

7. Selection of Subcontractors, Conflicts of Interest and the Ministers' Committee

Our democracy will be the richer and our nation the wiser when we emerge from this (Arms Deal) experience (Head: Government Communications, Joel Netshitenzhe, in The Star, 28 August 2003, 6)

The Joint Project Team (JPT) appointed to manage the procurement project in respect of the patrol Corvettes played a major role in the nomination of element suppliers and eventual selection of element suppliers. F Nortje (Corvettes' Combat Suite Procurement Project Manager) explained that, in dealing with these subcontractors, the JPT members had to wear two hats. It is therefore clear that it is not correct, as apparently alleged by (Government) DoD and ARMSCOR that they had nothing to do with the choice of subcontractors. All evidence points to the contrary and F Nortje in fact admitted it when asked about it specifically. The fact that the JPT (Government) exercised considerable power in the choice of subcontractors is clear from all evidence. R Adm JEG Kamerman (Corvettes' Combat Suite Procurement Project Officer) also pointed out in his evidence that they requested the GFC to replace ADS with C2I2 for the supply of the NDS (JIT 2001 11.11.1, 11.5.1.1(i)(j)(k)(l))

In the *Special Review of the Auditor-General of the Selection Process of the Strategic Defence Packages for the Acquisition of Armaments at the Department of Defence* [RP 161-2000] the Auditor-General stated: "Although the role players were subjected to a security clearance, the potential conflict of interest that could have existed was not certainly addressed by this process." Rife in the media is the belief that a certain senior member of Government and officials of the Department of Defence had interests in companies that bided for the SDP and were awarded contracts and such interests were apparently not disclosed.¹ "This aspect could have been addressed more significantly by way of obtaining declarations prior to the strategic offers process," concludes the *Special Review of the Selection Process* by the Auditor-General.

¹ For the key elements in the definition of conflict of interest, and conditions and circumstances typical of conflict of interest, items 10.3.1.1-5 and 10.3.2.1-8 of the JIT Report make interesting reading.

In response, the *Fourteenth Report of the Standing Committee on Public Accounts* further expressed “concern about the possible role played by influential parties in determining the choice of subcontractors by prime contractors. What further concerns the committee is that the government had no influence in the appointment of subcontractors.” SCOPA therefore proposed that the forensic investigation (into the numerous allegations regarding possible irregularities pertaining to awarding of contracts many of which pertain to contracts awarded to subcontractors) already recommended by the Auditor-General, include “a review of the selection of subcontractors and conflict of interest.”

The acquisition policies of ARMSCOR, DoD and the Defence Review stipulate that the prime responsibility for the selection of subcontractors rests with the main contractors. In any event, ARMSCOR was not prevented from contracting subcontractors directly, if this proved to be more cost-effective (see K-STD-0020 - ARMSCOR's general conditions of contract, in JIT 2001 10.2.1.3). Through the RFOs sent to the preferred bidders during the procurement process, ARMSCOR imposed on them, *inter alia* a) submission to ARMSCOR for its approval of a list of the subcontractors they proposed to use b) provision of proof of the required experience and expertise pertaining to the management of major subcontractors and c) a memorandum of understanding or letter of intent between the bidder and his proposed subcontractors (JIT 2001 10.2.2.1-2). ARMSCOR mandated the prime contractors, in terms of its policy, to subcontract with enterprises owned by designated groups to the maximum possible extent without unduly compromising on cost and time. The Corporation reserved the right to require that a predetermined percentage of a contract value be subcontracted to enterprises owned and staffed by designated groups.

The Defence Review stipulated that competition should be as fair and open as is practicable in the procurement of armaments. ARMSCOR, as the contracting party of DoD, failed to impose this requirement on the prime contractors to ensure a fair and competitive procurement process at the sub-suppliers level, nor did ARMSCOR prescribe to the main suppliers any specific procedure for the selection of subcontractors. The prime contractors did not follow the tender process for the selection of subcontractors, and in the two instances where they did – selection of the supplier of the engines for the light utility helicopters (LUH) and the contractor of the gearboxes of the Corvettes – the basic principles of fairness and open competition were grossly disregarded (JIT 2001 10.2.4.1-5). The entire process of the selection of the secondary contractors, according to

the JIT Report (10.2.4.5), “from soliciting through to adjudication of the relevant tenders, can be criticized. The facts and circumstances show that the project teams and senior personnel in the employ of ARMSCOR and DoD played a significant role in these instances of the selection of subcontractors.”

The Joint Investigating Team Report lists the companies in which Schabir Shaik, brother of Shamin Chippy Shaik, Head of Procurement of the DoD, held interests, including Nkobi Holdings and Nkobi investments (JIT 2001 10.4.2.1). However these two different companies were subsequently referred to interchangeably, which tended to obscure the actual amount of interests in share terms and the timelines during which interests were held in these companies (*confer* JIT 2001 10.4.2.3(b)).² Thompson-CSF Holdings (SA) (Pty) Ltd, the SA subsidiary of Thompson-CSF, was incorporated on 21/27 May 1996. Thompson-CSF of France bought Allied Technologies (Altech)/African Defence Systems (ADS) between 24 April 1998 and 19 February 1999 and transferred all the shares it acquired in ADS to Thompson-CSF International on 9 June 1999, which subsequently transferred/sold 80 per cent of the ADS shares to Thompson-CSF (SA) (Pty) Ltd for R29.8 million and the remaining 20 per cent to Futuristic Business Solutions (FBS) for R7.4 million on 15 September 1999.³ ADS changed its name, from Allied Technologies Limited/(Altech) Defence Systems to African Defence Systems, on 25 August 1998 but retained the abbreviated name ADS. Share transactions in September 1999 resulted in Nkobi Holdings retaining 25 per cent shares in Thompson-CSF (Pty) Ltd where Nkobi Investments previously held 30 per cent shares from 1 August 1996 (see JIT 2001 10.4.2.3(b)(c)(d), 11.1.3.1; *The State versus Schabir Shaik & 11 Others* 2005, 1, 9, 10).

² Some of the positions held by Shamin Chippy Shaik during the Government's arms procurement process are as follows: i) Chief Director in the Department of Defence ii) Chief of Acquisitions/Head of Procurement of DoD by virtue of which he was the Fund Manager of the Special Defence Account from which the SDP were to be funded iii) Chairperson of the Armaments Acquisition Control Board and as such was in control of policy matters and planning relating to all acquisitions iv) co-Chairperson of the Strategic Offers Committee (SOFCOM) v) Chairperson of the Project Control Board (PCB) vi) Member of the Defence Staff Council vii) Member of the NIP and DIP Consolidation Committee viii) Member of the International Offers Negotiating Team (IONT) ix) Secretary of the Ministers' Committee.

³ It is an allegation of extreme public concern presently being investigated by the Director, Serious Economic Offences arm of JIT that former Defence Minister Joe Modise held interests in FBS whose merger with Conlog/Logtek only amounted to undue making of payment or, rather, that Joe Modise paid for shares in Conlog with a bribe received from a successful prime contractor in the arms procurement process (see JIT 2001 1.3.1(d), 1.3.1.2). It is hoped that the truth or untruth, of this allegation is brought to light without undue delay, as the Constitutional and Parliamentary Accountability of the Executive prescribe that the Directorate, Serious Economic Offences' arm of JIT is required to work in a reasonable time frame.

Schabir Shaik became a director in Thompson-CSF (SA) (Pty) Ltd from the date of incorporation on 21/27 May 1996. Nkobi Holdings/Investments bought a 10 per cent shares of Thompson-CSF (SA) (Pty) Ltd five days after the incorporation of Thompson-CSF (SA) (Pty) Ltd. Schabir Shaik ceased to be a director in Thompson-CSF (SA) (Pty) Ltd on 30 September 1999 (JIT 2001 10.4.3), the same day Nkobi Investments sold back its 10 per cent shares to Thompson-CSF (SA) (Pty) Ltd, with Nkobi Holdings acquiring 25 per cent shares of Thompson-CSF (Pty) Ltd, in which Nkobi Holdings/Investments previously held 30 per cent shares. Schabir Shaik held the position of a director in Thompson-CSF (Pty) Ltd from 16 July 1996 to date, and has been the Director, Nkobi Holdings and Nkobi Investments from the dates of incorporation in February 1996 to date, and was appointed a director in ADS in September 1999.

African Defence Systems was proposed by GSC as subcontractor for the submarines of the SA Navy and by Agusta in the Air Force's LUH programmes, and was nominated for the development, design and production of the Munitions Suite by GFC, in their bid for the supply of the Navy's corvettes dated 11 May 1998. ADS had worked with ARMSCOR in its technology retention programmes. It featured strongly in the SDP and was the only contender that participated prominently in the arms procurement process both as prime contractor and sub-supplier. African Defence Systems is a member of the GFC, the main contractor that was awarded the contract for the supply of the Corvettes. Cabinet approved GFC as the preferred bidder for the Corvettes on 18 November 1998. Thompson-CSF France and Dassault merged in January 1999 to become Thompson-CSF Detexis, hence ADS and Detexis are both in the Thompson-CSF group and form part of the prime contractors, i.e., the European SA Corvette-Consortium (ESACC). Thompson-CSF France was a partner in the GFC for the supply of the Corvettes and, as the minutes of the PCB meeting of 6 June 1999 read, Thompson-CSF (SA) (Pty) Ltd was a strong contender at subcontractor level for elements of the Combat Suite.⁴

Taking heed of the forensic investigation into the numerous allegations regarding possible irregularities pertaining to the award of contracts and officials' conflicts of interest in companies which were awarded contracts during the SDP purchases process, as advised both by the *Special Review of the Selection Process* [RP 161-2000] of the

⁴ The Project Control Board (PCB) chaired by Shamin Chippy Shaik was charged with the responsibility of the Corvettes. Senior members of the Board include the Chief of the SA Navy Vice Admiral RC Simpson-Anderson and CEO of ARMSCOR. PCB controlled all projects and all high-level project decisions were forwarded to it for finalization.

Auditor-General and the *Fourteenth Report of SCOPA*, the joint task team was to minutely and thoroughly probe, *inter alia* the extent of officials' conflicts of interests, the degree to which they declared their conflicts of interest and whether or not officials' conflicts of interests bore on the recommendations made concerning the preferred bidders and the ultimate decisions on the successful suppliers of armaments as well as contractors of the weapons' platforms' vital component parts. But as will be abundantly shown *infra* the Joint Investigating Team produced a very inadequate and incomplete Report *vis-à-vis* the above matters. As has been pointed out, "[t]he JIT lists almost all positions held by DoD's Head of Procurement within the arms deal structure. It also lists the businesses in which the Head of Procurement's brother had a significant interest. Not mentioned are businesses in which his political and other associates had an interest" (*The Arms Deal Investigation – accountability failure – a critique of the JIT Report* February 2002).

Noseweek (August 2000) and *Financial Mail* (30 March 2001), as well as documents submitted to SCOPA, charge that the (former) Minister of Defence, Joe "Modise received an interest-free loan of R40 million from a friend in Germany shortly after he retired as Defence Minister on 16 June 1999 and used it to buy shares in Conlog, a company with extensive interests in the overall armaments package." Both *Noseweek* and *Financial Mail* cite an unchallenged Press Report of June 1999 quoting Defence Minister Joe Modise announcing that a draft agreement had been concluded with the German Submarine Consortium to supply submarines for the SA Navy. *Financial Mail* (1 December 2000) claims that Defence Minister Joe "Modise received R10 million for his signature to the German submarine contract." It is alleged that 'FBS (a company partly owned by two of Joe Modise's relatives) "a supplier for R35 million in contracts for the helicopter package," did not have the capacity to subcontract the initial work allocated to them until the merger with Conlog/Logtek – (and that this involved) the making of undue payments.' Further, according to *Mail & Guardian* (12 April 2001), "a German company which successfully tendered in the SA arms acquisition process, appears to have paid Futuristic Business Solutions to lobby "key decision makers within the Government of South Africa." For a fee of R1,2 million, relatives of a "key decision maker" were to have lobbied the "key decision maker" on behalf of the German Frigate Consortium for the supply of patrol corvette ships for the SA Navy. As we have seen, Cabinet indeed named the German Consortium as the successful bidder for the contract in the most controversial manner. All allegations hanging over the name of former Defence Minister Joe Modise have been under the investigation of the Directorate of Special Operations (Scorpions) of the National Prosecuting Authority (NPA) since November 2000.

The missing pieces from the final report (Business Day 22 May 2003), as well as *Officers got gifts "before" signing deal (Business Day 26 May 2003)* insist that on 10 December 1999, Corvettes' Combat Suite Project Officer R Adm Johnny G Kamerman and the Project Engineer received "gifts" of R7 000 00 and R4 000 00 respectively, from African Defence Systems (ADS) and other subcontractors, the receipt of which had not been authorized by a superior officer, nor was it reflected in a gift register.⁵ The Auditor-General, in his *The President did not ask me to change anything (Business Day 5 June 2003)*, recently reassured the SA public that the perception that "gifts" given by bidding contractors to naval officers, who were to later preside over the evaluations and ranking of bidders' offers, may have skewed officials' judgement of these offers, especially where they were apparently awarded contracts in a very controversial and contestable way during the arms packages purchases process, is being probed by the NPA and that the investigation will not last forever. 'This was referred to the Scorpions and the final Report deals with this on page 290: "Those allegations that point to criminal conduct form the subject of an investigation, the contents of which are, for the reasons explained, not discussed in this Report." Since these allegations have been made, the National Directorate of Public Prosecutions has issued a media statement confirming the fact that the investigations into these matters are still ongoing.' But as *It's in there somewhere (Business Day 5 June 2003)* says, the *bona fides* of the Auditor-General's assurance regarding "gifts" is questionable as the final Report, released by him in November 2001, made no mention of these "gifts." For any one who closely studies the final Report *vis-à-vis* the drafts, "those allegations that point to criminal conduct (and) form the subject of an investigation, the contents of which are, for the reasons explained, not discussed in this Report," which Shauket Fakie makes reference to, are the outline of item 1.3.1.2 of the final Report, and apparently the "gifts," as given to naval officers by subcontractors in December 1999, do not make the list and were not referred to throughout the Report. *It's in there somewhere* is in full agreement with this: 'the "gifts," organized by Thompson, to naval officers and reported in the draft, are not mentioned in the final Report; the

⁵ The Auditor-General's final *draft* to the JIT Report records that the Project Officer R Adm JG Kamerman received "a farewell gift" of R7000 00 from African Defence Systems (ADS) and other subcontractors on 10 December 1999. ADS obtained contracts related to the Corvettes on 3 December 1999. An official of African Defence Systems confirmed to *Officers got gifts "before" signing deal* that Kamerman received the "gift," as he requested, in cash, on or before 1 December 1999 and *before* he initialled the deal. The section of the draft reports on "Gifts" was part of the discussion of the Ministers' Committee with the Auditor-General and was removed from the JIT Report.

explanation they were to be investigated does not hold water' (see JIT Report 20011.3.1.2; *Business Day* 22 May, 26 May, 27 May, 5 June, 2003, and January 2005).

Jayendra Naidoo, Government's Chief Negotiator in the multibillion Rand arms deal, hand picked by the highest reaches of Government in late 1998 as the representative of the Office of the Deputy President to negotiate the best possible deals and finalise contracts with the arms suppliers, "had a close association with, and acquired a stake in, electronics giant Tellumat, which scored subcontracts worth hundreds of millions in the arms deal." As *From arms broker to arms boss* (in *Mail & Guardian* 1 February 2002) says, Jayendra Naidoo received R1 million for heading the IONT to which he was appointed in November 1998 and on which he served until January 2000, when the deal was finalized. In December 1998, the same month Naidoo started as Chief Negotiator, he was appointed Chairperson of Plessey SA, predecessor to Tellumat. In July 1999, J & J (Pty) Ltd, the holding company founded by Jayendra Naidoo and former communications Minister Jay Naidoo, bought a 2,5% interest in empowerment company Primgro. The following month Primgro of which Jayendra Naidoo became a director bought a 25% interest in Tellumat. *From arms broker to arms boss* suggests that Naidoo "was apprised of Tellumat's interest." A BAe document dated 15 October 1999, and available to Jayendra Naidoo's IONT, lists Tellumat as the subcontractor for the BAe Hawks's "IFF transponders." An ARMSCOR document of December 1999, which would have been available to the IONT, lists Tellumat as having R334 million worth of "local Industrial Participation" contracts in the Navy's corvettes and submarines purchases. As the JIT Report (JIT Report 2001 11.6.8.13) shows, minutes of the decision-making PCB meeting of 8 June 1999, in which the recommendations of selected major projects and their suppliers for the Corvette programme, as presented by the Project Officer, were ratified by the Board, lists Tellumat as the chosen supplier of the Corvettes' IFF System, viz

Element	Contenders	Selected Suppliers
Star	Thompson Dasa Ericcson	Thompson ADS
IFF System	Thompson Reutech	Thompson NCS/Tellumat
HMS	Thompson STN Alenia	Thompson Marconi
SSM	Aerospatiale Saab Dasa	Aerospatiale

Jayendra Naidoo's apparent conflict of interest was not examined in the JIT Report on the arms deal submitted to Parliament in November 2001. "Unless the Scorpions' investigation into shareholdings and business interests promised in the Report brings about a thorough probe of Jayendra Naidoo...the credibility gap of the Report will widen," concludes *Mail & Guardian* (1 February 2002).

Unlike in the case of Jayendra Naidoo, the conflict of interest charge against Defence Department Procurement Head, Shamin Shaik, was investigated. The Joint Investigating Team was presented with different versions of witnesses, evidences and testimonies about the declaration of disclosure of the conflict of interest of the Chief of Acquisitions, all very contradictory to one another. In his letter to Gavin Woods of SCOPA dated 17 October 2000, Chief of the Navy V Adm RC Simpson-Anderson stated:

To my knowledge no members of the SA Navy involved in the selection process to determine equipment, whether at Project Team, Naval Board or Project Control Board level had then or has now any interest or connection with any of the tendering suppliers or sub-suppliers.

The chief of acquisition disclosed his perceived interest that his brother had an interest in ADS, which was tendering for submarines, on the grounds that a perception of bias might exist. It was agreed that whenever the corvette and submarine combat suites were discussed I would take over as chairperson Mr Shaik would not take part in any discussions, consultations or decisions. This was at the level of Project Control Board (JIT Report 2001 10.4.5.1).

Chief of the Navy V Adm Simpson-Anderson, in his letter to the Secretary of Defence, on the same 17 October 2000 stated:

2. *Chief of Acquisition.* On 4 Dec 98, before preferred Main Contractors were requested to solicit offers for any combat suite equipment, the Chairman, Mr S Shaik, Chief of Acquisition, informed the *first* Project Control Board meeting of a family member's business connection with one of the tendering parties for the Corvette and Submarine combat suites, viz ADS. Although he personally had no interest in ADS, he proposed to recuse himself from any decision making related to the Corvette and Submarine combat suites on grounds that a perception of bias might exist. It was agreed that whenever the combat suites were discussed I would take over the chair and that Mr Shaik would not take part in any *discussions, consultations or decisions. The process*

in the Project Control Board was followed throughout the period leading to final contract signature. I consider it laudable of Mr Shaik to have voluntarily recused himself early on, despite having no actual "conflict of interest" as defined (JIT 2001 11.10.5, emphasis added).

But the minutes of the *first* PCB meeting that discussed Corvettes Project held on 29 September under the Chairmanship of SC Shaik, do not reflect that any conflict of interest was disclosed, but show that Shaik informed the meeting that "the Combat Suite had become a political issue and should be resolved urgently" (*confer* JIT 2001 11.11.8.1). There is no indication in the minutes of the PCB meeting of 4 December 1998 exactly what interest Shamin Chippy Shaik did declare contrary to the claims of the Chief of the SA Navy *supra*, and the minutes of subsequent meetings bear this out. The joint task team concurs, as in respect of minutes of the PCB meeting held on 4 December 1998, it says, "The above-mentioned minutes clearly do not bear out what was stated in the letter" (JIT 2001 11.10.6). As far as SC Shaik's declaration of interest goes, both in the minutes of the PCB meeting of 4 December 1998 *infra*, chaired by Shamin Shaik, or any other meeting of the Board, as contained in the JIT Report, the terms of the declaration of his interest is as follows:

The Chairperson informed the meeting that, due to a conflict of interest, he is to recuse himself from the combat suite element of the corvette and submarine (Minutes, PCB Meeting, 4 December 1998, in the JIT Report 2001 10.4.5.2, 11.10.3).

DoD, in their presentation to SCOPA, not only tried to be exact and precise concerning what Shamin Chippy Shaik meant by "due to a conflict of interest," as disclosed in the above minutes of the *second* meeting of the PCB on the Munitions Suite, it went further, referring to interventions, anecdotes and allegations which the minutes of the PCB meetings could not give expression to. DoD stated to SCOPA that SC Shaik disclosed:

His potential conflict of interest due to a family member being associated with one of the candidate supplier...PCB agreed that the procedure to be followed would be that he would hand over chairmanship of the PCB to the Chief of the Navy during discussion/decisions on combat suite matters in which he would take no part unless requested to amplify a point. This procedure was followed throughout the combat suite tendering and contract negotiations phase. In several instances the Chief of Acquisitions

physically absented himself from the meeting room during such discussions/decisions (see JIT 2001 11.10.7).

