An analysis of the Seriti Commission of Inquiry and its shortcomings

by

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ABSTRACT

It has been said that Commissions of inquiry are governmental tools that assist the state in adjudicating disputes; however, is that really the true state of affairs? With their increasing popularity over the years, one would assume it is a mechanism that is without flaws; however, that could not be further away from the truth. Although they may be of benefit to the state, they do have one fatal flaw, they are utilized by Man.

This paper focuses on the shortcomings of the Seriti Commission of inquiry and ultimately its failure to fulfill its mandate, to find the truth. It is widely accepted that commissions of inquiry are established with a truth finding mandate however in the Seriti Commission, it appears as if it was established to do the opposite which not only undermined its primary purpose, but also the Constitution and the people of South Africa.

It explores how commissions are established and the legislation that governs them. This paper offers a critical analysis of the manner in which the Seriti Commission was conducted. It further explores the inextricable link between the law and morality, interrogating if one can exist without the other. It concludes with recommendations that are specifically aimed at ensuring commissions are not abused and used for nefarious purposes, purposes that do not benefit the people of South Africa.

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Chapter 1

"*It is not always clear why a government sets up an inquiry at all or why it chooses one kind rather than another*" (Drewry, 1975: 53)

1.1 Introduction

In recent years, commissions of inquiry have become a popular tool used by the state. As Michael Bishop pointed out, in the year 2014, there were approximately six commissions of inquiry running concurrently in the Republic of South Africa.[1] According to Bishop, the Commissions that were running at that time cost the fiscus an estimated R300 million which at the time was equivalent to 3100 RDP houses.[2] This fact is quite astounding in its own right as it is no secret that South Africa is riddled with corruption scandals, one would assume that commissions would be "*opening Pandora's box".*

Commissions of inquiry are one of the many bodies the government utilises to inquire into numerous issues. Commissions of inquiry not only give advice and report findings but they ultimately make recommendations.[3] Although their findings have no legal binding effect, they can be highly influential.[4] Sulitzeanu-Kenan defines commissions of inquiry as "*A special institution (i.e., established for a particular task, and once concluded, it is dissolved); formally external to the executive; established by the government or a minister; as a result of the appointer's discretion (i.e., not mandated by any formal rule); for the main task of investigation, of past event(s*)".[5]

There tends to be a lot of confusion surrounding courts and commissions of inquiry. Most people are of the opinion that they are one and the same thing irrespective of the fact that that is not the case. After the hearing of evidence in matters, courts will make a judgement that is "*binding and has a direct effect on the parties who are*

[1] Unpublished: JK Lawrence *Judicial Commissions of inquiry in South Africa: An Examination of their Purposes, processed & shortcomings* 7.
[2] Lawrence JK (note 1 above) 7.
[3] Simpson A 'Commissions of inquiry – Functions, powers and legal status' 22.
[4] Simpson A (note 3 above) 22.
[5] R Sulitzeanu-Kenan Reflections in the Shadow of Blame: *When do Politicians Appoint Commissions of Inquiry*? 5.

involved."[6] If one is somewhat displeased with the court's ruling, one may get the judgement overturned by way of appeal or review by a higher court.[7] Commissions on the other hand, make non-binding recommendations to the individual who establishes them. A noteworthy aspect in this regard is that the Commissions Act "*accords to the commissions to which it applies virtually the same powers as a court of law in relation to witnesses and protects it against interference and obstruction*".[8] In this regard, commissions of inquiry can be seen as instruments that "*speed up the dispensation of justice*". Granted, the government then acts in accordance with said recommendations and publishes the findings.[9]

AJ Middleton sets out the benefits of commissions of inquiry as being the following:

"(i) It is an important tool of government.

(ii) it provides the means of arriving at a balance between public and private good.

(iii) it assists the government to formulate policy.

(iv) it enables an examination of conflicting expert opinion.

(v) it tests the strength of opposition to a project.

