ourselves as his evidence leaders were given by the Commission to the legal representatives for the Department of Defence prior to the hearing on 21 July 2014.

5. We have reiterated on several occasions our view that Dr Young is an extremely important witness. Indeed he is the only witness (with the possible exception of Johan du Plooy) who will testify as to their knowledge of bribery/corruption in connection with the Strategic Defence Procurement Package. For his evidence not to be called would in our view be a travesty. It is not the case that the Commission has "bent over backwards" for Dr Young – on the contrary the reverse is the position. He has made himself available for the various consultations which we and other evidence leaders have had with him and has spent many hours collating documents for his evidence. This has taken place while he has been trying to run his business and run a farm and attend to numerous other matters. We must, with deep regret, indicate that we cannot associate ourselves with any decision not to call the evidence of Dr Young.

6. We must also express our extreme discomfort at the *prima facie* views expressed to us in chambers regarding the acceptance of the evidence of Rear Admiral Kamerman. From the time we have spent consulting with Dr Young, we believe that there are at the very least serious grounds on which Dr Young will be able to attack Kamerman's credibility and demonstrate that he has not been candid when giving his evidence.

7. We have already referred to the fact that in our view we have been side-lined over the last few months. A clear instance of this is that a meeting

was held in Cape Town with Dr Young on 3 and 4 March 2014. Despite the fact that we were his evidence leaders, we were not invited to such meeting by the Commission. To make matters worse, Dr Young at such meeting handed to Advocate Mdumbe and to the representatives of Armscor and the Department of Defence a disk containing his 1 061 discovered documents. We were not informed of this by the Commission nor was a copy of such disk made available to us. It was a matter of huge embarrassment when we consulted with Dr Young and he enquired whether we had had sight of particular documents contained on that disk. We then for the first time learnt of the existence of the disk and had to acknowledge that we had not received a copy and had not seen the documents in question. Dr Young then kindly made a further copy of the disk available to both of us.

8. It was clearly impossible in the time available to us to peruse the approximately 20 000 pages contained on such disk. While we acknowledge that not all the documents would be referred to by Dr Young in his evidence, it still placed us in an impossible position where we had a consultation and no knowledge of any documents discovered by Dr Young.

9. Further, the refusal of the Commission to allow us to spend time reading the transcripts of evidence has meant that we are operating in a vacuum with insufficient or no knowledge of what evidence has been led that

needs to be raised with the various “critique” witnesses. This too has compromised our position as independent advocates.

10. We have on previous occasions during meetings between evidence leaders and the Commissioners expressed our reservations regarding the apparent approach to documents. In our view since this is not a court of law, it should not be required of a witness to prove the authenticity and source of a document before it can be referred to in evidence. We believe that since the Commission is an investigative body, the correct approach would be that a document which on the face of it appears to be a valid document should be provisionally accepted and a witness allowed to testify on it subject to any person named in such document being afforded an opportunity to deal with it and to demonstrate to the Commission that it is either a forgery or cannot be relied upon at all. Having heard all such evidence the Commission would then be in a position to assess the weight if any to be placed on such document. For the Commission not to permit documents to be referred to in evidence, such as the Debevoise Plimpton report, nullifies in our view the very purpose for which the Commission was set up.

11. The role of evidence leaders has been diminished to the point where they are serving little purpose and are not independent.

12. The Chair has made it clear that in his view the evidence leaders have no right to re-examine a witness after the legal representative of such witness

has re-examined. In this regard we would refer to the minutes on 1 March 2013. In paragraph 4.1 of the minutes of such meeting it was noted that the regulations are silent on the right of the evidence leader to re-examine but that the meeting was of the view that this right should not be taken away from the evidence leaders. In our view this is crucial. There has been very little cross-examination and accordingly the re-examination of the various civil servants/members of the defence force by their legal representatives, while clearly permissible in terms of the regulations, has naturally been designed to protect the status and credibility of such witnesses. This was all the more reason why the evidence leaders should have been permitted to re-examine each witness to point out any discrepancies in the evidence.

13. We consulted briefly with Mr Mahlangu. It would appear that his report will not be ready timeously and that in any event he has only had regard to a very limited number of bank accounts. In our view if he had been asked to examine the accounts timeously of all the known “middle men/agents” this would have helped considerably to deal properly with the allegations of bribery.

14. We are further concerned that despite the researchers working for many months we have never been furnished with a single report that they submitted setting out the results of their investigations. We accordingly cannot properly assess what evidence should be led in this phase which

therefore impacts severely on our standing and credibility as independent advocates.

15. At the meeting of 17 June 2014, all evidence leaders were requested to reconsider the investigation bundle and to submit comments to Advocate Sello urgently. This we did but nothing seems to be forthcoming and there has been no indication that the various obligors are being subpoenaed to produce documents and give evidence. If this is to be done, it will clearly take several weeks if not months to carry out adequately.

16. Every indication to us has been that the Commission is intent on completing the evidence of the "critique" witnesses in some seven weeks after taking almost a year to deal with rationale

For all the aforesaid reasons we find ourselves in a position that as a matter of principle we are unable to continue acting as evidence leaders. We believe that our integrity is being compromised by the approach which the Commission appears intent on adopting. We accordingly tender our resignation as evidence leaders with immediate effect.

It is with deep regret that we take this step but we can see no alternative. We thank you for the opportunity to have served as evidence leaders and for the knowledge and experience which we have gained as a result thereof.

Yours sincerely

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ADVOCATE B.L. SKINNER SC ADVOCATE C. SIBIYA