At another phase of the investigation, V Adm RC Simpson-Anderson's testimony in respect of the Chief of Acquisition's disclosure of his conflict of interest is uniquely enlightening. At the public phase of the investigation, the Chief of the SA Navy testified that at the PCB meeting on 4 December 1998, SC Shaik informed the meeting about his possible conflict of interest with regard to *his brother's involvement with ADS*. He informed the meeting that he would recuse himself from discussions about the Combat Suite and *he handed the chair of the meeting to Adm Simpson-Anderson in that and subsequent meetings whenever the Combat Suite came up for discussion*. This did not bother Adm Simpson-Anderson as Shamin Shaik *did not participate in discussions or the decision making process*. As he was the link between the PCB, the Acquisition Division of the Department of Defence, the Secretary for Defence, the SOFCOM, the Minister of Defence and the Ministers' Committee, Chippy Shaik had to provide relevant information to the PCB meeting and *had to attend the PCB meeting* to enable him convey important decisions and other information to the above-mentioned persons and institutions (JIT 2001 11.10.8, emphasis added). Thus, the Chief of the Navy justifies the reason why Shamin Shaik had to be *physically present* at the PCB meetings when the Munitions Suite was discussed.

SC Shaik's *presence when the Combat Suite was discussed* did not, in Adm Simpson-Anderson's view, put him in a position to influence the final decisions taken in that regard. Moreover, "the decision making process pertaining to the Combat Suite was such a long and interactive process involving personnel from the Navy, ARMSCOR, DoD and the main contractor that it was impossible for one individual to have had a manipulating influence," according to the Chief of the SA Navy. *Shaik's presence at the PCB meetings that he attended* was in no way intimidating to the other members. But this is beside the point. Even if Shaik were *not allowed to attend the PCB meetings when the Combat Suite was discussed*, he, as Chief of Acquisitions, would have been informed of the details of the decisions taken in connection with the Combat Suite. He would thus in any event have been in a position to convey such information to his brother, if he wished to do so. There is, however, no indication that he did so (JIT 2001 11.10.9, emphasis added), concludes the Chief of the SA Navy.

The testimony of Admiral RC Simpson-Anderson, in this phase of the probe, contradicts the minutes of PCB meeting of 4 December 1998 which he made reference to in his own letter of 17 October 2000 to the Secretary for Defence as well as the claim of a *PCB procedure that was followed throughout the period leading to final contract signature*. JIT is in full agreement: "The alleged procedure does not appear in the PCB minutes. Had it been agreed upon, one would have expected it to be recorded." The explanation provided by the Chief of the Navy about why Shamin Shaik was allowed to remain present during discussions of the Munitions Suite, as the investigators correctly point out, "in no way negates the perception of improper influence that was created where Shamin Shaik played a key role in almost all aspects of the acquisition" (JIT 2001 11.10.10, 11.11.8.3-4). Moreover, Vice Adm RC Simpson-Anderson's testimony does not tally with or corroborate the suspension and conviction by DoD of the Head of Acquisitions and the consequent resignation of the latter from office, in the wake of investigation into the irregularities of the SDP process, "for divulging information related to the controversial arms deal;"⁶ nor with the arrest in 2001 and subsequent court charge of theft against his businessman brother, relating to "his alleged illegal possession of Cabinet documents relevant to the arms deal and correspondence between the Departments of Defence and Public Enterprises (whose Ministers were key players in the arms deal)" (*Financial Mail* 25 January 2002, 30; *Sunday Times* 20 January 2002, 2; *Mail & Guardian* 25 January 2002), nor with the extent to which this discovery is suggestive of Shamin Shaik conveying the details of the decisions taken in connection with the Combat Suite to his brother, Schabir Shaik.

Trade and Industry Minister Alec Erwin dealt with the conflict of interest relating to SC Shaik's position in his testimony to JIT (JIT 2001 10.4.5.3) during the public phase of the investigation, viz

We were appraised of this matter very very early on in the process. Before the final decisions were taken. Shamin Shaik himself informed me of the position. I happen to

⁶ Defence Procurement Chief Shamin Chippy Shaik was singled out in the arms Report for his conflict of interest: he did not apply for security clearance, as required, and did not recuse himself in the discussions and decisions on the tenders in which his brother Schabir Shaik's company had an interest, being the driving force behind the SDP programme and adjudicator in its tender process. However, while Chippy Shaik is yet to face any such criminal charge, the disciplinary inquiry headed by Director-General Zam Titus of the Department of Provincial and Local Government convicted him on charges of misconduct for "leaking" drafts of the arms report to his lawyers (*Mail & Guardian* 1 February 2002).

know his brother well. So I was aware of it from that source as well, and we discussed the matter once again when Jayendra Naidoo was appointed as the chief negotiator. There was no sense in him recusing himself from all the areas at all because this was a certain part of the equipment, not the total contract as a whole.

Relating to the matter of whether S Chippy Shaik had recused himself, Minister Erwin testified, *viz*

From my point it was an instruction taken with the Minister of Defence. The President knew about it, we issued an instruction that he must recuse himself (JIT 2001 10.4.5.3).

According to the JIT Report (10.4.5.4), a letter from former Defence Minister Joe Modise addressed to the Chairperson of SCOPA indicated that Shamin Shaik had informed the former Minister of his possible conflict of interest due to the fact that Thompson-CSF France was in the process of acquiring ADS. The letter stated that Minister Modise had advised Shamin Shaik to follow the ARMSCOR procedures in this regard.

PCB minutes of subsequent meetings showed that despite his declaration of conflict of interest in December 1998, and contrary to the instruction referred to by Minister Alec Erwin, Chippy Shaik had actively participated in discussions relating to the evaluation, selection and appointment of the main contractors and sub-contractors in respect of which ADS and Thompson had been contenders. Outside the PCB he was also involved in matters that directly or indirectly concerned ADS and Thompson, despite having previously declared a possible conflict of interest based on his brother's interest in these companies. Clearly, 'Shaik's "recusal" from PCB meetings was no recusal at all,' the JIT Report summed up (see JIT 2001 10.4.5.5-6, 11.10.1-10, 11.10.11.1-16). The JIT Report (11.10.11, 11.10.11.1-2) provided an example of the Chief of Acquisition's "recusal" in the minutes of the PCB meeting on 23 March 1999 held at the Departmental Acquisition and Procurement Division (DAPD), *viz*

"13. The Chairperson reiterated that, due to a possible conflict of interest, he will recuse himself from any decisions taken on the combat suite, but will not recuse himself from the meeting."

After the portions of the minutes dealing with the Corvettes platforms, the following appears:

“Note: The Chief of Acquisition handed over the Chair to C Navy for the discussion on the combat suite.

18. Technology Effort: C. Acq. indicated that care should be taken to indicate...

Note 1: C. Acq. again took over the chair;

Note 2: Members of Corvette team withdrew.”

‘Shamin Shaik’s recusal was “no recusal” in the true sense of the word, and his taking part in discussions is contrary to what V Adm Simpson-Anderson stated in this regard.’ The minutes of eleven meetings of the Board between 29 September 1998 and 6 October 2000 reflect that the Head of Procurement of DoD declared a conflict of interest in four occasions; handed over the Chair to Chief of the Navy in two occasions but remained present; and took part in the discussions relating to the Munitions Suite on three occasions (see JIT 2001 11.10.12).

On 11 October 2000, Shamin Shaik testified to SCOPA regarding his conflict of interest, thus

I had a conflict of interest with ADS as a family member became a director this year in ADS and I have declared that conflict of interest. I admit that there was no formal declaration signed by individuals disclosing interests. This I concede was a weakness. There was just a verbal understanding regarding recusal in the event of conflicts of interest (Committee Minutes, SCOPA, 11 October 2000).

As shown *supra*, the details of what SC Shaik declared on 4 December 1998 were not contained in any of the minutes of the PCB meetings. Though declining to comment on the probity of his brother’s presence on the ADS, and possibly his wife’s involvement as well, Chief of Acquisitions, DoD told *Nepotism in R32bn arms deal* (in *Mail & Guardian* 26 May 2000), he disclosed his conflict of interest and denied any improper conduct on his own part:

I recused myself from all decisions on South African involvement in the weapons deals on the basis of conflict of interest...Those committees were chaired by the chief of staff of the Air Force and Navy.

Here, Chief of Procurement of DoD repeated the statement by the Department to SCOPA which stated that the meeting of the PCB on 24 August 1999 (where it was claimed the decision was taken not to bear the risk of the Information Management System of C2I2), was chaired by the Chief of the Navy. As Auditor-General Shauket Fakie told *Business Day* in June 2003: "The minutes of the meeting state that the meeting was chaired by S Chippy Shaik, and there is no reference to the chair being handed to the Chief of the Navy." The JIT Report (11.6.7.2) was precise: "The minutes show firstly that Shamin Shaik was the Chairperson. There is no indication that he, at any stage, handed the Chair over to the Chief of the Navy. The minutes therefore do not support the statement to SCOPA that the Chief of the Navy chaired this meeting." In conclusion, the Auditor-General told *Business Day* (5 June 2003) that ' "this inaccurate information given to SCOPA" identifies for the person reading the full report the salient piece of information that "SCOPA was misinformed by the Department of Defence (DoD)." '

Now, as Minister Alec Erwin stated, Ministers were appraised early enough during the arms procurement process about Chippy Shaik's conflict of interest arising from the acquisition of ADS, in which Schabir Shaik held an interest *via* Thompson-CSF, France, partner of GFC, a consortium tendering for the corvettes and submarines combat suites.⁷

⁷ In fact, Thompson-CSF, France acquired ADS between 24 April 1998 and 19 February 1999. On 25 August 1998, ADS changed its name from Altech Defence Systems to African Defence Systems and retained the abbreviated name ADS. In the event, Thompson-CSF France on 9 June 1999 transferred the shares to Thompson-CSF International. On 15 September 1999, Thompson-CSF International sold 80% of the ADS shares to its SA subsidiary, Thompson-CSF (SA) (Pty) Ltd for R29,8 million and the remaining 20% to FBS for R7,4 million (*confer* JIT 2001 10.4.2.3(c)), 11.1.3.1(d)). Beyond the JIT Report, Peter Bruce told *Business Day* (5 June 2003) that: "the purchase of half of ADS by Thompson was effective on 1 March 1998." The JIT Report, in fact states that the negotiations that led to the French Thompson-CSF purchase of 50% shares in ADS on 24 April 1998 "apparently commenced a year earlier" (JIT 2001 10.4.2.3(c)). But March or April, the fact is that Thompson and Schabir Shaik acquired ADS (a nominated supplier for various elements of the Corvettes' Combat Suite) *prior* to GFC's, the preferred supplier of the Corvettes's, offer for the contract on 11 May 1998 and/or GFC's earlier invitation of ADS to join its bid for contracts during the SDP process. Noteworthy is that this is contrary to the Department of Defence's statement to SCOPA that "at the stage of the GFC offer (i.e., May 1998) ADS had not yet any connection with Thompson, and was a wholly owned subsidiary of the Altech group of companies, in turn owned by Altron" (*Business Day* 22 May 2003). The

SC Shaik's recusal from discussions, consultations and decisions pertaining to the corvettes and submarines Munitions Suite "was an instruction taken with the Minister of Defence, (which) the President knew about and that Ministers issued an instruction that he must recuse himself" (JIT 2001 10.4.5.3). SC Shaik, himself formally and timeously informed his Minister, Joe Modise, of his conflict of interest and according to the JIT Report (10.4.5.4), this latter "had advised S Chippy Shaik to follow the ARMSCOR procedures in this regard."

For the record, "the procurement policy and procedures of DoD did not contain any provisions or prescripts pertaining to a conflict of interest," and this "fact," in the words of the JIT Report (11.11.8.5), "is a fundamental shortcoming." As things turned out, SC Shaik, though, declared his conflict of interest, in his capacity as Chief of Acquisitions, but continued to take part in the process that led to the ultimate awarding of contracts to Thompson and ADS" in the most controversial circumstances (JIT 2001 10.4.5.5-7, 10.5.4). After 4 December 1998, he not only chaired the meetings but, in a manner JIT describe as "strange," he imposed decisions, reached outside the PCB, on Board members, on issues in respect of which he had supposedly declared conflicts of interest. Outside the Board, Shamin Chippy Shaik also flexed his muscles to the advantage of ADS and Thompson. Indeed, over time, during discussions of issues *vis-à-vis* which he had previously declared a conflict of interests, he now chose when to and when not to

Auditor-General has now been forced to concede, beyond his many millions' Rand worth coordinated final Report on the arms acquisition package, that the above "inaccurate statement made to Parliament's SCOPA about ownership of ADS by senior Defence Department officials identifies the salient piece of information that SCOPA was misinformed by the Department of Defence (DoD)." The untruth of the statement of DoD to SCOPA *supra* as the Auditor-General now confirms, establishes the conflict of interest of SC Shaik in respect of his enormous role as Head of Procurement, DoD during the SDP process where his brother Schabir Shaik was partner to the Thompson bid for the supply of the Combat Suite component of the corvettes of the SA Navy. That said, and with the dates of transfer of shares amongst the Thompson-CSF Group and the change of name from Altech Defence Systems to African Defence Systems above borne in mind, that portion of the JIT Report carried out by the Auditor-General in conjunction with the Public Protector, making reference to these dates, states: "Altech Defence Systems (Pty) Ltd, whose name was changed to African Defence System *after* the above-mentioned transfer of shares, was a nominated or listed supplier for various elements of the combat suite, as well as the Combat Suite integrator" (*confer* JIT 2001 11.1.3.1(e)). This untrue statement jointly made by the Offices of the Auditor-General and Public Protector only supports "the inaccurate statement made to Parliament by senior Defence Department officials about the ownership of ADS (and, with which) salient piece of information SCOPA was misinformed by the Department of Defence," in the words of the Auditor-General. But whether or not these "bastions of public protection" misled and deceived Parliament and the Public by reporting that ADS changed its name *after*, rather than *during*, (or before) Thompson-CSF's purchase of ADS which is crucial for establishing the conflict of interest of a senior official of DoD, is food for thought.

recuse himself, and, in the final analysis, he chose not to recuse himself at all, in almost all circumstances. 'He did not recuse himself properly... As far as Shamin C Shaik's conflict of interest is concerned, it would of course have been a factor also affecting his other capacities in the procurement process. The irregularity or not of the decision not to select the IMS of C2I2 may also have been affected by the position of S Chippy Shaik' (JIT 2001 10.5.4, 11.10.1, 11.10.15-16), was the conclusion of the joint task team on the investigation into the conflict of interest of the Chief of Acquisitions, DoD.⁸ But the Joint Investigating Team made no remarks or recommendations in this regard.

Investigation established that the Chief of Acquisitions has not applied for and did not receive the military security clearances required by law (JIT 2001 10.5.5, 11.11.8.5). Document VB1000 of DoD and ARMSCOR, the "adapted" sanction period Document in effect at the time of Government's multibillion arms purchases, neither made provision for armaments acquisitions on international markets nor (was it) structured to deal with a multi-project of the SDP type, JIT says (JIT 2001 3.1.1.2, 3.2.4, 3.2.5). Throughout the JIT Report, investigators underline the fact that universally developed principles constituting best practices regarding arms procurement were not in existence before Government embarked on the controversial expenditure of 41 per cent of the Defence Department's annual budget on the purchases of weapons of war, and that where laws, rules and procedures existed, they were either broken or haphazardly applied. In investigators' own terms, regarding subcontracts, "this had the effect that the award of contracts worth approximately R2,6 billion took place without the normal ARMSCOR or State Tender Board procedures being applied. During the investigation no acceptable explanation for not applying a fairer and more transparent process was offered" (JIT Report 2001 11.5.2.10, 11.11.3.4). As in the main contracts, none of the subcontracts, as investigations show, was awarded without disregard for, and contravention of, fundamental procurement process and procedures.

⁸ The conflicts of interest rooted in the selection of the main suppliers could only make themselves manifest in the selection of subcontractors. The irregularities of the selection process at subcontract level could not have taken place had the process which selected the main contractors not been in equal proportion unduly influenced, incorrectly slanted and skewed. The same role by Government officials whose recommendations transubstantiated into the Ministers' Committee's decisions and ultimately Government's choices of prime suppliers of weapons equipment were only made to appear irregular at the sub-suppliers' selection process where it was mistakenly assumed the State and not Government has jurisdiction.

The process through which BAe/SAAB was chosen for the supply of LIFT/ALFA rather than the winning Italian Aermacchi MB 339 FB, was characterized by gross contraventions of laid down arms acquisition process: “There were fundamental flaws in the selection of BAe/Saab as the preferred bidder for the LIFT & ALFA programme,” according to the *draft* reports. The way the main suppliers of armaments were chosen undermines the whole idea of having to constitute the arms acquisition process in terms of a (so-called) “staged-approach,” “the long and interactive process,” comprising “the distinctive structure of the evaluation teams” (Committee Minutes, SCOPA, 26 February 2001). Drafts of the final Report confirm this: “...options as were decided by the AAC in essence meant that the acquisition process for LIFT was a fruitless exercise.” Could JIT have been set up just to determine that Cabinet was entitled to select the preferred bidder and hence do all it pleases and that the decisions of the Government with implications for proper finance management and accountability amount to a “political choice?” The choice of GSC, Germany for the supply of submarines, instead of either the French DCN International or Fincantieri of Italy, and the selection of GFC Meko in place of the winning Spanish Bazan 590 B in the bid for the supply of the Corvettes, were made with a clear disregard for - and involved the continual rewriting of - standard procurement principles. ‘The DIP evaluation process with regard to the submarines was “fundamentally flawed” resulting in “potential prejudice to the unsuccessful bidders,” ’ according to the *drafts* to the final JIT Report.

A very important question is whether deficiencies in the procurement policy and procedures of DoD, and whatever irregularities these gave rise to as well as the conflict of interest and perhaps unlawful participation of the Chief of Acquisitions in the SDP process, have any implications for the (constitutional) responsibility of either the Minister of Defence, who authored and co-ordinated the arms packages purchases, the Ministers’ Committee, who made final decisions on the multibillion Rand programme at a time of fiscal austerity, the Cabinet or Government? The response of the Auditor-General, Public Protector and the National Prosecuting Authority, so-called bastions of transparent and accountable governance in SA, is simple and in the negative. In terms of the “key findings and recommendations” from their joint investigation into the anomalies, improprieties, and irregularities of the SDP process, the JIT Report, item 14.1.1, states “No evidence was found of any improper or unlawful conduct by the Government. The irregularities and improprieties referred to in the findings as contained in this report, point to the conduct of certain officials of the government departments involved and cannot, in our view, be ascribed to the President or the Ministers involved in their capacity as

members of the Ministers' Committee or Cabinet. There are therefore no grounds to suggest that the Government's contracting position is flawed."

Within the Commonwealth jurisdictions sharing the same parliamentary system of government, *ministerial responsibility* is political, not legal, and rests upon convention and the practice of government and, may be considered part of the morality of the constitution (Geoffrey Marshall 1986, 11-12).⁹ Ministerial responsibility in the SA parliamentary government is accorded constitutional and legal force. Section 92(2) of the SA constitution gives ministerial responsibility the force of law, in which a Minister of Government cannot negate his/her *untransferable natural* responsibility over the Department under his/her care (emphasis added). According to C Turnip, key to ministerial responsibility, *inter alia* is the minister's responsibility to effectively and efficiently manage his department. The organisation and administration of the department are though normally delegated to the director-general, and agency chief executives are to have "maximum managerial authority" to run their agencies (Government Efficiency Unit Report *Improving Management in Government: The Next Steps* HMSO, 1998). However, commentators are in accord that the minister remains constitutionally responsible for ensuring that proper mechanisms are in place to identify problems and for ensuring compliance with legislation (see C Turnip 1989, H Corder 1999, C Murray 2002). Succinctly put by Sir Ian Bancroft,

The Minister in charge of a department is ... responsible, and accountable to Parliament, for the effectiveness of his department's policies and the efficient and economical use of the resources allocated to it. It is part of that responsibility to ensure that his department has the systems, procedures, organisation and staffing necessary to promote efficient management (Sir Ian Bancroft, in Jewel J and D Oliver 1989, 133).

Lord Herbert Morrison's maxim that "the Minister is responsible for every stamp stuck on an envelope," according to Albert Venter, epitomises an interpretation of ministerial responsibility that has continued to cloud the issue and to plague textbooks, (See G

⁹ The British system is a typical example of such Commonwealth jurisdictions. English constitutional conventions are quoted in South Africa as normative examples, both by commentators, politicians and the popular press. English constitutional conventions have been followed and adapted in South Africa's history since 1910. In previous chapters the thesis explored British moral and legal practices to clarify the issue of the relationship between ministers, civil servants and Parliament.