(vi) by giving more individuals and groups an opportunity to express their views, public inquiries provide public authorities with a more precise appreciation of the public's requirements and expectations; and

(vii) from the citizen's point of view, commissions of inquiry provide an opportunity to participate in the process of decision-making which affects their lives."[10]

Middleton's view may be construed as optimistic whereas in reality a commission of inquiry can also be seen in a cynical light. It may be seen as cynical that commissions are often used by politicians as an "*Aunt Sally intervention intended by politicians to give a sense of not only doing something about a problem that refuses to go away*

[6] 'South Africa's commissions of Inquiry: what good can they do?' Polity 9 November 2018.
[7] Polity (n 6 above).
[8] AJ Middleton *Notes on the nature and conduct of commissions of inquiry: South Africa* 253; The Commissions Act 8 of 1947 (hereafter "*The Commissions Act*").
[9] What Is the Purpose of a Commission of Inquiry? - (gambianewstoday.com) (accessed on 18/04/2022)
[10] AJ Middleton (n 8 above) 255.

without any intentions of actually resolving it".[11] The reality of it all is that the cynical view, every so often, is not without substance.[12] Taking the aforementioned into account, one can pose the question as to why exactly are commissions becoming so prevalent these days? Do commissions of inquiry alleviate pressure and the workload from the courts as matters of high public importance are investigated in plain sight? Are commissions of inquiry utilised as mechanisms to whitewash the acts of the government?

It is apparent that the Arm's deal was in fact one of the most controversial scandals to hit the Republic. This paper intends unpacking what transpired leading up to formation of the Seriti Commission as well as the findings and implications of the commission in five chapters. Chapter two of the dissertation examines legislation that not only includes the Constitution but also the Commissions Act in order to clarify when commissions of inquiry are established.

Chapter three is divided into two sub-chapters: the first being an overview of the Seriti Commission of inquiry which will then be followed by a discussion of the judgement in *Corruption Watch And Another v Arms Procurement Commission And Others*. Chapter 4 will not only explore the link between the law and morality as norms that regulate human conduct but critically analyse the impact they have on each other. Chapter 5 in this regard will consist of recommendations and concluding remarks.

[11] V Ngalwana *Commissions of inquiry: A positive or negative intervention* 1.
[12] V Ngalwana (n 11 above) 1.

Chapter 2

Legislation governing the formation of commissions of inquiry.

2.1 Commissions of inquiry are established either by the president of the state or premier of a province who in turn appoints a judicial officer (either retired or sitting) to oversee a process of investigation into matters of vital public importance.[13]

Section 84(2)(f) of the Constitution of the Republic of South Africa (hereafter "*The Constitution*") provides that "*the president is responsible for appointing commissions of inquiry"*.[14] At this juncture, it is imperative to take note that the power to establish a commission of inquiry does not solely lie in the presidency. Section 127 (2)(e) of the Constitution also confers powers to the premier of the province to appoint commissions of enquiry.[15]

In *President of the Republic of South Africa v South African Rugby Football Union (SARFU*), the court ruled that the president holds the power to appoint a commission of inquiry as it is a wide discretionary power and as such, must be exercised personally and should not be delegated.[16] *Prima facie*, this provision is somewhat problematic as it does not provide any safeguards against instances of possible conflicts of interest an aspect which will be discussed further in the chapters that follow.

Commissions of inquiry played an integral role in South Africa's political and legal system throughout the apartheid era and into the new constitutional dispensation.[17]

It should be borne in mind that although it has been established that the premier also possesses the authority to establish a commission of inquiry, for purposes of this dissertation only the presidential authority to appoint a commission of inquiry will be discussed. It has been said that "*power tends to corrupt and absolute power corrupts absolutely.*" When scrutinizing *power* in a South African context, the presidency would

[13] Lawrence JK (n 1 above) 7.
[14] The Constitution of the Republic of South Africa 1996.
[15] The Constitution (n 14 above).
[16] *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) (Hereafter "*SARFU*")
[17] Lawrence JK (n 1 above) 7.

be the most powerful position an individual would occupy as he or she would be considered head of state.

Another piece of legislation that is relevant is the Commissions Act 8 of 1947[18] (hereafter "The Commissions Act"). The Commissions Act was assented to with the aim of "*making provision for conferring certain powers on commissions appointed by the Governor-General for the purpose of investigating matters of public concern, and to provide for matters incidental thereto*".[19] This view is affirmed by Middleton where he reiterates that the Commissions Act should not only be used when necessary but also for matters that are of high public importance.[20] More often than not, commissions are established in response to what Middleton termed a *"national crisis of confidence"*.[21]

Commissions cost the fiscus quite a substantial amount of money and should only be established when necessary. At this juncture, it would be prudent to allude to the emergence of the "*community*" concept as the Act refers to the public. Public funds are utilised for the procurement of state resources and in this instance, the Arms deal. The public (community) have the right to hold those accountable and in this sense, the ordinary court of law may not be the best route to take. Commissions of inquiry are good mechanisms that assist the state in holding those who have transgressed accountable. Others, however, may argue that this is far from the reality as accountability is not achieved after a commission's recommendations are published. This aspect will be discussed in a brief review one of South Africa's most recent commissions of inquiry to date, the Zondo Commission of Inquiry.