Marshall 1989, 33; A Venter 1999, 235-6). The realisation that a minister is inevitably unaware of, and unable to control directly, a considerable part of the work of modern government has, as C Turnip also observes, destroyed for ever the idea that the responsible minister ought always to take blame and resign when something has gone badly wrong (C Turnip 1989, 139). Distinguishing between failure of ministerial policy, or anything for which ministers were to blame, and defective execution, or “operational failures” has become the new orthodoxy. According to Lord Privy Seal, while ministers could be challenged in parliament about any action of the civil service, this did not mean that ministers must “take the blame for the wrong decisions of their subordinates of which they know nothing or could be expected to know nothing” (Lord Privy Seal, in C Turnip 1989, 141).

As P Finn argues, an official *qua* official bears the burden of public obligation and the limitation that it entails: s/he cannot act as an independent moral agent only, as the danger of public officials dispensing power at their own discretion *must*, in the public interest trump individual conscience; an official is the holder of public trust (P Finn 1993; P Finn, in R Chapman 1986). Nevertheless, ministers “should be responsible, if a wrong is brought to their attention, for taking action to provide redress and to ensure that mistakes do not recur.” This does not mean that *all* actions of civil servants are to be defended, though mistakes can be admitted by explanation. Although a minister only defends those actions that involve Cabinet and departmental policy, where failure results from high-level “ministerial” policy, or where the minister himself (or herself) directed or approved the impugned action, that minister must, or should, take the blame: the idea of ministerial responsibility will (where a major policy failure occurs or a minister is seriously at fault in judgement or departmental leadership, or guilty of flagrant personal misconduct) hopefully stir itself in parliament, pressures and expectations that have arisen may become intense, perhaps culminating in the resignation of the minister. In cases of grave misconduct by civil servants, the latter could be blamed and named in order to ensure compliance with ministerial instructions (A Venter 1999, C Turnip 1989).

In both the Victorian and contemporary currency of ministerial responsibility, Ministers have not and will not escape the responsibility for mistakes or failings of their departmental officials and subordinates, which “they clearly knew about and ignored, or ought to have known about them” (see *Final Report of the Royal Commission on Financial Management and Accountability* 1979, 180). According to EL Normanton, in Smith and Hague (1971, 360), ministerial responsibility is, in its most reduced form, the

recent government suggestion that 'a minister's responsibility should extend only to "ministerial subjects," i.e., matters submitted for the minister's personal decision' (BLR Smith and DC Hague 1971, 311-345). This is something of a novelty, and remains the exception rather than the rule the world over; ministerial responsibility, in the most reduced form, again, still acknowledges that while officials should doubtless be properly accountable for their own decisions (which ministers neither knew about nor ignored, or ought to have known about), it does not follow that ministers should be relieved of all responsibility to Parliament for official acts that they have not personally authorized (see C Turnip 1989, 132; C Murray 2002, 89). If the discharge of amendatory responsibility excludes the "liability to resign" on the part of a minister, who is thus free from culpability when things have gone wrong in the department, it is still right, according to C Turnip, and within the Minister's responsibility for the effective and efficient management of his department, that he should answer to Parliament for such errors of officials in having to explain "what happened and why" and in taking appropriate remedial action.

In respect of the conflicts of interest of the Chief of Acquisitions of the Department of Defence, and his yet to be officially named business and political associates involved in the weapons packages purchases process, the Ministers who co-ordinated the arms procurement packages were, according to Minister Alec Erwin, again, very aware of the conflict of interests of Shamin Chppy Shaik. Ministers knew of his conflicts of interest ever before he declared it to them. They discussed the matter and issued an instruction to the effect that the Chief of Acquisitions of DoD recuse himself as and when due. And the Ministers acknowledge, in the words of Minister TA Manuel (Committee Minutes, SCOPA, 29 May 2001, 7, 26 February 2001, 3), their 'overall responsibility in the final analysis, as the ultimate "checking mechanism" ' for what has happened and why, in government departments, and that in the event of failures, what happened and why remains the untransferable obligation of Ministers to explain to Parliament and the SA public. This acknowledgement by the Ministers who put the arms procurement packages together, the Joint Investigating Team would have to agree, contradicts the "exoneration" of the Cabinet and the Government, in respect of the irregularities and improprieties referred to in their "key findings" on the weapons acquisition process. The joint task team is in a difficult position, it must answer whether it was the responsibility of the officials of Government Departments (themselves, civil servants on contract with Government) involved in the procurement process to have ensured *normal* standard (best practice) acquisition procedures in the various departments of their employ before the

commencement of the expenditure of 41 per cent of the annual budget of the DoD on arms purchases or of Government itself. JIT fell far short of the expectation of any reasonable person when it decided that Ministers, Cabinet, and Government, did nothing “improper or unlawful (and that) there are no grounds to suggest that Government’s contracting position is flawed.”

By officially informing the Ministers of his conflict of interest, the official concerned cautioned the responsible Ministers to ensure his recusal wherever necessary in the arms procurement process, as every non-recusal would be an invitation and an opportunity for him to intervene without subsequent blame. In the conclusions of the JIT Report: “Shamin C Shaik’s conflict of interest would of course have been a factor affecting his other capacities in the procurement process. The irregularity or not of the decision not to select the IMS of C2I2 may also have been affected by the position of S Chippy Shaik” (see JIT 2001 11.10.1, 11.10.15). The award of the contract to supply engines for new military helicopters was “irregular,” in the words of the draft versions of the final JIT Report (Drafts to the JIT Report cited in *Arms report sanitised*). Hence the problem put to JIT as to whether there is a case to be made against the Ministers’ Committee for the opportunity it availed the Head of Procurement of DoD. Could Ministers, perhaps, too busy with “higher matters,” be expected to ensure conflicts of interests were properly and timeously declared? Investigation is clear though that Ministers officially knew about the conflicts of interest of their senior officials whose continued active involvements in the SDP process, where their interests conflicted, most probably led to unusual decisions in terms of normal practices. This has implications for some degree of impropriety or wrongdoing, and the responsible Ministers are, accordingly, duty bound to account and explain their inaction (i.e., their dereliction of duty). Whether or not they were called by Parliament, in the circumstance, *via* JIT, to so account, is a different matter with significant implications for the thoroughness and completeness of the probe into the arms deal, *the integrity of the Investigating Team and Parliament’s oversight of Executive spending*. Likewise whether or not Ministers, who “stress unpreparedness to take responsibility for subcontracts” (Committee Minutes, SCOPA, 26 February 2001), did explain and answer for their inaction has implications for the degree to which Government demonstrates in its daily affairs a commitment to openness, transparency, accountability and good governance. Thus, it is also a test of the extent to which ANC policy, as VG Smith tells us, equals “proper financial management” (*Mail & Guardian* 1 March 2002; *Cape Times* 25 February 2002).

When the JIT Report says *vis-à-vis* the lack of arms acquisitions policy in Government Departments during the SDP process that it was the first time that government acquired armaments of the magnitude of the SDP concerned (JIT 2001 3.3.1; 14.1.2), it needs to be pointed out that this contain inputs from, and is couched in the language of, the Ministers themselves and officials of Government actually involved in the procurement process, for whom, “time pressures, and lack of experience precluded a thorough procedure from being applied” (JIT 2001 11.5.3.10; 11.5.1.1(g)). In respect of this unsolicited defence of Ministers’ dereliction of duty, the public is concerned with whether there was an impending threat of war against SA by her neighbours or from beyond, against the backdrop of which danger, weapons of war had to be procured *via* a haphazard acquisition procedure with immediate urgency? And, whether totally ignoring and sidestepping arms procurement procedures and processes was condonable even in the face of such urgency?

JIT’s defence, *viz* that the policy on the acquisition of armaments which evolved *during* SDP procurement process and which was approved *only* in July 1999 against the weapons procurement process which started in 1995, compares favourably with the armaments procurement policies in the rest of the world is story-tellingly absurd as it cannot be substantiated and can only be taken with a pinch of salt. This is just one of the variety of “findings” which, when juxtaposed with the corresponding recommendations on the arms acquisition packages, only sums up to JIT casting horrendous slurs on itself *via the deficient investigative work done on the arms acquisition packages*. While the acquisition policies and procedures put in place well after the acquisition process had commenced “compares favourably with defence procurement policies in Great Britain and Australia” (whatever the exact meaning of this), JIT nonetheless recommend their redefinition and refinement to deal with deficiencies crucial to the procurement process, and which resulted in certain of the irregularities in the arms procurement process. JIT fell short of stipulating just how a “cut-and-paste” of different departments’ procurement procedures and processes - which evolved only during the life of the procurement - compares favourably with the arms procurement policies in the UK and Australia. They stopped short of saying whether the arms procurement procedures in the rest of the world were put in place before, during or after commencement of arms procurements. They said nothing about the *ad hoc* or permanent forms of these policies and procedures, and neither were they forthcoming on the inconsistent, haphazard, (versus proper, controlled), applications of arms acquisition policies during arms acquisitions processes in the rest of the world. JIT has yet to distinguish between Ministers’ performance of duties with a

sense of urgency which still adheres to the rules, and the reckless abandonment of best practice in the name of unwarranted and indecent, haste. They have yet to come forth with findings on why the DoD had to acquire arms, i.e., initial their acquisitions, in such a hurry that it looked as if it had to be done before the former Minister of Defence retired from Government.

During the arms procurement process debate, and in defence of the integrity of the defence packages purchases, the responsible Ministers made a strong distinction between the evaluation process and the decision-making process, and, using such phrases as “the distinctive structure of the evaluation teams,” “the nature of the complex and staged-approach,” “due diligence built into the mechanism,” “the institutional arrangements of the negotiating team,” “its *ad hoc* nature,” “the role of the Cabinet sub-Committee itself,” “the new feature of decision-making,” etc they argue, “no single individual had the capacity to influence the process disproportionately” and thus, according to them, “conflict of interest is an imprecise term” (Committee Minutes, SCOPA, 26 February and 29 May 2001). In fact, the Cabinet sub-Committee argues that the specific nature and structure of the arms procurement process would adequately have regulated the conflicts of interests of officials who were subjected to no formal, external, screening of conflict of interest. But, this was not to be, and given that Chief of Acquisitions’ conflict of interest clearly affected his judgment during the procurement process, the Ministers’ Committee’s argument concerning the “self regulation” of the SDP process falls away and, because, in the final analysis, Cabinet was the ultimate - and importantly, the *natural* - “checking mechanism” of the process “due to its overall responsibility,” the responsibility for checking the conflict of interests of the Chief of Acquisitions ultimately falls on Cabinet, Government.

When investigators recommend in this regard, viz “steps should also be taken to ensure that a particular individual, irrespective of his/her position is not tasked with incompatible functions in multifaceted procurements to prevent a conflict or perceived conflict of interest, which could have a detrimental effect on the overall acquisition process” (JIT 2001, 14.2.12), they just reflect the protest of the public that, in the absence of distinct guidelines, conflicts of interests bore heavily on the outcome of the SDP process. Given that the Cabinet sub-Committee could not ensure the regularity and propriety of the arms procurement process, critics of the arms deal charge that the reasons for the Ministers’ Committee’s usurpation of the DoD/State Tender Board, in the allocation of tenders, during the SDP process, lie elsewhere, and require explanation.

It was in the light of the JIT Report that Ministers of Government - well aware that the details (i.e., the body) of the 400-page final Report on the arms procurement packages cannot, for reasons that beggar the comprehension of reasonable persons, always be logically integrated with its "findings," i.e., where the Report decides to "find" anything at all – attempted to rescind their previous acceptance of natural and logical responsibility for their failure to ensure adequate systems, procedures, and staffing in their various departments to promote the economical use of resources and effective management of the multibillion Rand arms procurement packages *before* embarking on the programme. More than that, Ministers try to defend the indefensible when they argue that JIT have actually exonerated Cabinet-cum-Government of all allegations levelled against it regarding the improprieties of the SDP process. Ministers, as usual, seem to say that the Executive "emerged from the most rigorous, truly independent inquiry in the land, without blemish; it (the JIT Report) was, they contend an actual work, not a work of fiction and not a work that has been trundled out" (*Hansard SA*, cols 2288 and 2290, 5 June 1996). They express the all too obvious desperate hope of Government to put the rumpus generated by the SDP behind it and get citizens to now move on. Ministers themselves proclaim from on high that the ANC-in-Government has, on the basis of an investigation which left almost every one of the serious concerns raised in SCOPA's 14th Report of 2000 unattended to, passed the litmus test of commitment to rooting out corruption and nepotism in government with flying colours. The spectacle is as demeaning as it is unedifying. Ministers whose phantom notion of "due diligence built into a complex decision-making mechanism carrying a check against undue influence" collapsed dismally and who failed in their duties to exercise final checks on officials' conflicts of interests, and, hence, were in dereliction of their duties, as Ministers, unabashedly celebrated their "acquittal," "victory" and "innocence." Unless JIT can tell us now that its verdict on the other allegations, including those hanging over the head of the author and coordinator of Government arms procurement, Joe Modise, purported to have been under investigation for almost five years, will confirm their main Report on the issue, the acquittal, as well as its celebration, is hasty.¹⁰

¹⁰ For the records, allegations before JIT which have implications for the former Minister and which, according to JIT, "creates negative public perception," and are "extremely undesirable," given his "active involvement" in the SDP process, may include, *inter alia* a) "that the former Minister, Joe Modise, paid for shares in Conlog with a bribe received from a successful prime contractor" b) "a possible conflict of interest in respect of various persons involved in the overall acquisition process due to directorships, shareholding, relatives, etc" c) "various role players in the overall acquisition process hold shares through nominees in entities, which benefited from the

It is the consistent logic of the *details* of the final Report (i.e., of its body) on the arms acquisition packages that: a) had the requirements for an open, fair and competitive procurement process prescriptions of both the Defence Review and State Tender Board (via ARMSCOR) been followed b) had the Ministers' Committee not taken an inexplicable "political choice," and c) had the Cabinet as the ultimate decision-maker not been entitled to arbitrarily select the preferred bidders regardless of set rules and procedures, at least, three of the 5 choices of the prime contractors, specifically, the main suppliers in the LIFT, Submarines and the Corvettes, would have been otherwise, i.e., would have involved *other bidders*. In fact, an attentive reading of the JIT Report, which itself in this respect corroborates both the Auditor-General's *Special Review* [RP 161/2000] and SCOPA's 14th Report of 2000, shows that a) had it not been for the Ministers' Committee's *regrettable* resolution to embark on an expenditure of multibillions of public money on weapons of war with virtually no arms procurement policy in place, and b) had the disqualification of bidders who disqualified themselves at various stages and levels of the evaluation and decision-making processes applied, as not only required by, but explicitly stated in, what insufficient procurement policy existed, neither of the bids for main- nor sub-contracts would have been proceeded with at the time; or, rather, the results of the winning bidders would have been different from what they eventually turned out to be. But despite this, and thereby undermining the details of the "body" of its Report, JIT *concluded* that: 'The irregularities and improprieties referred to in the "findings" as contained in the report, point to the conduct of certain officials of the government departments involved and cannot, in our view, be ascribed to the President or the Ministers involved in their capacity as members of the Ministers' Committee or Cabinet.'

The Joint Investigating Team tried hard to separate the Government (whom it exonerated of improper conduct and whose contracting position is seen as without blemish) entirely from the officials to whose conduct the "irregularities and improprieties" referred to in

acquisition" d) "a high-ranking official is a shareholder and chairperson of local sub-contractor that is a beneficiary of a prime contractor DIP offset offer" e) 'FBS "supplier for R35 million contracts for the helicopter package" did not have the capacity to subcontract the initial work allocated to them until the merger with conlog/Logtek - the making of undue payments' (see JIT 2001 1.3.1, 1.3.1.2, Committee Minutes, SCOPA, 11 October 2000). One of these allegations was, without any explanation whatsoever, "found to be without any substance and therefore required no further investigation." JIT says others have been "under investigation" of the DSO since November 2000.

the “findings” of the report, point. The line between Government and its Departments is very tenuous, and all attempts, at least presently, to clearly differentiate between Government Departments and Government remain unrealised. The intention of JIT to both create a chasm between Ministers and their Departments, as well as carefully demarcate a decision of the State from that of the Government, remains of dubious validity. Notwithstanding the growth and development of modern government, ministerial responsibility still exonerates public officials from responsibility in ways distinct from that of their Ministers. Ministerial responsibility has never properly reflected the existing role of officials and, importantly, does not contain any major extension of the power of Parliament to call departments’ officials to account, unlike the non-transferable liability of Ministers to be held to account.

Grave misconduct by civil servants requires the naming and blaming of officials in order to ensure compliance with ministerial instructions. Somebody *must* take responsibility for *all* that a department of government has done or has not done, i.e., for “every stamp stuck on an envelope,” in the words of Herbert Morrison. At any rate, JIT established obvious irregularities, improprieties and unlawful acts which can only be ascribed to certain officials of Government Departments, but failed to categorically name, less apportion blame to, these officials. The joint team of the Auditor-General, Public Protector and the National Prosecuting Authority resolved not to express any disquiet in respect of the totally unacceptable conduct of particular senior Government officials all through their 400-page Report, let alone call the Department of Defence to formally bring their findings to the attention of officials, or for the institution of a disciplinary action against such palpable dishonesty, in terms of s 20(b), and s 20(i) of the Public Service Act 1994 and in compliance with s 21(1)(b), and s 20(i) of that Act.¹¹

¹¹ A cursory look at a) the tact and thoroughness self-evident in the Protector’s Reports on some very controversial matters, e.g., his stern position on certain Government officials in the Department of Health whose “misconduct,” “misrepresentation of true facts,” “reprehensible acts” he underlined (*confer* PP 1996 6.4.12, 7.6.6, 7.7.12-17, 10.17-8); b) the Auditor-General’s critical audit reports on various departments, bodies and agencies of Government, *inter alia* the Department of Home Affairs and Statistics SA; and c) the temerity with which the National Prosecuting Authority has handled and reported on its work (which culminated in the unwarranted ordeal of the Head of the NPA before the Joos Hefer Commission not long ago) suggests something very wrong with the work these three agencies jointly did on the arms acquisition programme. An attention to the Public Protector’s *Special Report No 1 on Sarafina 2 vis-à-vis* the JIT Report on the SDP immediately reveals the incompleteness, superficiality and poverty of the latter. The logic in which the Public Protector’s *Special Report No 1 on Sarafina 2* was explicitly damning to senior officials of the Department of Health not excluding the Director-General as impliedly damning to the Minister of Health. This is not true of the JIT Report on the

This failure on the part of JIT remains the Achilles' heel of the joint probe into Government's controversy-shrouded arms procurement process and the Report itself. There are striking cases of dishonesty, and endless grounds for suspicion against senior officials of Government involved in the SDP process, and these are catalogued in the JIT Report. In the cases of misconduct of the officials of the Department of Education in *Sarafina 2*, the Director, Finance Management Services, D Vorster, was appropriately and severely reprimanded, and an investigation of a charge of misconduct was instituted outside the Department of Health, against the Chief Director, Support Services, AH Badenhorst, and the Pro tem Chairperson, Tender Committee, JG Angelo. This reveals the suspect credibility of the Report by JIT on the Government arms expenditure, in particular the claim that there is insufficient incriminating evidence of misconduct and dishonesty, on the part of any official involved in the arms procurement process, to launch a disciplinary investigation. The degree of misconduct which implicated the experienced senior officials of the Department of Health in the *Sarafina 2* musical, was no more than that of the Chief of Acquisitions of DoD, Chief of the SA Navy, the Project Officer Project Corvette and the Corvettes' Combat Suite Programme Manager in the arms procurement process. More than that, whereas the former involved only 2 per cent of the Health Ministry's annual budget, the latter gulped 41 per cent of the Department of Defence's budget. Given the claim of insufficient evidence to initiate disciplinary action against any officials involved in the arms procurement process, which is quite contrary to what is *detailed* in the Report, recourse is made to a rhetorical question, viz is the JIT really a team of constitutionally based institutions aiming at strengthening and supporting transparent and accountable democratic Governance in SA? It remains the contention of this thesis that "all wrongdoers" including all those in collusion of wrongdoing, in respect

Government arms deal which pages are splattered with unsolicited apologies on behalf of senior government officials, the Ministers' Committee and Government. Even when Ministers, before Parliament, on 29 May 2001, admitted "ultimate, overall responsibility" for all that was done and not done by their departments regarding the arms procurement packages (Committee Minutes, SCOPA, 29 May 2001), JIT "found" no improper conduct by the Government. Most intriguingly, they found irregularities and improprieties in the Government arms procurement process but ascribed those anomalies to certain officials of the Government Departments involved rather than the Ministers, none of whom, consequently, in the final Parliamentary Debate of the JIT Report on the SDP process, on 13 August 2002, and quite in defiance with the sub-Cabinet Committee's previous acceptance of the "overall responsibility" for the actions and inactions of their departments, neither apologized for the irregularities and improprieties in their respective departments nor seriously promised to make good what they left undone in respect of the arms acquisition process. Unlike PP 1996 1 on *Sarafina 2*, the Report of JIT on Government's arms procurement packages purchases was very poor, it elicited inadequate and improper response from Ministers and dismissed Government responsibility and accountability to Parliament.

of both the SDP process *and* its investigation, should “meet their just desert,” to quote the State President himself.

JIT is not unaware of the corrosion of public respect caused by the impression - as opposed to actual proof - of impropriety, wrongdoing and corruption on the part of Government. In fact, it admits that the mere appearance of wrongdoing “may be serious and potentially damaging (and) can undermine public trust in ways that may not be restored adequately even when the mitigating facts of a situation are brought to light” (JIT 2001 10.3.1.3-4). However, in a total break with the Public Service Act, 1994 and the Public Finance Management Act (PFMA), 1999, JIT neither requests that this apparent dishonesty be formally put to the officials, nor that a charge of misconduct be brought against them by their Departments. To what does the Report on the SDP point, if not the fact that in a manner unprecedented, since 1994, institutions notionally strengthening and supporting a nascent SA democracy succumbed to the pressure of politics in the most partisan (and, ultimately, coercive) manner? The public may have lost trust in Government *via* the JIT Report on the SDP, which has been variously referred to as, *inter alia* “insufficient,” “unsatisfactory,” “deficient,” “superficial,” “incomplete,” “of poor investigative quality,” “incomprehensive,” “lacks rigorous and lateral thinking,” “not forensic,” “lacks specific recommendations and clear answers,” “poor,” “a whitewash.”¹²

Here are some reflections on the JIT Report and its significance for democracy in South Africa:

Andrew Feinstein MP (ANC) begins

The investigation into the arms deal was the most searching test of the ANC’s commitment to a nonpartisan, vigorous oversight function. The expenditure involved and the questions it raised about not only the procedural aspects of the deal but also the advisability of certain of the decisions taken by senior members of the Executive, proved

¹² For an overview of the South African public’s attributions to the JIT Report on the Government’s arms deal, see *Mail & Guardian* 2002; *Business Day* 2002; the Independent Newspapers: www.iol.co.za 2002; *Debate on committees’ reports on Joint Investigation Report into the Strategic Defence Procurement Packages* 13 August 2002; G Woods *The arms deal investigation - accountability failure – a critique of the JIT Report* February 2002; as well as his *A statement at a Press Conference held at Parliament, Cape Town* February 2002; *Democracy and the arms deal: a submission to Parliament*, PIMS: IDASA, December 2001).

too sensitive for the ANC leadership. It was decided that SCOPA's role in the investigation had to be neutralized... So, in a series of interventions - to which I was witness - by the Chief Whip (whose commitment to the neutrality of SCOPA might just have been tinged by his now well-known conflict of interest), a senior Minister in the Presidency, a few other Cabinet Ministers (with varying degrees of enthusiasm) and, most sadly, the leadership of Parliament, the Committee was neutered... SCOPA was neutered. A deeply unsatisfactory, incomplete report by the investigators was warmly embraced by a myriad of parliamentary committees that knew little or nothing of the deal itself... The last rites have been read... By my resigning I am acknowledging my deep concern about our accountability mechanisms in Parliament (*Mail & Guardian* 1 March, and 25 January, 2002).

Raenette Taljaard MP (DA) follows

The JIT Report failed to deal with the issues raised in SCOPA's Fourteenth Report and refute the concerns it expressed... The battle for truth and democracy had to be carried out on behalf of all members by a handful of courageous and principled people who, in the end, were all defeated and forced to resign. Our resignation was the symbolic defeat of Parliament's own power to rise to the challenge of holding the executive to account... South Africa's parliamentary democracy failed the test of constitutionally demanded accountability, but most important of all and most tragic, it failed the test of integrity. This left damaged institutions, damaged individuals and shattered public trust in the wake of the ANC Government's arrogance and impunity... The history of South Africa's Strategic Defence Procurement is the history of an unsound, highly contestable decision-making process... It is a history that exposes the lack of executive accountability to Parliament... When, in a new democracy, political manipulations and agendas stifle the pursuit of truth, conspiracies of complicit silence rob public representatives and key institutions, tasked with protecting public trust and constitutional democracy, of their integrity, their worth and their credibility. This is the truth that cannot be hidden as has emerged from the arms deal saga. South Africa has damaged institutions. This is the legacy of the JIT report (*Debate on committees' reports on Joint Investigation Report into the Strategic Defence Procurement Packages* 13 August 2002).

Gavin Woods MP (IFP) continues

The quality of the JIT investigation as documented is generally substandard, superficial and poor (whether out of pure incompetence or for whatever reason we will probably never know), and given the secrecy, politics and controversy, which it was surrounded by, an inevitable skepticism prevails... It was an exercise of much information gathering but with very narrow lines and very shallow depth of investigation. There is virtually no thorough "forensic" investigation in evidence. At best it looked around the peripheries of some of the SCOPA raised issues while ignoring all the more important of these. Where

it came across poor practices, it suggests that these still somehow produced the right answers, but it never gives proof of this. And where ever it could not produce the more important sought after answers, it simply closed the door on the problem or question by way of once-off statements such as “it is a political decision,” “the Cabinet had the right to change its mind,” “compares favourably with elsewhere in the world,” “there was insufficient evidence available,” etc. Thus, the JIT have produced a report, which finds little wrong with the SDP. This led to celebration by those who might otherwise have been embarrassed and led to the whole saga now being assumed buried... (The failure of the JIT) to establish the truth or otherwise of the allegations especially, in respect of allegations of criminal type wrong doing, given their negative bearings on public morale, respect for Government and, ultimately, on economic sentiment is as crucial as has compounded the negative perceptions of Government and the country and has done little to discourage such criminality in the future... For SCOPA - through its majority produced and majority voted report - to express gratitude to and confidence in the JIT when it ignored almost every issue/concern SCOPA had raised and which Parliament had adopted, will remain a blight on the oversight record of SCOPA for ever... The Executive warned every one to put the affair behind them and Parliament reacted smartly by pushing the report through a superficial scrutiny exercise. Of one thing we can be certain, with the JIT having taken the positions it did and Parliament - mostly through SCOPA - having abdicated its investigative responsibility, justice has not been done to the public interest. Parliament has failed the people! (*The arms deal investigation - accountability failure – a critique of the JIT Report* February 2002, 15, 17 & 18).

My resignation must be seen therefore as being both in protest of that which has undermined SCOPA's oversight role and compromised constitutional accountability arrangements, and also the Committee's refusal to take any positive action towards restoring its effectiveness. As importantly, and related to this situation, I am resigning in order to allow for a new fluidity in which it would be easier for concerned parties to make the corrections necessary to re-establish SCOPA as a Committee which exercises effective oversight over public finances (*A statement at a Press Conference held at Parliament, Cape Town* February 2002, 4).

In the words of GW Koornhof MP (UDM)

The joint investigation report fails to cut to the bone on major issues, for instance, industrial offsets, hidden costs and ministerial accountability. Furthermore, by its own admission it cannot be regarded as a complete investigation... No wonder that people have lost faith in the investigation process and that there is a constant questioning of issues such as value for money regarding the promised industrial offsets, creative accounting, the inclusive cost of the arms deal to the taxpayer and the promised 65 000 to-be-created jobs. The fact that there are so many unanswered questions about the arms deal, three years after the signing of the contract, is a clear indication that something major went wrong with this procurement process... The truth is that the public lost confidence in the process when calls for a judicial inquiry were rejected and when the

HSIU was stopped from participating in this investigation. The subsequent interference by the executive, the unwarranted attacks on Parliament, the ANC's bad behaviour in the SCOPA and the involvement of the presiding officer (of Parliament), all work to cast a huge shadow of doubt onto this investigation (*Debate on committees' reports on Joint Investigation Report into the Strategic Defence Procurement Packages* 13 August 2002).

A Blaas MP (New NP) says

The joint investigation report on the arms procurement lacks specific recommendations and clear answers in certain areas... Ministerial accountability and ministerial responsibility need to be addressed as well. The JIT used a conservative approach by exonerating Government from all improper and unlawful conduct. The team did not indicate what Government's responsibility was with reference to officials who engaged in improper and unlawful actions. Ministers have a constitutional obligation to explain and account to Parliament and the public for departmental actions (*Debate on committees' reports on Joint Investigation Report into the Strategic Defence Procurement Packages* 13 August 2002).

For Adv ZL Madasa MP (UDM)

Although it is difficult to find fault in law with the report of the investigators into the arms deal, their conclusions leave a bitter taste in one's mouth. I cannot forget the statement of the Public Protector when he said there was no evidence of wrongdoing by any person; that where it existed, it was not sufficient to warrant prosecution. This is one of those cases in which a judge would say that he or she was not satisfied that the accused had told the whole truth, but that there was no evidence of guilt and that therefore the accused was discharged. That is the arms deal (*Debate on committees' reports on Joint Investigation Report into the Strategic Defence Procurement Packages* 13 August 2002).

And IDASA

It is uncertain from the JIT Report why former Minister Joe Modise (or members of the IONT) had initialled the contracts for the procurement of corvettes prior to the outcome of the affordability team's report. No comment is made in the findings and recommendations about this curious incident... The JIT is very clear when it says that government's contracting position is in no way flawed. However, the question which must be asked with regard to the tainting of the contracts by corruption and fraud, is: if the subcontracts are ostensibly tainted by fraud as a result of these conflicts of interest, is there not a case to be made for saying that the main contracts are flawed?... In addition, the confident pronouncement on the contracting position of government may be

premature given that there are a number of allegations, which are still under investigation by the Directorate of Special Operations. As such uncertainty about the validity of the contracts will remain until such investigations have run their course. As regards cost, no conclusions are drawn from government's conduct in persisting with the deal, safe to say that the choice was a "*political one*" (*Democracy and the arms deal: a submission to Parliament*, PIMS: IDASA, December 2001, 5).

These are very damaging perceptions especially for a country with such a short democratic history. These are institutions (supposedly) improving democracy, but, consequent upon the Report, speculation has arisen as to whether the objective and professional judgment of JIT has been interfered with, impaired or clouded? And while these perceptions grew, it emerged that the Report, as submitted to Parliament, had been subjected to "re-examination," "instructions," and "comments" by senior members of Government, and had thus been further "sanitized," "heavily edited," "doctored," to suit the Executive (see *Business Day* May/June 2003, and January 2005; *The Star* August 2003, and January 2005; *Mail & Guardian* 22 August 2003, and 7 January 2005; Committee Minutes, SCOPA, 20 August 2003; *The Sunday Independent* 9 January 2005). It transpired that this had been done on the basis of s 4(6) of the Auditor-General Act of 1995, a hangover from the apartheid regime, which, in effect, gives the accused the right to judge in his own case.¹³ Relying on throwbacks to the regime of the enemy, the

¹³ As *Parliament must unravel arms deal mess* (in *The Sunday Independent* 23 January 2005, 6) argue, "considering the patently clear conflict of interest" of the AG's contact with the Ministers' Committee at the beginning of the investigation, and more importantly, his discussion of the draft final JIT Report with them at the end of the investigation, "it would seem that had the JIT kept its distance from the Cabinet sub-Committee, it would have produced a report that would have earned greater public confidence." *Drafts aren't meant for changing* (in *The Star* 27 January 2005, 14) as well as *Parliament must unravel arms deal mess* contest the AG's reasons for the submission of the final draft to the JIT Report to the Cabinet sub-Committee who oversaw the defence procurement process. In *The President did not ask me to change anything*, the AG argues, "referral to the President was done under s 4(6) of the Auditor-General Act, 1995," but critics assert that referral to the State President in terms of this particular provision of the Auditor-General Act, 1995, was 'a poor interpretation of the law, and is probably what later caused the AG to change his reason to that of its being "due process" in an audit to consult the "management" ' (also *Mail & Guardian* 22 August 2003; *The Star* 21 August 2003 & 27 January 2005). Both *Drafts aren't meant for changing* and *Parliament must unravel arms deal mess* have also contested the secret submission of the draft documentation to the final Report on the defence equipment purchases deal to the Executive - the investigated party - on the basis of it being "due process." In the routine auditing of books of government departments, management letters and meetings with senior managers to clarify issues are used only in a regulatory audit, not a forensic audit. The investigation into the arms packages purchases was spawned by a regulatory audit and its findings revealed serious problems with the SDP process and this resulted in the unique forensic investigation, as requested by Parliament. In any audit it is for senior managers to

Apartheid regime which preceded April/May 1994, only make a mockery of the ANC-in-Government's professed commitments.

The Auditor-General's explanation was that the changes were merely questions of "format and style," of "making the Report more readable" and "user-friendly" (Committee Minutes, SCOPA, 20 August 2003; *Mail & Guardian* 22 August 2003). But what the changes *really* involved was, *inter alia* the conscious and meticulous deletion (from the final Report) of findings and recommendations suggesting substantial shortcomings in the procurement process in almost all the product-lines. It also involved the inclusion of sections seeking to absolve Cabinet of any wrongdoing or blame and affirm the integrity of Government's contracting position in its arms deal, even though no such conclusions appeared in the draft versions. The Auditor-General insistence that the "comments" and "instructions" of the Ministers' Committee on the draft final report, to whom it was (surreptitiously) submitted, served only "to verify the factual correctness of (draft reports') findings," does not hold water. It is public knowledge that "a point-by-point rebuttal" by the Executive of all findings and recommendations of the *draft* final Report that seemed to threaten the contracting position of Government reinforced the Auditor-General's intention to "dissemble" the final Report, with findings and recommendations of the draft versions either entirely edited out or watered down (where they suggest irregular and corrupt interventions into the selection processes of armaments

provide appropriate clarifications, not political heads of departments. In the management letter process only factual corrections are made, not changes to findings, conclusions and recommendations such as was the case of *the draft report*. The State President is not "management," and in parliamentary/executive relations, the relevant accounting officer represents accountability. Had the Auditor-General mistaken Parliament's recommended forensic investigation for a financial audit, and Cabinet for management, he should have applied the SA Audit Standard 730, which advises, due to the sensitivity of the "audit," that the interaction between the auditor and management should be in writing. The interaction process and responses between the AG and the presidency and the inter-ministerial committee to whom the draft to the final Report was submitted were *ad hoc*, secret, and unrecorded and as such left no trail of how changes to the final Report were introduced. In the investigation into the arms deal the investigated party was a suspect not an auditee. Because the competence of certain decisions of the Cabinet sub-Committee regarding the selection of the successful suppliers and the integrity of the procurement process were key in the probe, there was patent conflict of interest *in submitting the draft report to the Ministers' Committee under investigation*. As *Parliament must unravel arms deal mess* asks: 'If the Auditor-General claims he was following "due process" by submitting his work, on what basis did he also submit the investigative work of the Public Protector, who is not subject to auditing rules?' In conclusion, the article delightfully notes, "on the occasion of his initial report on the arms deal a year earlier, the Auditor-General considered such due process to be irrelevant, and as such did not submit his report to the President and the Ministers' Committee."

in a manner that would question the competency of the Ministers' Committee), or removed from the findings sections and buried in the background chapters of the final version. This resulted in an unnecessary obfuscation and convolution in the final Report for which it has been severely criticized (Reference *supra*).

The revelations of the drafts to the final Report, wrestled into the public domain between October 2001 and December 2004, through a series of court injunctions in terms of Act No 2 of 2000: Promotion of Access to Information Act, 2000, are extremely important. These injunctions were brought by an aggrieved SA bidder in the SDP process, whose bid was overruled in the most opaque manner in favour of French arms company Thompson-CSF, now Thales, after a controversial "risk premium" was added to his tender which almost doubled its value (JIT 2001 10.4.5.6(f)(g)).

The AG's repeated argument of cosmetic, not material, changes from the final draft documentation to the JIT Report though, any honest comparison of the draft and the final Report shows that hugely significant and material changes were made in the final Report. That there was fundamental wrongdoing in the arms deal procurement process, the *main* finding of the *final draft* report, never reached the intended audience, being Parliament and the SA public, due to the direct intervention of the Executive with the connivance of the Auditor-General.

Mail & Guardian (January 2005); *Sunday Times* (January 2005); *The Sunday Independent* (January 2005); *Business Day* (January 2005) record certain critical portions of the final draft report of the Auditor-General submitted to the Ministers' Committee, which were startlingly excised from the JIT Report, viz

- the existence of two conflicting sets of minutes purporting to record the same Cabinet Committee meeting of 31 August 1998, where it was falsely claimed that a decision was taken to forgo the SA Air Force's preferred Aermacchi MB 339 FD for the BAe Hawk 100 – the existence of these parallel sets of minutes for one and the same crucial Ministerial meeting attests to the "severe lack of integrity in the procurement process."
- the indication that the former Defence Minister Joe Modise (now deceased) personally influenced Cabinet's decision to buy the BAe Hawk 100 rather than

the SA Air Force favoured Italian Aermacchi MB 339 FD jet trainer and “caused the Hawk to be selected.”

- the finding that there were “fundamental flaws” in the selection of the BAe/Saab joint bid for the supply of the ALFA/LIFT aircraft (the most exorbitant portion of the entire weapons purchases); another related finding also edited out is: “it became apparent that during the technical, DIP, NIP, and financial evaluations as well as during the negotiation phase, preference was given to BAe/Saab.”
- the direct intervention of one official led to a re-evaluation of two bids, relating to the award of contract for the supply of engines for helicopters, after which the original decision was overturned.
- the finding that the award of the contract to supply engines for the LUH was “irregular.”
- critical information relating to C2I2’s failed bid.
- allegations by ARMSCOR staff opposed to certain noticed manipulations and irregularities in the arms procurement process that they had been intimidated and threatened with, *inter alia* threats of loss of their jobs, by two officials.
- the rampant use of correcting fluid, tippex, in respect of the evaluation of the submarines, in contravention of regulations on the documents recording evaluation of the different bids.
- the finding that the DIP evaluation process with regard to the submarines was “materially flawed” resulting in “potential prejudice to unsuccessful bidders.”

“Findings and recommendations” *not* contained in the final draft report of the Auditor-General submitted to the Cabinet sub-Committee, but which surprisingly found their way - after the Ministers’ Committee and State President’s point-by-point responses to the draft - into the JIT Report, *inter alia* include paragraph 14.1.1, viz

- No evidence was found of any improper or unlawful conduct by the Government. The irregularities and improprieties referred to in the findings as contained in this report, point to the conduct of certain officials of the government departments involved and cannot, in our view, be ascribed to the President or the Ministers involved in their capacity as members of the Ministers' Committee or Cabinet. There are therefore no grounds to suggest that the Government's contracting position is flawed.

Among others, *The Sunday Independent* (9 & 23 January 2005), *Mail & Guardian* (7 January 2005), and *Business Day* (22 May, 5 June, 2003 & 7 January 2005) are united in the view that the extent to which the draft reports were "sanitized," "doctored," and "watered down," as the above cursory look at the final draft version *vis-à-vis* the JIT Report reveals, suggests an explanation as to why Auditor-General Sauket Fakie fought so hard to avoid disclosure and was eventually only forced to do so through a marathon legal battle with the Managing Director of C2I2. According to *Mail & Guardian* (7 January 2005, 2), the drafts suggest the final version was edited to exclude "any earlier findings that might indicate breach in governance serious enough to threaten a contract; any direct contradiction of Cabinet Ministers; any finding that a Cabinet Minister personally influenced the decision making process." The final Report instead contained only piecemeal criticism that avoided substantive conclusions relating to the probity of the acquisition process and completely exonerated Ministers, "finding" that "there were no grounds to suggest that the government contracting position was flawed." This "finding" of the Auditor-General, Public Protector and the National Prosecuting Authority is inexplicable and cannot be substantiated - it completely ignores and side-steps the welter of facts and statements highlighting several significant irregularities and improprieties in the arms acquisition process, as exposed by the drafts but mysteriously left out of the final JIT Report.

Though the discrepancies between draft documents and the final Report question the integrity of both the JIT Report and the SDP itself, the Ministers' Committee and Government have maintained dead-silence; this is unusual for them, hence *Drafts aren't meant for changing* (*The Star* 27 January 2005, 14) criticism that "the Government's silence, plus proof of changes to the draft report submitted to them, form a cogent argument that they have things to hide." Auditor-General Sauket Fakie, co-ordinator of the JIT Report, for his part, has said relatively very little since the release of *the last*

tranche of the draft versions of the final Report in December 2004. Now, this “differs from the final version strongly in tone and conclusion,” and contradicts the Auditor-General’s previous public denial that the Report was edited in any “material,” “substantive,” way (*Business Day* 22 May, 5 June, 2003 & 7 January 2005; *Mail & Guardian* 7 January 2005; *Sunday Independent* 9 January 2005). On 20 August 2003, at the presentation to SCOPA of “the Special Report of the Auditor-General, in response to allegations made against his office with regard to his conduct around the submission of the JIT Report on the arms deal,” Auditor-General Suaket Fakie stated: ‘categorically, due process was followed and no “material,” “substantive” changes were made to the final draft’ (Committee Minutes, SCOPA, 20 August 2003; *The Star* 21 August 2003).