In *Democratic Alliance v President of South Africa*, a court case where it became evident that the objective test[22] that is applied when determining whether something is of "*public concern*" is set out as follows:

"*The legally relevant question is not whether the President thought that the subject-matter of the inquiry was a matter of public concern, but whether it was objectively so*

[18] The Commissions Act (n 8 above).
[19] The Commissions Act (n 8 above).
[20] AJ Middleton (n 8 above) 255.
[21] AJ Middleton (n 8 above) 255.
[22] Lawrence JK (n 1 above) 21.

at the time the decision was taken [...] In this context, the Constitution requires that the notion of 'public concern' be interpreted to promote the spirit, purport and objects of the bill of Rights and to underscore the democratic values of human dignity, equality and freedom. The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern."[23]

The court refers to an interesting aspect, "*equality*" which is quite relevant in the present circumstances. Equality in this instance is the application of the law to all those in the land, the rule of law. Commissions utilising their investigative powers can lead to the discovery of possible malfeasance by civil servants and consequently, accountability as the transgressors would face possible legal ramifications for their conduct. Thus, it is of the utmost importance to ensure that commissions are used correctly.

Once it has been decided that a commission is meant to be established, the president of the republic is empowered by the Commissions Act to enact the operation by way of proclamation in the Government Gazette.[24] The commission's mandate as per the gazetted notice encompasses aspects that include but are not limited to: the chairperson's identity, the commission's terms of reference as well as any other operational requirements or directives that are specific to the commission encompassing the commission's mandate as per the gazetted notice.[25]

The concept of rationality plays a significant role in the establishment of commissions in the sense that when the president elects to establish said commission, the establishment thereof must be rationally related to the realization of these goals.[26] In terms of the Arms Deal Commission, this would mean creating an environment where the commission could establish the truth regarding the contracts that were entered into in the Arms Deal in a manner that can be considered transparent as well as

[23] Lawrence JK (n 1 above) 21; *Democratic Alliance v President of South Africa* 2013 1 SA 248 (CC) 19.
[24] Lawrence JK (n 1 above) 21.
[25] Lawrence JK (n 1 above) 21.
[26] Lawrence JK (n 1 above) 22.

independent.[27] Establishing the truth in this regard would ensure that the relevant individuals are held accountable.[28] To a greater extent, it would require the President to uphold the Constitution's foundational values namely accountability, openness and transparency.[29] This in itself raises an interesting aspect. According to section 96 of the Constitution:

"(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—

a) *undertake any other paid work.*
b) *act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or*
c) *use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."*[30]

This above-mentioned provision, specifically section 96(1), (2)(b) and (c) is of paramount importance in the case of *Corruption Watch*[31] as it addresses the issue of a "conflict of interest". From its establishment, the Seriti Commission drew considerable condemnation based on serious concerns around its impartiality, integrity and credibility not only from the general public but also from within the commission itself.[32] The state president has the discretion to make the provisions of the Commissions Act, or any other Act, applicable to any commission he or she may appoint.[33] The president in this regard is also empowered by the Act to create regulations in relation to a commission, regulations that may in fact bestow additional powers upon the commission.[34] These powers bestowed upon the members and

[27] Lawrence JK (n 1 above) 22.
[28] Lawrence JK (n 1 above) 22.
[29] Lawrence JK (n 1 above) 8.
[30] The Constitution (n 14 above).
[31] *Corruption Watch And Another v Arms Procurement Commission And Others* 2019 (10) BCLR 1218 (GP). [2019] 4 All SA 53 (GP) 25.
[32] Lawrence JK (n 1 above) 22.
[33] AJ Middleton (n 8 above) 253.
[34] AJ Middleton (n 8 above) 253.

activities of the commission protects against contempt similar to that existing in respect to the courts of law, powers to control the commission's procedure and safeguard secrecy as may be deemed necessary."[35]

The Constitution bestows power onto the president to appoint a chair and impartiality and independence should be at the forefront when making such decisions. This view can be affirmed in *SARFU* where the court reiterated that *"[…] the President must act in good faith and must not misconstrue the powers […]*".[36] Section 96(2)(b) of the Constitution places a further duty on the president as it states "*Members of the Cabinet and Deputy Ministers may not act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests*."[37] At this juncture, it is quite evident that should commissions continue to play a role in South Africa's legal system, additional restrictions must be placed on the president's power in relation to commissions.[38]