‘ “ Sick and tired” of the arms deal row,’ and determined to close, once and for all, its chapter on the controversial multibillion Rand arms deal and to reaffirm its own integrity, SCOPA’s “*complicit majority*,” in August 2003, accepted Sauket Fakie’s evidence before the Committee that the changes to the Report were simply a matter of format and style. The Committee’s initial insistence, backed by Speaker Frene Ginwala, on examining the drafts of the final Report to make a determination on the matter, *having been crushed*, the Auditor-General moved to head off further criticism against his office and invoked Parliament’s Rule 66, which bans MPs from commenting on the competence or honour of a judge or office-bearer in government institutions, bodies and agencies: “Such criticism is causing damage to an institution critical to democracy. I am concerned that there has been an effort by certain individuals to discredit me and my office. I rely on Parliament to protect the integrity and honour of the Office of the Auditor-General as a constitutional institution” (see Committee Minutes, SCOPA, 20 August 2003; *The Star* 21 August 2003; *Mail & Guardian* 22 August 2003). In spite of the dissatisfaction of opposition party MPs with the Wednesday 20 August 2003 presentation to SCOPA by the Auditor-General, and their description of the meeting as “shallow” and “a PR platform for the Auditor-General,” SCOPA accepted his explanation and made no further attempt to examine the material on which the relevant allegations against the conduct of the Auditor-General were based (*Mail & Guardian* 22 August 2003). Not satisfied with crushing the opposition party MPs’ effort to investigate the allegations that the final JIT Report on the arms deal was materially and substantively “doctored,” “sanitized,” and “heavily edited,” Vincent Smith, ANC chair and spokesperson in SCOPA, went so far as to call on Parliament “to discipline MPs who have impugned the integrity of the Auditor-General” (Committee Minutes, SCOPA, 20 August 2003; *The Star* 21 August 2003).

After December 2004, the forced release, for the public's view, of the latest draft documentations of the JIT Report on the arms packages procurement process resulted in several important revelations, but the Auditor-General adopted a practice and principle in which 'the Auditor-General does not comment on the contents of draft documents purely because of the magnitude of information contained in drafts and the fact that the contents of such documents are "there for changing" ' (cf. *Business Day* 7 January 2005; *The Star* 27 January 2005). In view of the fact that Auditor-General Sauket Fakie has now *changed* his explanation to contradict an earlier, repeatedly reiterated, public statement regarding the changes made from the drafts to the final Report on the arms deal (together with all the outstanding questions about the probity of the arms procurement process, the Auditor-General himself, as well as serious issues in relation to the effectivity of the checks and balances in SA's democracy), parliamentary voices have insisted the Auditor-General be called once again before Parliament to explain and justify the material and substantive - not cosmetic and immaterial - changes from the draft version to the final version of the JIT Report.¹⁴ ANC spokesperson and leader in SCOPA VG Smith agreed, in an SA-*fm* radio talk show entitled *Why the arms deal allegations will not go away* that "there is no problem in calling the Auditor-General before Parliament to justify the (now exposed material) changes from the draft documents to the final Report on the arms deal." However suspicion remains as to how Government intends to deal with the matter, which has been termed, an "outrage," and a "crisis," in relation to parliamentary checks and balances and the parliamentary accountability and oversight procedures of a new constitutional democracy.

Would the Auditor-General be brought to Parliament and questioned to establish the veracity of the "key findings" of the JIT Report submitted to Parliament in November 2001, and the appropriateness of his behaviour in respect of the investigation and the production of the final Report, particularly his collaborations with the Ministers' Committee? At stake, in respect of the latter, is the ethical question about the propriety or otherwise of the Auditor-General's contact with the Cabinet sub-Committee (whose competence in having overseen the arms packages purchases the Auditor-General was

¹⁴ Of interest in this regard, amongst others, are the contributions by Judith February of the Parliamentary Information Monitoring Services; Terry Crowford-Brown of the Economists Allied for Arms Reduction; Eddie Trent MP (DA), and Gavin Woods MP (IFP), in SA-*fm* radio after-eight debate 10 January 2005; *The Sunday Independent* 9 & 23 January 2005; *Business Day* 10 & 11 January 2005; the Independent Group of Newspapers: www.iol.co.za 11 January 2005).

investigating) at the beginning of the investigation and his discussion of the draft report with the Ministers' Committee at the end of the investigation. This would be an opportunity for Parliament to re-engage with the arms deal and its unending spin-offs relating to allegations of corruption – the trial of Durban businessman Schabir Shaik, the public row between the Public Protector and the National Prosecuting Authority (subsequently mediated by Parliament), and the concerns relating to the viability of arms deal related offsets projects – all of which have ensured that the matter remains in the public consciousness and will not go away unless clarity is brought to the whole phenomenon. It would also avail the Auditor-General once more of the opportunity to defend the statement that there is “no evidence of any improper or unlawful conduct by the Government (and) no grounds to suggest that Government's contracting position is flawed,” in view of the overwhelming evidence to the contrary in the newest revelations of the final *drafts* to the JIT Report. More importantly, a rare opportunity would have been afforded Parliament to reposition itself and its role as the representative of the will of the people, and to regain trust where that trust may well have been seen to be eroded in the recent past through a series of damaging events – including the controversial arms deal, high profile breaches of the parliamentary code of ethics, and misappropriations of travel vouchers by MPs, *the travelgate*, in common parlance. Or, will Government pass on the problems of the arms procurement process and the Office of the Auditor-General to Parliament and then let the ruling ANC's 70% majority steamroll any effort to determine the truth with respect to these issues, as Parliament has tended to do, since the inception of the arms deal itself?

7.1 Selection of subcontractors for the IMS, SMS and NDSS

The *Special Review of the Selection Process* [RP 161-2000] by the Auditor-General and the *Fourteenth Report of the Standing Committee on Public Accounts* were both concerned about the “numerous allegations of irregularities pertaining to contracts awarded to sub-contractors” during the strategic defence procurement process, and SCOPA itself was concerned “that the government had no influence in the appointment of subcontractors,” hence its proposal for a forensic investigation into *all identified reasonable concerns*.

Pursuant to the regularity or otherwise of the non-selection of C2I2 Information Management System (IMS), senior officials of DoD incorrectly and misleadingly stated before SCOPA that 'at no stage in the (Request For Offers) RFO or Combat Suite tender process was any company designated by the DoD or ARMSCOR as a "nominated supplier" ' (JIT 2001 11.5.2.1). Project Officer, Project Corvette, R Adm JG Kamerman, Lewis Mathieson and other officials were themselves members of both the Joint Project Team (JPT) which compiled the list, and were involved in the compilation of the list of subcontractors, which they submitted to the German Frigate Consortium (GFC) in terms of the Request For Offers of the Corvettes Munitions Suite, in contradiction of DoD's statement to SCOPA (*confer* JIT 2001 11.5.2.4-6). "The Germans and (African Defence Systems) ADS were given a list of prospective suppliers for sub-contracts," was what Chief of Acquisitions of the DoD, Shamin Chippy Shaik, said before SCOPA on 11 October 2000. In terms of the JIT Report (11.5.2.2-3), 'at least in the "*SA Navy Patrol Corvette Combat Suite Element Costing and Description*," there was a reference to certain "nominated" suppliers... It is clear that a list of Combat Suite suppliers was compiled, and given to the GFC in terms of the RFO.' Further, regarding "nomination" of suppliers and "compilation" of list of the Corvette Munitions Suite supplier, issued to the German Frigate Consortium, prime supplier of the Corvettes, the document titled "*SA Navy Patrol Corvette Combat Suite Element Costing and Description*" that formed part of the Request For Offers, contained various significant provisions expressed in the following extracts, *viz*

...The Combat Suite Element, comprising of systems developed and produced by nominated RSA industry...

3. ...The Vessel Contractor will be a teaming arrangement between the ship platform supplier and the nominated RSA combat suite supplier, with sub-contractors placed on nominated companies for the various sub-systems.

9. The Combat Suite consists mainly of sub-systems developed or under development by South African industry, in addition to some items of equipment from the SA Navy inventory; and three major sub-systems to be acquired from foreign suppliers (JIT 2001 11.1.2.2).

Clearly, therefore, nominated SA industry was to play a significant role in the supply of the Corvettes' Munitions Suite, contrary to the public statement of DoD in this regard.

R2,6 billion was the approximate total cost of the Munitions Suite in 1998. R1,938 billion was the value of its local elements. The foreign elements of the Combat Suite amounted to R671 million.

Senior members of the ANC-in-Government as well as party leaders have had to point out repeatedly that “the (arms) procurement does not deal with subcontractors (and that) to insist that Government must be held to account for minor subcontracts is to misunderstand procurement” (see *ANC Today* 3 (21): 30/5/-5/6/2003). Corroborating the denials of Government, DoD further stated to SCOPA that, “at no point in the entire tendering process did the SA Navy indicate a preference for the C2I2 IMS product or technology, even though the SA Navy being (sic) a co-owner of the C2I2 IMS technology,” (and that) on the contrary, the final selection between the C2I2 option and the proposed alternative Detexis option was chaired by the Chief of the Navy” (JIT 2001 11.6.3.1). Chief of the Navy V Adm RC Simpson-Anderson’s letter of 18 September 2000 marked “*Without Prejudice*,” for action by the Chief of Acquisitions, and which was later submitted to SCOPA, stated: “The Combat Suite databus selected for the Patrol Corvette by the Project Control Board was considered the best option. At no stage was the C2I2 option the SA Navy’s selected or preferred option” (JIT 2001 11.6.4.1). Contradicting the Chief of the Navy, the Chief of Acquisitions Shamin Chippy Shaik, on 11 October 2000, testified before SCOPA that “the decision not to bear the risk of the IMS of C2I2 was taken by the Chief of the Navy, who chaired the meeting of the Project Control Board with the approval of his Naval Command Council” (see JIT 2001 11.6.3.2).

In response to these incorrect and misleading presentations by DoD, the JIT Report asserted: ‘From the investigation it appears that, up to a point, the C2I2 IMS was the preferred databus of the Navy. This is clear, not merely from its nomination as the IMS supplier and the amounts spent by the Navy on its development, but also from the conclusion of the Navy (and Detexis) engineers as reflected in the “*Report on the Diacerto bus*” (JIT 2001 11.6.4.2). It was also confirmed by different witnesses. It is difficult to accept, in the light of the evidence, that the C2I2 option had at no stage been the Navy’s preference,’ contrary to DoD’s public statement in this regard. In the words of the JIT Report, “the *Report on the Diacerto Bus proposed by the SAN of Project Sitron*,” compiled by Lewis Mathirson, Lt Cmdr Andrew Cothill and Cmdr Egan-Fowler, ‘concludes with the following “(a) from a technical point of view, the Combat Suite project team proposes that the current architecture based on the IMS be retained... (b)

Both Thompson and GFC recognize that the IMS is a superior product” ’ (*Report on the Diacerto bus*, in JIT 2001 11.6.6.8). According to the JIT Report (JIT 2001 11.6.2.1), ‘the possibility of *replacing* the IMS was first reported to the PCB, according to its minutes, on 27 May 1997, when (Project Officer Project Sitron/Corvette) R Adm JG Kamerman submitted his status report, in which the following is stated: “Dassault (Detexis) databus *now* offered in place of C2I2 bus: project team awaiting full specification and system architecture implications before this can be deemed to be acceptable.” ’

A Joint Project Team (JPT) of DoD personnel was appointed to manage the Corvettes procurement project. JPT was mandated to negotiate with contractors about, *inter alia* the price and specifications of products. As established in the JIT Report, “they did have direct contacts and negotiations with the subcontractors who received technology retention funding on technology development.¹⁵ Annual audit and risk assessments were done of all the contractors who received funding in terms of the technology retention programme. F Nortje (Corvettes’ Combat Suite Procurement Project Manager) explained that in dealing with these subcontractors, the JPT members had to wear two hats” (JIT 2001 11.5.1.1, 11.11.1) – a clarification in conflict with the contention of Government that procurement does not deal with subcontractors. As the JIT Report (JIT 2001 11.5.1.1(j)(k)(l)) puts it: “It is therefore clear that it is not correct, as apparently alleged by DoD and ARMSCOR, that they had nothing to do with the choice of subcontractors. All evidence points to the contrary and F Nortje in fact admitted it when asked about it specifically. The fact that the JPT exercised considerable power in the choice of subcontractors is clear from all evidence. R Adm JG Kamerman also pointed out in his evidence that they requested the GFC to replace ADS with C2I2 for the supply of the Navigation Distribution Subsystem (NDSS).”

However, whatever happened to overturn the preference and recommendation of C2I2 for the supply of the Corvettes Combat Suite data bus, as contained in the conclusion of the

¹⁵ The Corvettes acquisition programme consisted of a technology retention programme called SUVECS (Surface Vessel Combat Suite), in an attempt to preserve the local naval technology base that had been nurtured at substantial cost to the State for years during the time that the Defence Review was conducted. SUVECS consisted of small contracts issued to a number of local companies, on a year-to-year basis, not to develop products, but rather technology demonstrators; in other words, something that could work and could be considered for further development. It was further considered important for the strategic advantages of local sourcing of sensitive combat technologies; and the economic advantages of supporting an industry that has a major job creation factor and significant export potential.

SA Navy (and Detexis) engineers' *Report on the Diacerto Bus* (JIT 2001 11.6.4.2, 11.6.5.1, 11.6.6.8), is apparently beyond the remit of the JIT Report on the SDP procurement process.

In their investigation into the regularity or otherwise of the non-selection of the C2I2 as the subcontractor for the IMS, the Auditor-General and Public Protector could neither substantiate who categorized subcontractors into either category B or category C risk equipment, nor the veracity and regularity of the decision, if it was ever taken.¹⁶ On the other hand, the JIT Report variously emphasized the categorization of subcontractors in items 10.4.5.6(f), 11.5.1.1(a)), 11.5.1.1(d)), 11.6.7.3(10)(a)), viz "The project team categorized the C2I2 Bus as Category B risk (10.4.5.6(f), 11.6.7.3(10)(a)). The JPT took

¹⁶ In terms of "ITEM 5: CORVETTES – Contracting Model Categories of Risks, as in minutes of the PCB meeting of 24 August 1999 (JIT 2001 10.4.5.6(f), 11.6.7.3) where it was *allegedly* decided to opt for Detexis Diacerto Databus and not to bear the risk of the Information Management System (IMS) of C2I2, "the acting project officer briefed the board on the combat suite risk and the risk management pertaining to project-contracting model contained in Appendix A. He emphasized that, although the SAN accepts some risk with reference to Category C products, the Prime Contractor retains full responsibility for the delivery and performance of a fully integrated vessel, which includes the full integration of the combat suite ashore and abroad." The thesis emphasizes the fact that PCB was briefed of the combat suite risk and the risk management pertaining to project-contracting model contained in Appendix A. It notes with strong emphasis that in regard of the project-contracting model contained in Appendix A, "risk with respect to Category C products," acceptable to the South African Navy and in which "the Prime Contractor retains full responsibility for the delivery and performance of a fully integrated vessel including the full integration of the combat suite ashore and abroad," was elaborately explained to the Board. In respect of appendix A annexed to the minutes of PCB meeting of 24 August 1999 which "contains details of the contracting model for the Combat Suite (and discussion on) the background problem of the Combat Suite," JIT wrote, 'of significance is the list with Category B equipment which contained the following information: "Combat Management System: Thompson/ADS"' (*confer* JIT 2001 10.4.5.6(f), 10.4.5.6(g)). The document titled Combat Management System: Thompson/ADS was indeed an outline of the risk/problem associated with the Combat Management System of Thompson/ADS. Was Category C equipment presented to the PCB meeting of 24 August 1999 for the acceptance of the Detexis Diacerto data bus where the Detexis Diacerto data bus was in fact Category B risk equipment? This further complicates the claim that the Thompson/ADS data bus was ever accepted by any board, body or team during the arms procurement process, where absolute lack of visibility reigns. C2I2's IMS/data bus was rejected for the alleged reason of it being "a Category B risk, i.e., the Prime Contractor retains full responsibility for the delivery and performance of a fully integrated vessel, which includes sub-systems that have a critical effect on the overall delivery" (JIT 2001 10.4.5.6(f)). Contracts were categorized into three groups, i.e.: a) Category A, which consisted of the vessel platform b) Category B, which consisted of all sub-systems, which have a critical effect on the overall vessel delivery and for which the prime contractor retains full responsibility and c) Category C, which consisted of sub-systems whose performance and delivery remained the responsibility of the subcontractors until delivery to the prime contractor for integration into the vessel (see JIT 2001 11.6.1.1). SA Navy accepted some risk with respect to Category C products.

decisions, e.g., regarding the categorization of subcontractors as either Category B or Category C subcontractors, and submitted their decisions to the Project Control Board (PCB), which consisted of SA Navy, ARMSCOR and DoD officials (11.5.1.1(a)). It was the JPT that had the necessary technical know-how and also negotiated with both the main contractors and the subcontractors. The evidence indicates that certain members of the PCB did not have the technical knowledge to interfere with the decisions of the JPT and it appears that the PCB merely ratified the decisions of the JPT (11.5.1.1(a)(d)).”

None of this is borne out by the investigation into the defence equipment procurement process. Apart from the bits and pieces of evidence of senior officials of government charged with the responsibility of overseeing the arms acquisition process, which investigators regarded as “misinformation,” “inadmissible,” and “allegations,” the only visible audit trail with reference to the categorization of subcontractors into either risk B or C equipment (and the consequent imposition of a risk premium of some R42 million to the C2I2 IMS price, which doubled its value and led to the decision not to bear the risk of C2I2 data bus), was created through the minutes of the PCB meetings of 8 June 1999 and 24 August 1999 - all chaired by the Chief of Acquisitions of the Department of Defence, who neither declared any conflict of interest nor recused himself (JIT 2001 10.4.5.6(b)(e)(f), 11.6.7.1-2)). And, with respect to these two meetings, the minutes of the PCB meeting of 8 June 1999, as per the JIT Report, reads:

‘On 8 June 1999, a “*decision-making*” PCB meeting was convened and chaired by Shaik. He informed the meeting that its aim was to confirm decisions already taken by the PCB with regard to certain projects. This in itself seemed strange. A list of contenders for the various elements of the ship platform and the Combat Suite was presented to the board for ratification. The list was entitled “*Project SITRON (Corvettes): summary of supplier decisions by PCB where alternatives were evaluated or considered.*” Thompson featured prominently on this list. *The PCB proceeded to ratify the decisions to select the suppliers.* There is no indication that Shaik recused himself from this “*decisions-making*” PCB meeting. Shaik signed the minutes. He participated in the discussions as per the following recording...’ (JIT 2001 10.4.5.6(e)).

The minutes of the PCB meeting on 24 August 1999 chaired by Shamin Chippy Shaik state in connection with the Combat Suite Data bus “Further, the acting Project Officer Project Sitron informed the Board that if C2I2 data bus option is selected over the ADS Detexis Data bus, the project team would have to find the extra funds required to bring

both options on par with respect to risk coverage.¹⁷ This would result in lifting the ceiling price of the Corvettes. The Chief of Acquisitions informed the Board that the CEO of ARMSCOR had presented this matter to the AAC and that the Minister supported the principle of the main contractor carrying the overall risk and the responsibility for the sub-contractors. If the principle of the Main contractor carrying the risk for the sub-supplier is changed, then the added difference in cost will have to be borne by the DoD. The principle of the contractor carrying the risk must be adhered to. The AAC decided that the ceiling price per equipment should not be raised" (JIT 2001 10.4.5.6(f), 11.6.7.3(10)(b)).

As the JIT Report shows, "Apart from showing that Shamin Chippy Shaik took part in the discussion, the minutes merely reflect that the PCB was informed of certain facts"

¹⁷ Whereas the JIT Report says the SA Navy accepted some risk with respect to Category C products, *The State versus Schabir Shaik & 11 others* (2005) stated, "Government (who) had (from the start of the procurement process) wanted to retain the capacity of deciding who should supply the sort of Combat Suite that was required regardless of the anticipated price that the Munitions Suite would cost (in fact) spoke for the Navy"(in this regard). For that reason after the announcement of GFC as the preferred bidder for the Corvettes, a further process was commenced to decide on the required contents of the Munitions Suite or the "Black Box" at the most competitive price. In this context, although Thompson-CSF (France) had ADS to offer, since by then it had acquired control of that company, and ADS, being South African and already a supplier of some of the Navy's requirements, would have been a preferred choice for this work, the first presentation by Thompson-CSF of what it proposed to provide was not accepted because the price was too high. *The GFC, which had in its bid indicated an intention to use ADS as a leading part of the Combat Suite installation, was then asked to obtain prices from other possible suppliers to compare these with those of Thompson. This was done and the result was that if the Navy was to accept Thompson's offer, it required a reduction in price. Some anxious exchanges then took place that were finally resolved, according to Pierre Moynot (representative of Thompson's in SA in the early 1990s), by the Government being prepared to underwrite the risk of any defective performance by any of the South African sub-contractors that it wanted to be used in this contract.* If that were done, Thompson would be able to reduce its price by the amount of the risk provision it had factored into its original cost projections to cover this potential source of liability" (see Judge HJ Squires' Judgment: *The State versus Schabir Shaik & 11 others* 2005, 12, emphasis added). But does all this have any implication for the alleged "clandestine meetings in Paris of the then Deputy President with Thompson-CSF during the contracting process and his preparedness to guarantee them contract?" (*The Star* 27 January 2005). Such an intervention on behalf of a foreign company would not have furthered the constitutional imperatives of a transparent and cost-effective government at all. Having preferred the French Munitions Suite for the SA Navy's Corvettes and taken the decision to underwrite the risk of a foreign product against any SA competitor from the time of commencement of the SDP process, did not Government encourage the *criminality* of inviting C2I2's tender just as a statistic and to enable ADS lower its price? In short, not just Auditor-General Sauket Fakie but JIT must be given the opportunity to, once again, answer to Parliament and the SA public as to whether Government was culpable for the improprieties and wrongdoings shrouding its multibillions public money expenditure on the armaments deal?

(JIT 2001 11.6.7.4). In fact, minutes of the PCB meeting of 24 August 1999, as in the previous “*strange decision-making*” PCB meeting of 8 June 1999, only reflect the interference and control of the Chief of Acquisitions of DoD and the Project Officer of Project Corvettes, who kept PCB abreast of contentious decisions particularly “vital to the acceptance of the Detexis bus and the rejection of C2I2’s IMS,” and got the Board to ratify decisions reached elsewhere, decisions not made by but imposed on the members of the PCB (see JIT 2001 10.4.5.6(h), 11.6.7.5). Amongst the decisions ratified by PCB were the Chief of Acquisitions’ false declaration of conflict of interest and recusal from participation in the discussions of issues relating to the Corvettes Combat Suite in which he was in fact the dominant, if not the only, voice. The *Appendix D* to the minutes of the PCB meeting of 24 August 1999 - the covering page of which read: “*Project Sitron Presentation to special PCB meeting regarding contracting model Combat Suite 19/08/1999*” - was also ratified in that meeting. Appendix D to the minutes of the PCB minutes of 24 August 1999 relates to a special PCB meeting which senior officials of government claimed to have held on 19 August 1999 to discuss and decide the “*categorization of the sub-systems as either Category B or C, the risk reduction measures, other areas, implications,*” i.e., shortly before and prior to the Board’s regular meeting of 24 August 1999 (see JIT Report 2001 11.6.8.1-17).

JIT emphasized that the Joint Project Team categorized the subcontractors into either risk B or C equipment, which as we have seen, resulted in the imposition of a risk premium of some R42 million to the C2I2 IMS price, doubling its value, as well as the decision not to bear the risk of the C2I2 data bus. Senior officials of government alleged however that a meeting of the Project Control Board was held on 19 August 1999, which discussed and decided, *inter alia* the “*categorization of the sub-systems as either Category B or C*. This is contradictory. Post-JIT Report, in his *The President did not ask me to change anything* (*Business Day* 5 June 2003) the Auditor-General in fact told *Business Day* that “the decision was taken not to bear the risk of C2I2’s IMS” at the meeting of the PCB on 24 August 1999. This is untrue as, going by both the several thousand pages of draft documentation and the final JIT Report on the arms deal, there is a clear lack of any visible audit trail for this decision by the PCB, JPT or any other body involved in the strategic defence packages procurement process. Regarding this very important meeting of 19 August 1999, the JIT Report (11.6.8.2-3) states:

“This special meeting, if it took place, was one of the most crucial meetings of the PCB. The investigation team has ascertained that all other special PCB meetings were duly

recorded and minuted. However, various factors create doubt whether this meeting on 19 August 1999 in fact took place; alternatively, if it is accepted that it did take place, serious doubt exists (as to) whether it was a properly constituted meeting. Some of the pertinent factors are the following:

- (a) Although all PCB meetings were recorded, this one was not. No reason for such omission could be advanced; nor is it obvious.
- (b) The minutes of the meeting of 24 August 1999 refer back to the minutes of the previous meeting of 6 June 1998, and contain absolutely no reference to a meeting on 19 August 1999. The minutes of the meeting of 24 August 1999 were accepted as correct at the next meeting, which took place on 6 October 1999.
- (c) No agenda for such meeting could be found. Only the agenda for the meeting of the 24 August was found.
- (d) There does not seem to be any reason why a meeting had to be held on Wednesday, 19 August 1999 only five days before the regular PCB meeting of Monday, 24 August 1999.
- (e) Likewise, the exclusion of certain people from the meeting casts doubt on its being properly constituted and issues discussed."

In addition, conflicting statements abound amongst the very senior government officials alleged to have convened, attended and/or made presentations at this very special meeting as to whether they themselves actually did convene, attend, or make presentations at - or even have any recollection of - the meeting (JIT 2001 11.6.7.6-9). Typical of the discrepancies and contradictions in the statements of the principal participants of the alleged meeting are as follows,

R Adm JG Kamerman, Project Officer of the Corvettes told investigators that a special PCB meeting, held on 19 August 1999, was requested by L Swan, CEO, ARMSCOR. Hanafey of ARMSCOR, Shamin Chippy Shaik and R Adm Howell, among others,

attended the meeting. F Nortje, Project Manager of the Corvettes and himself made their presentations to the meeting (JIT 2001 11.6.8.4).

F Nortje, for his part, told investigators that Shamin Chippy Shaik, Chief of Acquisitions of the DoD and L Swan, called a special meeting of the PCB on 19 August 1999. The meeting was chaired jointly by S Chippy Shaik and L Swan and attended by Mr Hanafey and R Adm Howell, among others. 'Only the Combat Suite issue was on the agenda, and he had to make a presentation on the Category B and C risk issue. The presentation made by him is Appendix "D" to the minutes of the meeting of 24 August 1999. His impression was that the PCB approved his proposals. The proposal put forward was not a proposal of the JPT, but of Kamerman, Cothill, Watson, Mathieson and himself' (JIT 2001 11.6.8.5-6).

But Mathieson told the JIT (JIT 2001 11.6.8.7) "he did not assist in preparing the presentation to the PCB, and does not know what was presented. Kamerman and Nortje prepared the presentation."

Hanafey of ARMSCOR "does not remember such a meeting or attending a meeting on 19 August 1999, and that, if it did take place as described, it would have been irregular" (JIT 2001 11.6.8.9).

For R Adm Howell, a meeting of the PCB "did not take place on the 19 but on the 24 August 1999" (JIT 2001 11.6.8.9).

And, very importantly, the alleged co-chairman, Shamin C Shaik testified, "there was no PCB meeting on 19 August 1999" (JIT 2001 11.6.8.10).

In respect of the Project Manager Project Corvettes' alleged presentation at the meeting of the PCB of 19 August 1999, the JIT wrote, "Appendix D contains no reference to the IMS of C2I2, and there is therefore no indication of any decision, or ratification of a decision. No agenda for a meeting of 19 August 1999 could be found, according to Capt Clayden-Fink, whose responsibility it was to arrange meetings, prepare agendas and keep minutes of PCB meetings regarding Project Sitron" (JIT 2001 11.6.7.7, 11.6.8.8).

As the JIT summed up, "...in all probability, no such meeting took place. Based on the above-mentioned evidence, the only conclusion that can be drawn is that, if a decision

was taken regarding whether the IMS of C2I2 should be a Category C item, doubt exists regarding the regularity and validity of such a decision and the process followed in arriving at such a decision” (JIT 2001 11.6.8.16-7). At any rate, the Auditor-General and the Public Protector made a grave error in not having explicitly formulated a more holistic, rounded conclusion based on all that was made evident in the JIT Report on the SDP process. So if a decision was ever taken regarding whether the C2I2’s IMS should be a Category B or C equipment, very serious doubt still exists in respect of the regularity and veracity of such a decision and the process followed in arriving at it. The existence of allegations of a meeting of the PCB on 19 August 1999, side by side with another on 24 August 1999, each claiming to have been the forum where bidders’ equipment were categorized into Category B or C risk equipment, *heavily bear* on the regularity of the (alleged) categorization. Minutes of PCB meeting of 24 August “indicate no decision, or ratification of a decision” in respect of the acceptance of the Detexis bus and the rejection of the IMS of C2I2 either.

Turning to the meetings of the JPT, where investigators say the all-important decisions were reached with reference to categorizing subcontractors as either Category B or Category C subcontractors, (and which resulted in both the imposition of a risk premium on the C2I2 data bus, doubling its price, and the decision not to bear the risk of C2I2’s IMS) all the JIT Report says, is:

“To complicate matters, the JPT did not keep minutes of its meetings. It should be pointed out that conflicting versions were given about whether minutes were kept of formal JPT meetings. No minutes were found during the investigation. This, coupled with the evidence, leads to the conclusion that minutes were not kept; this is not in accordance with good procurement practice. The lack of record-keeping complicated the issue as it made it difficult to establish objectively what took place and determine responsibility” (JIT 2001 11.5.1.1(6)(e)(f)). In light of the foregoing, therefore, rather than the *arbitrary* claim by the Auditor-General and the Public Protector that the JPT took the decision regarding the categorization of subcontractors as either Category B or Category C subcontractors, investigation is inconclusive *vis-à-vis* the crucial decisions with respect to the categorization of subcontractors into risk B equipment, the imposition of risk premium on C2I2 data bus and the decisions not to bear the risk of the C2I2 IMS and to opt for the Thompson/ADS Detexis Diacerto data bus. The JIT Report agrees: “there is no evidence to indicate that a proper risk assessment of the IMS was made. No minutes of the Naval Board meetings (or any other board, organ, agency or body involved in the

procurement process), reflecting a decision to opt for the Detexis bus, could be found. It is therefore not clear when and by whom the decision was taken not to award the contract to C2I2” (*confer* JIT 2001 11.6.9.8, 11.11.4.14-15). Category B risk having been wrongfully imposed on C2I2’s data bus, GFC/ADS consequently imposed a risk premium of R42 million on C2I2’s IMS’s offered price of R44 303 918 00, which almost doubled its value to R89 255 000 and priced it out of reckoning in favour of the Detexis Diacerto data bus. The Detexis data bus was offered at a price of R49 255 000.

Again, regarding the audit trails in respect of the acceptance of the foreign Detexis Diacerto data bus, all the JIT Report says, is, “the investigation team did not have access to the Detexis proposal, which is in the GFC’s possession. The JPT merely received spreadsheets from the GFC reflecting details of the tenders submitted. It is not clear how the risk premium was calculated. Furthermore, the calculation of the risk premium cannot be evaluated without evidence from the GFC and assistance of an expert witness. It seems that the risk premium placed on IMS of C2I2 was merely accepted by the JPT and PCB, without any attempt to properly evaluate or access it. One would have expected a proper assessment by the JPT instead of a mere acceptance” but “there is no evidence to indicate that a proper risk assessment of the IMS was made” (see JIT 2001 11.6.1.8, 11.6.9.4-5, 11.11.4.8, 11.6.9.8).

The Navy’s recommendations to the Joint Project Team that C2I2 and Detexis should be given the opportunity to present their systems on a competitive basis to prove maturity, reliability and performance, was not accepted. The proposal for a full risk evaluation of the C2I2 data bus, including a demonstration of functionality on a strike craft, was not accepted. The same happened, according to the JIT Report, in respect of a recommendation that ADS should be requested to substantiate and explain, in detail, the reasoning behind their statement of high risk and immaturity of the C2I2 system and why they were adding so many millions to the C2I2 price (JIT 2001 11.6.6.10, 11.6.6.13). The SA Navy which took part in the evaluation leading to the *Report on the Diacerto bus*, confirm that the demonstration of C2I2 data bus in October and December 1999 was “with resounding success,” confirming the reason for the Navy’s preference for C2I2’s system.

The Joint Investigating Team heard during investigation that the tendering process in respect of subcontractors was administered by the GFC. There was no control from the Navy’s side over the fairness of the tender process conducted by the GFC. No formal

state tender procedures were applied in respect of the approximately R2,6 billion to be spent on the Munitions Suite. Time constraints precluded a thorough procedure from being applied and the Navy and ARMSCOR did not have experience of such a major acquisition process (JIT 2001 11.5.3.10, 11.5.1.1(g)). Investigators did not bring clarity as to who authorized the management of a whole process of acquiring the Combat Suite, involving some R2,6 billion, outside ARMSCOR/DoD and the Navy's normal tender provisions, and they conclude, "no acceptable explanation for not applying a fairer and more transparent process was offered" (JIT 2001 11.5.2.10, 11.5.3.9, 11.5.3.15). Against this background, in respect of the Munitions Suite data bus, GFC was provided with detailed User Requirement Statement and required to tender in accordance with the URS, though it was free to offer alternatives that did not comply with the URS but that, as JG Kamerman put it, "*could do the job*" (emphasis added) (JIT 2001 11.5.3.12, 11.6.6.14).

If JIT later "found" that the Diacerto bus of Detexis "could also do the job" (JIT 2001 11.11.4.10) despite its association with Category B equipment risk, viz "(a) extensive use of copper enhances the expected EMI/EMC problems for which Thompson has already said they will not be accepting any responsibility (b) the proposed 100 Mbit/s ethernet products still require a degree of development (c) the SAN will have to rely heavily on the supplier for future support, despite allegations to the contrary by the supplier (d) the 100 Mbit/s ethernet has never been done on a warship before (e) the design is in fact only a concept at this stage (f) strategically the core technical understanding and support of this system will lie in the hands of the supplier (g) it is the CS (i.e., Combat Suite) project team's expert opinion that for a mid-life upgrade of the vessels, the entire LAN will have to be replaced with the associated consequences on the CS" (*confer* JIT 2001 11.6.6.7, 10.4.5.6(g)). The relevant question then is why "the SA Navy preferred C2I2 IMS, and both Thompson's and GFC's recognized superior product" (see *Report on the Diacerto Bus*, in JIT Report 2001 11.6.4.2, 11.6.6.8, 11.11.4.10) was mysteriously passed over for "Detexis bus architecture, a design only at *concept stage* (among other critical problems), that "could also do the job?"

In their presentation to SCOPA, on 11 October 2000, DoD stated that risk premiums were placed on subcontractors "mainly due to most of them still being under technology development" and that, in addition to the main contractor's risk premium, "most of RSA sub-contractors included an internal development risk allocation in their quotations to the main contractors. It told SCOPA (see Committee Minutes, SCOPA, 11 October 2000, 6) that 'the local company's IMS, already paid for by SA and preferred by the SA Navy for

the Combat Suite for the Corvettes, was rejected because “it was too great a risk to use *unproven*” South African technology...The technology belongs to the SA Navy, but the Navy had to freeze the technology and then “*test*” it. The technology is the nervous system of the ships and radar (the spine of the Combat Suite)... *A Cabinet Committee instructed the tender process not to take that risk...*¹⁸ *The Chief of the Navy did not want*

¹⁸ The repeated claim of senior members of Government including its highest reaches that the SDP did not deal with subcontractors is utterly incoherent: that is to say the JIT Report says it is not correct, as alleged, that Government had nothing to do with the choice of subcontractors. All evidence points to the contrary, and officials of DoD in fact admitted it when asked about it specifically. The fact that the Joint Project Team exercised considerable power in the choice of subcontractors is clear from all evidence. Beyond the JIT Report, Minister Alec Erwin unequivocally stated to SCOPA, on 26 February 2001, that ‘the LIFT technical aspects and “the NIPs/DIPs” were decisive rather than the cost’ in the choice of the prime supplier of the LIFT hence the suggestion “that investment and trade agreements (along with the job opportunities they were to create) formed the very basis for entering into the arms contract in the first place.” And, because ‘it is primarily at the level of the subcontracting arrangements that “the NIPs/DIPs” agreements for investment, trade and job creation opportunities would be realized in any event, “the integrity of the sub-contracting arrangements entered into are consequently crucial to the integrity of the entire deal.” In light of subcontracts thus bearing on the choice of main contracts and the integrity of the entire strategic defence packages, could Government substantiate its claim of lack of concern with subcontracts? It is a public statement of the Chief of Acquisitions of DoD that a Cabinet Committee instructed the tender process not to take the (alleged) risk of the C2I2 IMS for the Corvettes’ Combat Suite. *Revealed: state link to Shaik’s arms firm* (in *Business Day* 5 June 2003) learned that Government has a contractual link with a subcontractor in the multibillion Rand arms deal despite repeated assurances that it dealt only with the four prime contractors in the weapons programme. A draft report prepared for the Public Protector’s investigation into the arms deal revealed that the State has a foreign loan agreement with Societe Generale (SG), the French banking Group, to facilitate the export to SA of the Munitions Suites being built by Thales/Thompson-CSF of France for installation on three corvettes being built in Germany. Government has paid R746 million for the equipment through its arrangement with SG over the past three years, in terms of the budget reviews prepared by the national treasury. Although *Fishers of corrupt men* (in *ANC Today* vol. 3 (21) 30 May-5 June 2003) says “the Government has no contracts with companies retained by the GFC (German Frigate Consortium building the corvettes) to supply the various component parts of the corvettes,” the draft report prepared for the Public Protector, and the budget reviews, lists not four but five loan agreements by Government. Facilitating export credits for the prime contractors are: 2 agreements with the German Ausfuhrkredit Gesellschaft and Commerzbank for the supply of the corvettes and submarines, one with Barclays Bank for the Hawk and Gripens aircraft and another with Mediocredito Centrale Italy for the helicopters. “A fifth agreement entered into directly by Government is with SG, also for the corvettes, and is clearly designed to cover the Combat Suites on the corvettes,” in terms of the draft in possession of *Business Day*. As *Revealed: state link to Shaik’s arms firm* argue, the loan agreement is of interest to SA public because Thompson-CSF’s (Thales’s) SA subsidiary, African Defence Systems (ADS), has, as a major shareholder, Schabir Shaik, a close confidant of Deputy President Jacob Zuma and brother of Shamin Chippy Shaik, the Head of Procurement, DoD during the arms acquisition process. A member of the GFC and therefore a prime contractor though, “if it remains a subcontractor to GFC, it appears nevertheless to be the only subcontractor whose contribution to the defence packages was directly facilitated by Government,” *Business Day* (5 June 2003) concludes. This jars with, if not directly

to take the risk...The CEO of the local company accepts that his tender “is technology at this (development) stage rather than product” ’ (emphasis added). The rejection of the local data bus - despite its preference by the Navy, its recommendation by the *Report on the Diacerto Bus*, and its recognition by both Thompson and GFC as the “superior product” between the two bidding databuses - is intriguing especially because the accepted foreign Diacerto databus is also fraught with similar, (if not greater), risks.

“It is not clear who all the recipients of the *Report on the Diacerto Bus* were. It is clear, however, that it was not submitted to the PCB or to SCOPA,” was the conclusion of the JIT Report, contrary to the claims of the Corvettes' Combat Suite Project Officer, R Adm JG Kamerman (*confer* JIT 2001 11.6.6.1, 11.6.6.17-19). Contrary to his testimony during the public phase of the Joint Investigating Team's investigation, the Project Officer Project Corvettes told the forensic committee that the *Report on the Diacerto Bus Proposed by the SAN of Project Sitron*, as compiled by Lewis Mathieson, Lt Cmdr Cothill and Cmdr Egan-Fowler, was issued to PCB members (see JIT 2001 11.6.6.1). In the words of the JIT Report, and, as supported by the evidence provided by both members of PCB and compilers of the Report, “it is clear, however, that it was not submitted to the PCB.” The JIT Report is replete with inaccurate and deliberately misleading statements by the Project Officer Project Sitron in which he tried hard, but in futility, to substantiate the incorrect statement of the JIT Report itself that a decision was ever taken relating to the acceptance of the Diacerto databus offered by the Detaxis and the rejection of C2I2's IMS. R Adm JG Kamerman told the public phase of the investigation by the JIT (JIT 2001 11.6.6.2(a)(e)) that the *Report on the Diacerto bus* was an interim preliminary report to another report, a “*perfectly satisfactory technical alternative to IMS bus*” written by Lewis Mathieson of DoD. Mathieson's response to Kamerman's conflicting and misleading claims was that after the technical Report on the Detaxis Combat Suite undertaken by a preliminary technical evaluation team, various additional technical exchanges took place between the project team and ADS, however “*the result of these technical interchanges did not result in any further technical reports being written*” (JIT 2001 11.6.6.3(d)).¹⁹

contradicts, the thrust of the assertion by the highest reaches of Government that Government had no direct contracting link to Thompson (Thales) - an assertion Government makes to distance itself from the fray of accusations of impropriety, irregularity, and corruption in the arms deal which have grown and lingered over the years.