One individual, the president, is given such power to appoint individuals however, it does not appear that more stringent safeguards have been put in place to ensure that the president appoints appropriate individuals to carry out the mandate. The empowering provisions envisaged in the Constitution and the Commissions Act do not specify or prescribe who is eligible for appointment as a member of a commission of inquiry, which can be problematic in itself.[39]

In *SARFU* It was held that the power to appoint a commission is a discretionary power which is not susceptible to delegation.[40] The president must exercise this power at his own discretion, which implies that there are no set standards or criteria for appointment. Commissions are appointed for matters of high public importance and measures should be put in place to ensure that they are not abused.

[35] AJ Middleton (n 8 above) 253.
[36] Lawrence JK (n 1 above) 19; *SARFU* (n 16 above) 148.
[37] The Constitution (n 14 above).
[38] Lawrence JK (n 1 above) 26.
[39] *'Appointment of sitting judges to preside over commissions of inquiry: A lawful but undesirable practiced'* De Rebus 1 March 2018.
[40] SARFU (n 16 above) 146.

One of the reasons behind the Seriti Commission receiving widespread condemnation is the selection of Judge Seriti to chair the Arms Deal Commission. His appointment in this regard is peculiar as it is alleged that Judge Seriti permitted the taping of the telephonic conversations that were leaked to President Zuma and ultimately led to the National Prosecuting Authority dropping 783 fraud and corruption charges against Zuma in the year 2009.[41]

Seriti Commission spokesperson, Mr. William Baloyi advised the *Mail & Guardian* that the "*Supreme Court of Appeal judge could not recall whether he had signed the forms granting the National Prosecuting Authority the authority to tape/record conversations between its own head, Bulelani Ngcuka, and Scorpions head Leonard McCarthy*".[42] Mr. Baloyi further added that Judge Seriti could not be reasonably expected to disclose confidential information as "*At any rate, he [Seriti] cannot recall whether he handled the specific matter, due to the format in which such applications are bought and the nature of the reporting relating thereto*."[43]

Former President Jacob Zuma appointed a commission of inquiry where he himself was being investigated for allegations of impropriety and misconduct.[44] Furthermore, the very idea of leaving the establishment of the commissions' terms of reference and the nomination of a chairman for the commission to the president, who has a direct personal interest in the inquiry's end result, is in itself irrational.[45]

The mere existence of allegations of a conflict of interest is the very reason Judge Seriti was not the most suitable candidate in this regard. The issue lies with the empowering provisions i.e. The Constitution as well as the Commissions Act in the sense that they do not provide any safeguards/risk reducing procedures in the preliminary stages of the commission coming into effect. The relevant Acts do not provide any guidance on the criteria for the appointment of a chair, and it may lead to abuse of power in certain instances. The power is "centralised" in the sense that the appointment and the terms of reference are all dependent on one individual, whose personal motives may be unclear to the vast majority. Does this mean that the principle

[41]'Arms deal: Conflict of interest twist raises alarm' *Mail & Guardian* 19 October 2012.
[42] Mail & Guardian (n 41 above).
[43] Mail & Guardian (n 41 above).
[44] Lawrence JK (n 1 above) 25.
[45] Lawrence JK (n 1 above) 25

of separation of powers should also be applicable in these instances to ensure that constitutional values such as, openness, transparency, and accountability become achievable in the establishment and work done by said commissions?

As previously stated, section 96 of the Constitution places a duty on the president to keep at arm's length instances where a conflict of interest may arise. President Zuma appointing Judge Seriti was in conflict with section 96 of the Constitution as he had a substantial interest in the investigation, the appointment therefore cannot conceivably be at arm's length.

Furthermore, the appointment of Judge Seriti could not have been in good faith as observed in *SARFU*. A commission of inquiry is established to find the truth. In an "*ideal situation*" the *appointer* would not be involved in what the *appointee* would be investigating, and this is what makes the findings conclusive.

In *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*[46] the court further elaborated on conflicts of interest as it held that:

"[...] To find oneself on the wrong side of section 96, all that needs to be proven is a risk. It does not even have to materialise." [47]

The court points out a noteworthy aspect in this regard, that the risk need not materialise. The appointment of Judge Seriti considering his involvement in charges being dropped against President Zuma created a conflict of interest that both the president and learned Judge ought to have taken cognisance of. Due to the fact that the risk existed already places the commission's decision and advice in jeopardy.