¹⁹ Failing to substantiate JG Kamerman's allegation that the technical evaluation Report, and the only Report, on the Munitions Suite data bus, *Report on the Diacerto Bus*, which proposed retention of the C2I2, was preliminary to another report, a “*perfectly satisfactory technical*

In support of Lewis Mathieson's response *supra* and contrary to his own evidence before the forensic team of the investigation, Project Officer JG Kamerman's explanation for the failure to advise the PCB of the Report (11.6.6.18), viz "It is bizarre to consider that we should or would have taken a preliminary high level, untested, unsubstantiated technical report that was commissioned internally, solely for the further internal considerations, to a higher forum until we were certain of our facts. It is only when we were certain of our facts, several weeks later, in fact a month or so later – two months later, that when we went to the PCB we were able to state, gentlemen, these are real alternatives and these are the risk and cost – this is the risk and cost scenario with the buses." As investigators conclude, R Adm Kamerman's allegation that the *Report on the Diacerto bus* was submitted to the PCB members is *not* borne out by evidence. The failure to submit the Report to the PCB runs counter to and, in fact, directly contradicts, DoD's statement to SCOPA that "...the final selection between the C2I2 option and the proposed alternative Detexis option was ratified by the PCB which was chaired by the Chief of the Navy. Likewise, JG Kamerman's statement that the PCB was advised that Detexis is a Thompson company is not reflected in the PCB minutes and was not mentioned or

alternative to IMS bus," it "appeared" to JIT that "two copies" of the *Report on the Diacerto Bus* were written, in respect of one and the same technical evaluation of the Diacerto data bus recommended by the Joint Project Team and performed by the Navy and Detexis engineers (JIT 2001 11.6.6.5, 11.6.6.9). As appearance subsequently transformed into reality, the claim was made that this purely technical (not financial) evaluation on the Diacerto Bus produced a shorter and longer versions of the same Report, with the difference, most probably, only noticed in their conclusions where the former concludes, "(a) From a technical point of view, the Combat Suite Project Team proposes that the current architecture based on the IMS be retained... (b) Both Thomson and GFC recognize that the IMS is a superior product," while the latter went beyond a technical evaluation report and recommendation, "After the above report had been completed, it was provided to the Project Officer ... under cover of a memorandum. While the report clearly shows a preference for the CCII option, it must be stated that the evaluation undertaken was *purely of a technical* nature and that the technical potential of the CCII is preferred for all of the reasons listed in section 1.5. The Detexis option was selected *purely on financial* constraints placed on the project. The risk, as determined by the main contractor, translated into financial penalties for the CCII option. The databus is a critical sub-system to the overall performance of the Combat Suite of the SAN Patrol Corvette. As such, from a technical point of view, the Main Contractor has to assume the responsibility for ensuring that it works... In short, after delving a bit more into the Detexis bus, the technology is more widely used than that of the CCII option without any degradation in performance..." (JIT 2001 11.6.6.5, 11.6.6.8-9). Could a "purely technical" evaluation process make its final decision on "purely financial constraints?" This increases the suspicion already canvassed *supra*, about the basis of categorizing C2I2 into category B subcontractor or, rather, the moving of C2I2's IMS from "Part C to Part B" of the contract and ADS' statement of high risk and immaturity of the C2I2, as well as the addition of so many millions risk premium to C2I2's IMS's price (JIT 2001 11.5.1.1, 11.6.1.9).

confirmed by any of the witnesses” (JIT 2001 11.6.6.17, 11.6.6.19). These incorrect statements are a small fraction of the avalanche of misinformation with which Project Officer R Adm JG Kamerman and DoD misled Parliament and the SA public. The Auditor-General, co-ordinator of the JIT Report on the arms deal, now admit (*Business Day* 5 June 2003), “SCOPA was misinformed by the Department of Defence (with) identified salient pieces of information.” However, the Joint Investigating Team Report neither made this important finding in its Report on the arms deal, nor made any appropriate recommendation *vis-à-vis* the misconduct and written dishonesty of senior officials of Government who, in deliberately misinforming Parliament, obstructed the ends of democracy and justice.

As far as investigation into the imposition of a risk premium of R40 million and the non-selection of the IMS of C2I2 systems (Pty) Ltd goes, the Joint Investigating Team was clear: “The fact that ADS became part of the GFC, i.e., the main contractor, and was also the Combat Suite contractor and a contractor for the subcontracts, probably created a conflict of interest situation that amounts to non-compliance with good procurement practice. No acceptable explanation for not applying a fairer and more transparent process in the whole process of acquiring the Combat Suite, involving some R2,6 billion, conducted outside ARMSCOR’s and the Navy’s normal tender provisions, was offered” (JIT 2001 11.5.2.10, 11.5.3.15, 11.11.3.5). Details of the probe reveal “no evidence to indicate that a proper risk assessment of the IMS was made. Furthermore, no minutes of the Naval Board meetings, reflecting a decision to opt for the Detexis bus, could be found. It is therefore not clear when and by whom the decision was taken not to award the contract to C2I2” (JIT 2001 11.6.9.8, 11.11.4.14-15). In other words, investigation is *inconclusive* as to whether or not a decision was ever taken, when, where, and by whom, not to award the contract for the supply of the Corvettes Combat Suite data bus to the winning bidder, C2I2.

Post-JIT Report, and in respect of the award of the contract for the System Management System (SMS) of the Munitions Suite for the SA Navy’s Patrol Corvettes to ADS, the Auditor-General was forced to acknowledge to SCOPA, on 20 August 2003, the absurdity that “notwithstanding the fact that a particular company was allowed to tender more than once, C2I2 was the successful bidder at the end of the day.” An MP objected, pointing out to the Auditor-General that “C2I2 had not won the contract.” Both the JIT, and the Auditor-General, whose cardinal role in the co-ordination of draft reports on the arms deal is significantly felt at every page of the “heavily edited,” “doctored,” and

“sanitized,” final JIT Report, are yet to pronounce on the impropriety of the procurement process which awarded the contract for the supply of the SMS to ADS and not to “C2I2, the successful bidder at the end of the day,” in the words of the Auditor-General himself. “A further point regarding the SMS proposal of C2I2,” according the JIT Report, “is that a cheaper option was offered by C2I2...It was apparently not properly considered by the project team. No acceptable explanation in this regard was offered by the various witnesses” (JIT Report 2001 11.8.2.13-14).

The Report on the process followed for the System Management System (SMS) and the Navigation Distribution Sub-System (NDSS) for the Project Sitron indicates irregularities and the possible manipulation of the (sub-systems procurement) process followed in the award of the contracts for the SMS and NDSS of the Corvettes Combat Suite. ADS was the only nominated supplier for both the SMS and NDSS, though C2I2 is a local company, accredited by ARMSCOR as a supplier of software and computer systems for naval, airborne and mobile applications and a recipient of funding from ARMSCOR in terms of its technology retention programme for the IMS, SMS and NDSS (JIT 2001 11.1.3.3). According to the JIT Report, the process of unilateral nomination of only ADS was unfair because it was “clear that C2I2 was a contender who should have qualified during the nomination process for inclusion in the list of nominated suppliers for both the SMS and NDSS” (JIT 2001 11.8.2.9(d)). The process was potentially prejudicial to the State as ADS had to lower its unreasonable original quote of R65 million to R30 million, only after a competitive quote for the SMS has been obtained from C2I2. ADS was, thrice, given the opportunity of lowering the price of its tender for SMS to just that of C2I2 over a period of more than one month, while C2I2 was given just four days, at the most, to submit its tender. This was unfair as C2I2 was only requested to quote to enable ADS bring down its price. The GFC requested C2I2 to submit its quote for the SMS by 15 April 1999, as it had to lodge its tender by 16 April 1999. C2I2 submitted its quote on 14 April. ADS submitted its third quote on 15 April 1999 (JIT 2001 11.8.2.9(d)).

ADS, which was the only nominated supplier for the Navigation Distribution Sub-systems of the Patrol Corvettes' Combat Suite, submitted a quotation of R45,94 million on 15 March 1999, and subsequently, on 7 April 1999, a quotation of R25,03 million. At the intervention of government officials, C2I2 submitted a quote for R15,99 million against ADS's third quote of R18,9 million, and which lower quote may have secured the contract for C2I2. The Joint Project Team instructed the GFC to replace ADS with C2I2 for the supply of the NDSS (JIT 2001 11.5.1.1(l)). No explanation was given for this

instruction of the JPT to GFC. The contract for the supply of the NDSS was awarded to C2I2 though it was not a nominated supplier of the sub-system, thus demonstrating the lack of fairness in the process of nominating a single supplier per system. "Clearly, C2I2 who had been the recipient of R899 916 00 technology funding in respect of the NDSS, should have been listed with ADS as a potential supplier." The Joint Investigating Team makes the amazing admission that this demonstrates the lack of fairness and transparency in the whole process of the acquisition of the Combat Suite, involving some R2,6 billion, conducted outside ARMSCOR's and the Navy's normal tender provisions (JIT Report 2001 11.5.2.7-8, 11.5.2.10, 11.5.3.9-10, 11.5.3.15, 11.8.2.9, 11.8.2.12, 11.11.3.4-5).

In light of the fact that ADS and Detexis were Thomson companies and that ADS was part of GFC, on balance of probability, the specifications and price of C2I2 were certainly disclosed to Detexis. A letter from ADS to R Adm JG Kamerman in which "*Item 20: the Navigation Distribution System (NDSS)*" of the Report summarized the elimination of the C2I2 offer and the consequent inclusion of the ADS Navigation Distribution System in the offer submitted by GFC/ADS, demonstrates the ease with which GFC/ADS got access to C2I2's quotation due to the improper procurement procedures followed during the procurement process. As the JIT Report says, the ease with which ADS had access to C2I2's quotation, as brought to light by evidence, demonstrates the extent of the impropriety of the arms procurement process (see JIT 2001 11.5.2.8, 11.7.2.6, 11.8.2.9-10).

Officials testified that C2I2 was not allowed to resubmit subsequent tenders in order to adjust their quotations as was allowed ADS on the SMS "because C2I2 was not the designated supplier" (JIT 2001 11.8.2.8). Could it be that ADS was awarded the contract solely on the grounds that it was the nominated supplier, notwithstanding evidence before JIT (JIT 2001 11.8.2.13) that C2I2 may have offered a cheaper proposal for the supply of the SMS? If ADS got the SMS contract regardless of its more expensive option, as evidence indicates, what then would have been the rationalization or justification for awarding of the contract - value for money? - given the potential harm to the State (JIT 2001 11.5.2.8) created by the idea of the nomination of a single supplier? The lamentable absence of records and minutes of the meetings of the process where contracts worth more than R2.6 billion were awarded becomes very serious when wide inconsistencies exist between the evidence, statements and testimonies of witnesses (themselves very senior officials of Government Departments entrusted with responsibility for the whole of the procurement process). Their explanations were deemed "inadmissible," and

“unacceptable,” to JIT. However, no single remark was made, throughout the JIT Report, about this conduct on the part of senior officials. No reprimand was forthcoming of their blatant abuse of the Joint Investigating Team. As these officials of the DoD, ARMSCOR, and the SA Navy seem to have achieved their aim in this regard one can imagine how this has damaged public perception of the Offices of the Auditor-General, Public Protector and the National Prosecuting Authority. As *Letter to the Editor* (in *Business Day* 5 June 2003) concludes, “...it appears clear that we cannot rely on...the Auditor-General, the Public Protector or the Directorate of Public Prosecutions to cure the cancer of corruption in our public service.”

Going against the logic of this background and all the details of the investigation, the Auditor-General's co-ordinated final JIT Report, without reference to any evidence or authority, “found,” in respect of the selection of Detexis data bus and rejection of C2I2's IMS, that “...it is clear that such a decision was taken” (JIT 2001 11.11.4.15). But it is not true that there is clarity as to the decision *not* to select the C2I2's IMS for the Combat Suite of the Navy's corvettes: this was recognized by both Thompson and GFC as the “superior product,” it was “proposed” by *the Report on the Diacerto Bus*, and “preferred” by the SA'n Navy. The contention by JIT that this decision was ever taken is very controversial. Further, JIT “found,” very contentiously, that “such a decision was taken and that it was taken, generically speaking, by the *State* (emphasis added). Whether the decision of the State not to bear the risk was reasonable, especially in view of the R22 249 592-42 spent on the development of the IMS, is open to question” (JIT 2001 11.6.9.11, 11.11.4.17). This leaves matters seriously inconclusive: “The calculation of the risk premium cannot be evaluated without evidence from the GFC and the assistance of an expert witness. From a cost and time point of view, it was not considered feasible to pursue this matter” (JIT 2001 11.11.9.2). In view of the briefs given to the Joint Investigating Team, through the Auditor-General's *Special Review of the selection process of the SDP*, and the *Fourteenth Report of SCOPA, 2000*, as well as the acclaimed powers of the Joint Investigating Team itself, the inconclusive nature of what is said concerning the imposition of a risk premium on the IMS of C212 is very glaring in deed.

A cardinal reason for the exclusion of the SIU from SCOPA's envisaged forensic investigation into the SDP process was, according to senior members of Government, “the Public Protector's letter to the Justice Minister dated 22 November 2000 (in which he) advised that the Auditor-General, the Public Protector and the National Directorate: Serious Economic Offences could adequately deal with the present allegations and

issues.” Now, it cannot be disputed that the highest investigative agencies of State have all the powers required to see through a “fully fledged” and “thorough” probe into the serious allegations concerning the arms deal, and for which JIT was instituted. This probe concerned, *inter alia* the IMS of the Corvettes, which, in the letters of a Paper of Parliament, “is the basis for comparisons of the respective products and the basis upon which the risk for the South African product was loaded.” This as has been explained, priced the data bus of C2I2 out of reckoning, despite the nomination of C2I2 for the supply of this element and the huge amounts (more than R23 million) the State had spent on its nurture and development. While Government must be respected when they, repeatedly, and, on different occasions, assert that JIT commanded all the powers and expertise required to conduct a “full-fledged,” “thorough,” “forensic,” onshore and offshore, investigation, it is nevertheless necessary to underline the deceit in the lame claim concerning the “inconclusiveness” of the basis used to compare the C2I2 IMS and other competing products, which resulted in the elimination of the SA product in favour of a foreign one. Is this all the most powerful investigating team ever set up in the country can say about a process so mired in serious allegations of improprieties and dishonesty, which it was in fact set up to probe, and make findings and recommendations where appropriate? Was JIT *de nouveau* confused about its essence, aims and objectives? Given its publicly acclaimed combination of powers, expertise and wisdom, could JIT be excused on grounds of incapacity to conduct a “full-fledged” investigation, shortly after it made its pledge and promise to Parliament and the SA public? Where the weapons procurement “package was government-to-government, with tenders provided by the respective embassies,” as DoD told SCOPA (see Committee Minutes, SCOPA, 11 October 2000; and SCOPA’s 14th Report of year 2000 to Parliament), does the SA State lack the authority respectfully to ask GFC *via* their government to kindly comply with the request of the highest and most powerful investigation in the land since 1994, inaugurated “to prove or disprove once and for all the allegations which cause damage to perceptions of the government?”

The weak and unconvincing argument of JIT that “cost and time” made it “not feasible to pursue” the investigation of “the basis for comparisons of the respective products and the basis upon which the risk for the South African product was loaded,” is neither here nor there. It is beside the point, as JIT was, in this respect, in dereliction of its duty and responsibility, as explicitly set out and defined in the separate briefs and mandates to it by the Auditor-General and Parliament (see *Auditor-General: Special Review of the Selection Process* [RP161-2000]; and *SCOPA: Fourteenth Report, 2000*). The Auditor-

General, Parliament and the public alike made clear their concern with this issue and wanted “to prove or disprove once and for all the allegations which cause damage to perceptions of the government.” However, this turned out to be amongst those issues of concern JIT “found” insufficient time and resources to pursue. Nonetheless, Government seems to prefer matters as they are, i.e., as they have been inconclusively left by JIT, given its unconditional and unreserved acceptance of the JIT Report on the SDP (GCIS *Statement of the SA Government on the Joint Investigation Report on the SDP* 15 November 2001).

Government's and the Department of Defence's denials of involvement in the selection of *subcontractors* during the SDP process having been refuted, JIT (JIT Report 14.14.1.1) adopted a very narrow definition of Government to absolve it of all the misconduct and unlawful acts littered throughout the JIT Report. JIT's exoneration of Government is much too hasty, if not reckless. In terms of the work JIT was contracted to do, the JIT Report is, by its own admission, an incomplete Report. All allegations of substance, most of which were of criminal nature, referring to issues such as corruption and conflicts of interest, as graphically summarized and set out in the table in item 1.3.1.2, among others, are currently being pursued (*confer* JIT 2001 1.3.1, 1.3.1.2 and Chapter 11, 290). Put in the JIT Report's own language: “Due to the nature of an investigation of this kind, and also in order to avoid disclosure of information in contravention of section 41(6) of the National Prosecuting Authority Act, it has been decided not to make public the details of the matters under investigation. By the time this report is tabled, numerous events flowing from the investigation would have materialized, which should provide an indication as to its contents” (JIT 2001 1.3.2.4). *The missing pieces from the final arms deal report* highlights an allegation of extreme public concern presently being investigated by the Director, Serious Economic Offences arm of JIT, viz ‘the farewell “gifts” of R7 000 and approximately R4 000 from ADS and other subcontractors given to the Project Officer and the Project Engineer respectively, at a farewell function on 10 December 1999.’ *Say it ain't so Joe* (in *Mail & Guardian* 8 April 2001) as well as *Arms deal now it's R50bn* (in *Mail & Guardian* 12 April 2001) record other allegations at the heart of the investigation of the Scorpions, viz Minister Joe Modise held interests in Futuristic Business Solutions, “a supplier for R35 million in contracts for the helicopter package,” which merged with Conlog/Logtek, and that Joe Modise paid for shares in Conlog with a bribe received from a successful prime contractor in the arms procurement process (*confer* Committee Minutes, SCOPA, 11 October 2000, JIT 2001 1.3.1(d), 1.3.1.2, 10.4.5.8). *From arms broker to arms boss* (*Mail*

& *Guardian* (1 February 2002) insists Jayendra Naidoo, Government's Chief Negotiator in the multibillion Rand arms deal, "had a close association with, and acquired a stake in, electronics giant Tellumat, which scored subcontracts worth hundreds of millions in the arms deal."

Indeed, since the tabling of the JIT Report to Parliament, on 14 November 2001, the "numerous events" referred to in the Report have *not* emerged from the investigation, nor materialized sufficiently to provide the patiently awaited indication as to its contents. All we have seen is the scapegoating of "small fry" in the larger scheme of things: the arrest, trial and conviction of ANC Chief Whip Tony Yengeni, the suspension and conviction of misconduct by DoD and subsequent resignation of Chief of Acquisitions of DoD, brother of Durban businessman Schabir Shaik, a trusted comrade of Deputy President Jacob Zuma, currently being tried on two counts of corruption: the first relating to a series of payments made for the alleged benefit of Jacob Zuma between 1996 and 2002, totalling R1,25-million; the second relating to the alleged solicitation of a R500 000 a year bribe for Jacob Zuma from French defence company Thales/Thompson Group. Schabir Shaik faces a third charge, of fraud, relating to the writing off of payments made by his Nkobi Group – some allegedly for the benefit of Zuma and some for the benefit of Shaik himself, according to *Zuma was bribed* (in *Mail & Guardian* 1 October 2004, 4).

The State alleges that payments to Jacob Zuma by the Nkobi Group were bribes, that the alleged agreement in respect of annual payments to Zuma by Thales/Thompson Group was a bribe agreement and that "Zuma was a party to the bribe agreement." The state maintains that Deputy President Jacob Zuma attended a meeting with Schabir Shaik and Alain Thetard, the SA representative and director of Thales/Thompson in March 2000 at which Zuma indicated his approval of the Thales payment (and after which meeting Thetard on 17 March 2000 consequently drafted an encrypted letter/note faxed to Thales/Thompson Group Head Office in Paris France). The State has relied, for evidence of the meeting, on a contemporary handwritten note by Alain Thetard and which note Alain Thetard has had to admit, in his two affidavits of April 2004 and Thales/Thompson public statement in August 2004, that he authored. In it, Thetard refers to a meeting with "JZ" and "SS" at which Jacob Zuma gave a coded endorsement of the request for an "effort" to be made by Thales. Alain Thetard recorded that the objective of this "effort" was the protection of Thales/Thompson Group in the context of investigations into the arms deal and "the permanent support of JZ in future projects." Thetard noted an amount attached to this effort: "500K ZAR per year." The State claims the note was indeed

transmitted to Thales Headquarters in encrypted form; that an arrangement was indeed made to pay Zuma; and that R500 000 was indeed paid for his benefit, disguised as a donation to the Development Africa Trust, run by millionaire Durban businessman Vivian Reddy. In relation to the many payments, detailed in a schedule of 238 separate accounts, made directly and indirectly to Jacob Zuma by the Nkobi Group, the State alleges that Zuma acted together with Shaik and others "in the furtherance of a common purpose... to secure and cement the political connections that the accused (Shaik and his companies) thought necessary for achieving success in conducting business... The payments were made and received in order for the accused ...to benefit from Zuma's power relating to the public offices he held. Zuma was effectively placed on a retainer" by Schabir Shaik and received payments from time to time, *Zuma was bribed* alleges.

Besides the allegation of a *general* agreement for Zuma to support Shaik's businesses and to allow Shaik to trade on his name, the State cites several cases that allegedly demonstrate a corrupt relationship, *inter alia* a) the arms deal: Zuma's alleged intercession with Thales *vis-à-vis* the initial exclusion of Nkobi from their South African subsidiary, African Defence Systems (ADS), the company that was to have a R450-million direct stake in the arms deal, resulted in Nkobi being granted a 20% effective interest in ADS; b) Protection against investigations: Zuma inappropriately wrote a stinging and scathing letter on 19 January 2001 to the Chairperson of SCOPA in which he attacked the Committee's intended investigation of the arms deal and conveyed the view that the Special Investigating Unit, which had certain special powers over and above those of the Joint Investigation Team that eventually looked into the arms deal, be excluded from the probe; c) Letters from Shabir Shaik indicating that Jacob Zuma, at Shaik's behest, arranged a meeting between then Safety and Security Minister Steve Tshwete, Schabir Shaik and British businessman Grant Scriven to enable Scriven and Shaik to present a proposal for the privatization of the police motor vehicle fleet; d) The Durban Point Waterfront Development: according to Sam Sole, when Shaik's company lost out in contention for this project to another empowerment group, Zuma attended a meeting with the developers, Renong, and allegedly urged that Shaik be involved in the project; e) Prospective Eco-Tourism School in KwaZulu Natal: Zuma signed a letter, allegedly written by Shaik, urging Professor John Lennon, an expert in tourism from Glasgow Caledonian University in Scotland, and part of a British government delegation sourcing for the development of skills to enhance tourism, to include Nkobi as a joint venture partner in a planned tourism training school in SA. Lennon could not reply to this letter given the peculiarity of it having to be sent to him from Shaik's Nkobi Holdings'

fax machine, rather than Zuma's Office, the oddity of Zuma's suggestion of one company in particular, and the lack of confidence created by a letter written on behalf of a minister by Nkobi Holdings. The project did not see the light of the day. As Lennon puts it, "I did not reply to their letter. I wanted nothing to do with them. Despite our efforts, we could go nowhere with a project that would have been worthwhile. We had to move on. It was very disappointing" f) The Witnesses: the state assembled a massive list of 105 witnesses to pull the threads of the prosecution case together.²⁰

Some idea of the scale of the Scorpions' investigation into Schabir Shaik and Deputy President Jacob Zuma, according to *Secret report nails Zuma*, is provided by a 250-page "top-secret" forensic report drawn up by the international auditors, KPMG, contracted by the Scorpions to analyze Nkobi's accounts as well as a list of 20 members of the Directorate of Special Operations as witnesses. Of the witnesses, the most crucial included the Nkobi Group and Alain Thetard, in providing context and interpretation for the documentary evidence, much of which consists of financial records and correspondence seized during raids on Nkobi and Thales/Thompson in 2001, as well as computer data and information retrieved from seized hard-drives and diskettes by computer forensic retrieval experts. Among other witnesses, Celia Bester, former employee and financial manager of the Nkobi Group, contends that payments made to Deputy President Jacob Zuma by Durban businessman Schabir Shaik were bribery and that fabrications in the financial statements of the Group of Companies were used to hide this. The State alleges that Schabir Shaik funded Zuma in return for favours in the multibillion Rand arms deal, and committed fraud when the payments were written off as development costs for Prodiba, a company in which Nkobi Holdings had a significant stake. Prodiba's only costs were to pay staff, and, Celia Bester insists, there were no set-up fees or prototypes. The nature of Nkobi's investment in Prodiba meant that there were no development costs whatsoever, she concluded (in *Shaik cooked books to hide Zuma bribes* (*Business Day* 17 November 2004)).

Documentation setting out the details of the case against Schabir Shaik, *Zuma was bribed* says, makes it clear that the State persists with the allegation that Deputy President Jacob Zuma was a conscious party to the corruption for which Shaik is charged. While it was

²⁰ Cf. *Zuma: Damaging new evidence*, and *Shaik trial: What the court saw this week*, in *Mail & Guardian* 4 February 2005; *Secret report nails Zuma*, and *How the plot thickened*, as well as *Shaik trial puts South Africa itself in the dock* in *Sunday Times* 3 October 2004; *Zuma touted for Shaik* and *Dear Professor Lennon...* in *The Star* 26 November 2004.

Schabir Shaik who was on trial, Zuma's name appears on "almost every second page of Schabir Shaik's 45-page charge sheet and forms part of a paper trail of evidence consisting of thousands of pages of documents and annexures." Bound together by deeply personal ties of family and political struggle, Schabir Shaik and Jacob Zuma are two trusted comrades and close confidants, or, rather "associates," and, lately, Shaik allegedly became Zuma's financial adviser. This appointment was not made however in terms of any regulations relating to such appointments and Shaik received no remuneration for apparently performing such an office, and has variously used the terms "special economic adviser," "financial adviser," "personal adviser," and "special adviser," to denote the office he performs for Deputy President Jacob Zuma (see *The Star*, 26 August 2003, & 7 October 2004, 13; *The Sunday Times* 3 October 2004, 21; *The Sunday Independent* 10 October 2004, 5; *Mail & Guardian* 4 February 2005, 2; *The State v Schabir Shaik & 11 Others*, 2005, 2, 19, 27, 29).²¹

The explanation by the Joint Investigating Team of the seemingly indefinite probe into allegations of wrongdoings on the part of Government during the SDP process, as *Business Day* (5 June 2003) would say, "does not hold water." Allegations of a criminal nature, which were brought to finality as per the draft documentation to the final Report, were strangely omitted in the final JIT Report published in November 2001 and, thus, hidden from the SA public taxpayers, the ultimate financier of the strategic defence acquisition packages. Despite the fact that the entire Chapter eleven of the JIT Report on the arms deal was devoted to determining the regularity or not of the "mysterious overruling" of SA C2I2's IMS in favour of French Thompson-CSF Detexis Diacerto databus, the matter was left inconclusive in the final Report on grounds of the unavailability of "expert evidence, time pressure and cost constraints." In any event, in

²¹ Schabir Shaik was convicted, as charged, on all three counts (two, of corruption, and one, of fraud), and sentenced accordingly, in *The State versus Schabir Shaik & 11 others* CC27/04 (31 May 2005). This, together with issue of the "generally corrupt relationship" between the Deputy President and the accused having been emphasised in the *Judgment* by Justice HJ Squires raises questions of conduct that would be inconsistent with the constitutional expectations that attend those who hold public office, the President of the Republic, as it is his duty to regulate the nation's affairs in a manner that promotes the realization of the ideals of the Constitution, "came to the conclusion that the circumstances dictate that in the interest of the Honourable Deputy President, the Government, our young democratic system, and our country, it would be best to release the Hon Jacob Zuma from his responsibilities as Deputy President of the Republic and Member of the Cabinet" (see *Full text of President Thabo Mbeki's speech*, in *Business Day* 14 June 2005; *The State versus Schabir Shaik & 11 others*, CC27/04, 2005). Axed from the Cabinet and Government, the former Deputy President was subsequently charged with two counts of corruption by the NPA in the Durban Magistrate's Court (see *Business Day* 21 & 30 June 2005).

terms of the latest batch of the draft documents of the final JIT Report, which the Auditor-General was forced to make the public's view in December 2004, finality may have been brought to the matter of the imposition of a risk premium of R42 million on the value of C2I2's IMS. The draft version of the Report suggests that a group of ministers was informed that C2I2's databus was "high risk" (*Business Day* 7 January 2005). This information was immediately followed by paragraphs 12.8.9.6-7 in the draft report, viz "This statement is contrary to the evidence of all Naval and ARMSCOR personnel who testified, and to all documents made available to us. It is not clear who did the assessment of the IMS and who informed the DoD; it should be noted that this meeting took place well before the PCB meeting of 24 August 1999." Although the final JIT Report discussed the issue of risk, it simply omitted this statement, which "suggests that a Cabinet Committee might have been misled," and that something went very wrong in the procurement process (*Business Day* 7 January 2005, *The Star* 27 January 2005).

Having established the degree of impropriety that was permitted in the process of the awarding of the contract for the supply of the Corvettes' Combat Suite data bus to ADS, JIT then say the decision was taken by the State, less the State Government. Again, JIT worked hard, in futility though, to hide the questionable integrity of the controversial armaments procurement process, this time under the cloak of "the State" and the mistaken assumption that "Government" has no jurisdiction. Just as we have, with respect to ministerial responsibility and accountability, demonstrated the logical absurdity of JIT's attempt to restrictively define Government as distinct from the Departments of Government, we point here to the futility of JIT's attempt to hermetically insulate, and thereby protect, Government from the decisions that are supposedly the business of the State. But the State does not run her affairs herself, but under the management of Government. Where the State is involved in an irregularity or wrongful act, it could only have acted through the Government. In fact, in respect of the Government's multibillion expenditure on weapons purchases, the State was implicated in all the wrongs committed precisely through the irregular and improper doings of *Government*, i.e., Cabinet, the Ministers' Committee, her accounting officer – a conclusion apparently in collision with the "Key Findings and Recommendations" of the JIT Report (14.1.1).

Government which had, before the commencement of investigations, expressed their complete confidence in the ability and powers of JIT to satisfy Parliament and public concern in respect of the many allegations on the arms procurement process, could not but, after November 2001, confirm its support for a manifestly deficient and utterly

superficial Report, warts and all. In acceptance of the JIT Report, the ANC-in-Government avers:

The SA Government welcomes the *completion* of the joint investigation by the Auditor-General, the Public Protector and the National Director of Public Prosecutions into the SDP process.²² The Report clarifies issues that have been the subject of public discourse; and we hope that it will lay to rest speculation on these matters. Government wishes to reiterate its confidence in the institutions that were delegated to undertake the investigation. We have noted that they undertook their work without fear, favour or prejudice, and in a manner that instils confidence in our democracy...From the outset, we wish to assert that government accepts the findings of the investigators without reservation...For anyone to question the integrity of the report simply because they do not like the findings of a thorough public and forensic audit conducted by the Auditor-General, the Public Protector and the National Director of Public Prosecutions, would smack of opportunism of the worst order (*GCIS Statement of the SA Government on the Joint Investigation Report on the SDP...*, emphasis added).

The JIT Report does not, however, really clarify several serious issues of public contention, and it is wishful thinking to believe that it will put to rest speculation on these matters. JIT itself acknowledges that it could not pursue these matters “from a cost and time point of view.” Where “allegations which cause damage to perceptions of the government” are yet, as the JIT Report clearly informed us (see JIT 2001 11.11.9.2), to be proved or disproved, or, rather, where JIT have not found the time and resources properly to investigate the major issues which it was commissioned to probe, it smacks of subterfuge by Government to represent the JIT Report as having clarified such issues, which have continued to dominate public discourse. And how can it be opportunistic to question the integrity of a report, which together with its “findings,” completely failed Parliament and its people?

²² Whereas Government has declared investigation into the SDP programme by JIT “completed,” the probe into allegations of criminal conducts continues. However, in light of the seeming indefiniteness of this investigation by the DSO arm of JIT, can we be content that the Executive has declared investigation closed on behalf of the JIT? When the JIT stepped into the hurly-burly of contested politics by making controversial political statements at the release of their Report, typical of which is the exoneration of Government of all blame in respect of the arms procurement process, does this mean that Government and watchdog institutions are now partners? Commenting (as he shouldn't) on the resignation of IFP's G Woods from SCOPA, SA Fakie said he was “very disappointed” with the manner in which it had been done. *Sunday Times* (3 March 2002) reminds him though that he is not called upon to make political pronouncements, as the Auditor-General is merely an appointed official.

For its part, the ANC majority-in-Parliament, against the will of all minority parties in Parliament, went on to ram its proposal for SCOPA's Third Report on the SDP through the Committee. In words that capture the spirit and essence of the Government's own unflinching confidence in the JIT, the official Report of SCOPA states:

The Committee expresses its appreciation to JIT for the painstakingly, diligent and thorough manner in which it conducted its investigations. It further wishes to thank the JIT for the open and cordial manner in which it interacted with this and other committees of Parliament. It affirms its confidence in the capacity, integrity and independence of the three agencies involved in the investigation. The Committee believes that the manner in which JIT has conducted itself has contributed to further strengthening accountability, transparency and respect for the Constitution and the institutions it creates to support democracy (Committee Minutes, SCOPA, *Appendix 3*, dated 11 December 2001).

Thus the JIT Report on the SDP process is, according to SCOPA, worthy of "confidence" and "acceptance;" it is "diligently thorough," "strengthens accountability, transparency and respect for the Constitution and the institutions it creates to support democracy." But in reality as has been abundantly shown *supra* the JIT Report is full of statements which just rationalize away serious issues of accountability and proper financial management. Some matters, as we have seen, were simply "not feasible to pursue," tender and procurement practices were whitewashed by claiming they "compared favourably with the rest of the world." Dubious decisions were justified by the remarkable claim that in such matters "Cabinet was entitled to select the preferred bidder," as what is involved is a "political choice." Remarkably, such claims totally undermine the *raison d'être* of the Committee itself. It became a constant refrain of the Ministers of Government during the protestations and heated debates around the defense equipment purchases and its aftermath that "SA is the richer" for these debates, and that Parliament will emerge from them "a better community" (*The Star* 28 August 2003). If this is so it will not, however, be something for which the Government, Parliament and SCOPA will be able to claim any credit whatsoever.

Just like the JIT and the Government, the over politicised and "executive-minded" SCOPA of the arms procurement era was trapped in a fantasy in which the imperatives of democracy are dissolved into those of Executive power, when it accepted the JIT Report

on the arms procurement packages.²³ SCOPA of the first five-year Parliament was the embodiment of meaningful oversight of the Executive. Its conduct in the *Sarafina 2* issue, the Independent Broadcasting Authority credit card debacle and several other important matters clearly attests to this. The SCOPA that emerged during the arms acquisition investigation was the very opposite - from being a "Rottweiler-like-watchdog" it became nothing more than a "poodle-like-lapdog," obsequious and subservient to its (party) master. The special interest of the Executive and the leadership of Parliament in the manner in which the probe into Government's controversial expenditure was to be handled brought a previously fearless SCOPA to a juddering halt. The expenditure on the weapons equipment purchases and the questions it raised not only about the procedural aspects of the procurement but, importantly, the advisability of certain decisions taken by senior members of the Executive, became too sensitive for the ANC leadership, hence it focused on SCOPA and through a series of interventions by the Executive, the leadership of Parliament and ANC Whips, it succeeded in neutering the Committee.

The Committee lost its non-partisanship and jettisoned its consensus seeking decision-making procedure, making itself incapable of performing any vigorous oversight function. Its ANC majority component, as instructed by their political masters (the Executive and ANC leadership), adopted majority voting as a decision procedure in SCOPA, whose concern, unlike other parliamentary committees, is solely financial management, as it does not discuss matters of policy. The way was prepared for this adoption of the majoritarian decision procedure in SCOPA by the series of interventions discussed *supra* including the instructions of the Speaker of Parliament, viz "in a democracy, the majority's decision must prevail" (*Mail & Guardian* 8 June 2001); and the warning of the Chief Whip of the ANC, "I know no Committee in respect of the ANC, which is above party political discipline. Some people have the notion that Public Accounts Committee members should act in a non-partisan way. But in our system, no ANC member has a free vote" (see *Business Day* 7 February 2001; *Mail & Guardian* 9 February 2001; *The Sunday Independent* 3 February 2001; www.iol.co.za 4 February 2001). The ANC members of SCOPA quickly succumbed and Room E249 2nd Floor of the Assembly Wing soon reverberated to the strains of this newly found majoritarianism.

²³ See Committee Minutes, SCOPA, 28 February 2001, 14 March 2001, 16 May 2001, 29 May 2001, 11 December 2001; *Business Day* 7 February 2001, 27 May 2001, 9 December 2001, 11 December 2001; the Independent Group Newspapers, 3 February 2001, 6 February 2001, 9 December 2001, 11 December 2001, 25 February 2002; *Mail & Guardian* 9 February 2001, 8 June 2001, 1 March 2002.

DM Gumede began: "I move the normal parliamentary procedure that the position of the majority is recorded. I propose we vote, as the normal procedure in the South African Parliament" (Committee Minutes, SCOPA, 28 February 2001, 2). And Geoff Doidge, "This is a democracy and the majority must rule" (*Sunday Times* 27 May 2001, 2). With VG Smith concluding, "Let's tell the House that we are divided. Let's take the flak if there is flak to be taken. The sooner we get the arms deal behind us without necessarily cutting corners, the better for SCOPA...if necessary by vote...I don't think our democracy insists that we need consensus. It says that majority rules. We want the vote to be recorded on the basis of the majority vote, and we reject the minority view" (see Committee Minutes, SCOPA, 14 February 2001, 4; and 28 February 2001, 1-2 & 3).

The disquiet voiced by the public and the minority parties, through all the mediums at their disposal, against the adoption of majoritarianism *vis-à-vis* financial management issues, did not prevent the majority party from bulldozing and steamrolling its wish through SCOPA. Thus, for the first time in its democratic history, the Committee decided a matter of proper financial management and the accountability of the Executive to Parliament through partisan voting, with its ANC majority toeing the party line. Thereafter, SCOPA was characterized by stagnant consensus, at best, or stark majoritarianism, at worst. The Committee's 3rd Report on the defence equipment purchases was indeed the ANC proposal, which to the distaste and pain of the public and all minority parties of Parliament, became SCOPA's final Report on the matter. As the Committee's minutes of 11 December 2001 records, "No consensus could be reached and the ANC tabled their report and voted for its adoption. The DP, UDM and the NNP did not vote. The IFP noted its objection. The ANC report was passed as the Committee Report" (Committee Minutes, SCOPA, 11 December 2001). The discordant relations within SCOPA, resulting from the conflict between minority parties' members' efforts for the continuation of the Committee's traditional cross-party, consensual and deliberative decision-making, and the ANC-majority members' sudden determination for majoritarianism, damaged the Committee's productivity, including its work on issues unrelated to the SDP. By 14 February 2001, barely three months after the adoption of the 14th Report and the controversy in its aftermath, SCOPA had agreed not to process between 17 and twenty reports outstanding since 2000 from the Auditor-General (see Committee Minutes, SCOPA, 24 January and 14 February 2001).

The majoritarian noise of the majority party and its impact on the productivity of the committee system did not end in SCOPA. It rubbed-off onto the decision rules and

workings of other committees, where the cross party work and the ANC's very judicious use of its majority characteristic of the committee system of the first 5 years of Parliament, was abandoned for simple majoritarianism. It echoed in other committees of Parliament, *inter alia* the Ethics and Members' Interests Committee, which claimed: "We are divided and will remain divided. Let's vote and go home" (*Mail & Guardian* 11 May 2001). Thus, for the first time in seven years, the Committee voted along party lines to end deliberations on an issue of the accountability and transparency of the leadership of the ANC to Parliament. The Safety and Security Committee was not left out in this ANC conception of democracy as simple majority decision-making (see *Mail & Guardian* 8 June 2001). What transpired when SCOPA and the other committees of Parliament forcefully adopted the majoritarian principle as a decision procedure was simply that the will of the ANC-in-Government and the party leadership was serviced, leaving parliamentary accountability, oversight procedures and SA democracy itself on the edge of a precipice.

The point of examining the JIT Report in such detail and in quoting from it so extensively is firstly to show that the contents of the Report themselves show beyond reasonable doubt that the investigation into the arms deal was, at best, seriously incomplete. This is what, in the first phase, undermines the conclusion of the Report to the effect that Government's position *vis-à-vis* the Arms Deal was proper and unassailable. The release of draft versions of the Report contribute further to this glaring contradiction between the content and the conclusion drawn from it emphatically exonerating the Government from any charge of misconduct in the spending of public money.

What the content of the findings shows is that the tender processes for the main suppliers were fraught with serious irregularities; the same holds for the subcontracting tenders. There is also substantial evidence of conflicts of interests, which probably biased the awarding of contracts. The evidence, from the content of the final JIT Report and the draft reports, is overwhelming – the investigation by JIT into the Arms Deal at the very least established the need for more investigation into the issues referred to above. In endorsing the final Report's Conclusion exonerating the Government from all misconduct SCOPA was therefore not fulfilling its proper democratic role, *viz* to make available to the South African Parliament and People the knowledge and information concerning what the Executive is doing in its name without which it cannot assess whether or not the Executive is executing its (the People's) will; SCOPA abdicated its democratic responsibility when it did this. Deliberation by the people over the way its will is being

interpreted and implemented is a *sine qua non* condition of democratic will formation and SCOPA failed to perform its proper role as a parliamentary committee in making possible such deliberation when it endorsed the final JIT Report. Majority support in the Committee is not enough to legitimise the activities of the Committee. The evidence is overwhelming that the investigation and the Report were inadequate; to the point where there can't be reasonable disagreement over this. As in the introductory Ch 1 and concluding Ch 8, reasonable disagreement and its resolution *via* the majoritarian decision rule, is only possible when a report – reflecting the investigative work of a committee – passes some minimal standard of adequacy. The contents of the final JIT Report show very clearly that the investigation was not sufficiently thorough for it to be possible to say that the Committee had discharged its democratic function – and this, it is argued, is plainly obvious to any reasonable individual. This is why public comment around SCOPA's performance *vis-à-vis* the Arms Deal is replete with terms such as “collapse.” This “collapse,” as has also been shown, was prepared by a series of interventions by the majority party into the composition and mode of functioning (matters should be settled by majority voting without concern for deliberative procedures) of SCOPA itself, which culminated in SCOPA's endorsement of the final JIT Report.

As our survey of the British and American committee systems has shown, the South African committee system is not the only one that has to confront the pressures of party power, including a party with majority support. Political systems, as we have seen, arrive at some compromise between the exigencies of deliberation, which entail a full and fair consideration of all the relevant facts and arguments, and those of the immediate maintenance of power. Modern democratic systems, insofar as they are party based, will always, then, be vulnerable to the influence of majoritarian power. All that can be done to counter this is to strive 1) to protect the institutions of power and “oversight” from the impulsive, immediate will of the majority party and the associated “domesticated” perception of the activities of Government and 2) to defend the institutional practices and sites necessary if the People is to be able to gain access to the political knowledge and information it requires in order freely to form its will, such as a strong and autonomous PAC.