The appointment of Judge Seriti cannot be considered as "*rational*" at any given instance. In fact, the appointment of Judge Seriti may be considered an "abuse of power" by the former President in this regard as one would assume that the Chair that is to be appointed would in fact be impartial. With the scandals surrounding Judge

[46] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC) (Hereafter "*EFF vs The Speaker*") 9.
[47] *EFF vs The Speaker* (n 46 above) 9.

Seriti and his involvement in other matters involving former President Jacob Zuma, the appointment of the commission should not have been an option to begin with.

Canadian legal scholar, Roderick Alexander Macdonald alluded to the view that "*while judges bring experience, impartiality and knowledge to the inquiry process, involving a sitting judge in what may turn into a prejudiced political issue can not only threaten the independence of the judiciary but also the reputation of the particular judge*".[48] Furthermore, as Justice Gomery reiterated that "*recommendations emanating from these commissions, coming from an independent and impartial source […]*"[49] one would pose the question as to whether Justice Seriti was the best candidate to appoint as chair of the commission, given simply the encounters he had with former President Jacob Zuma and further taking into account "*restoring public confidence in the State*" is one of the aims of any commission.[50]

Upon the report being publicised former President Jacob Zuma aired his "*sincere gratitude and appreciation*" to Justice Seriti for his findings that elucidated the fact that "*not a single iota of evidence was placed before it*" that revealed that bribes had been paid to public officials, members of the cabinet or even consultants.[51] The findings of the commission were generally considered to be "*partial and a whitewash designed to acquit the government of any wrongdoing*"[52] and it could be suggested that it was the expected or predetermined outcome of this commission.

The president is obligated to establish a commission as a method to respond to matters of public concern, ergo to not only "*seek the truth but also to restore public faith in the state, promote the spirit purport and objects of the Bill of Rights and achieve accountability*".[53] The question in this regard would be whether a person being investigated can appoint an individual to investigate him? An individual appointed at his own discretion based on reasons best known to him. I think not, allowing an individual under investigation for charges of corruption to choose his own investigator makes the chances of finding anything incriminating negligible.

[48] De Rebus (n 39 above).
[49] J H Gomery "*The Pros and Cons of Commissions of inquiry*" 783.
[50] Lawrence JK (n 1 above) 28.
[51] L Wolf "*The Remedial Action of the "State of Capture" Report in Perspective*" 26.
[52] L Wolf (n 51 above) 26.
[53] Lawrence JK (n 1 above) 22.

Lawrence argues that traditionally, judges fulfilling non-litigious functions have jeopardized the independence of the judiciary.[54] The appointment of Judge Seriti in this case is testament to such. How can the general public be led to believe that the judiciary is independent when such appointments are made? It legitimately appears as if the judiciary was captured.

Lawrence cites Hoexter who noted, "*that during the era of parliamentary sovereignty under apartheid, certain judges were specifically selected to chair commissions because they were believed or known to be supporters of the apartheid regime and could therefore be relied on not to criticise government institutions.*"[55] The question that arises is whether these occurrences are coming to light in the new constitutional dispensation?

During the apartheid era *certain judges were specifically selected* as part of an agenda, the apartheid agenda. The apartheid government made use of commissions of inquiry and judges with their reputation as adjudicators of disputes to whitewash government misconduct as commissions *were relied on not to criticise government institutions*. The Seriti Commission can be seen in a similar light as the existence of the conflict of interest strongly suggests that the commission was established with a similar motive, to whitewash what transpired in the Arms Deal.

Hoexter further noted that the sense of impartiality that judges have been associated with would more often than not disguise the intentional selection of specific judges.[56] In order to maintain the independence of the judiciary, "*a judge should be, and be seen to be, independent of all sources of power*" in modern-day commissions of inquiry.[57] I am in support of Hoexter's view in this regard. An aspect to take cognisance of is that judges, whether sitting or retired, have an image to uphold. Be it their involvement in judicial functions or non-judicial functions, they should at all times remember that they represent the judiciary.

In being a representative of the judiciary, judges should ensure that they act in accordance with what is expected of them in this position/function so as to ensure that

[54] Lawrence JK (n 1 above 31.
[55] Lawrence JK (n 1 above) 31.
[56] Lawrence JK (n 1 above) 31.
[57] Lawrence JK (n 1 above) 31.

they do not bring the judiciary into disrepute with their actions. Judge Seriti should have refused such a position due a possible conflict of interest arising therefrom. Considering the provisions set out in the Constitution as well as South Africa's Code of Judicial Conduct, I am of the opinion that Judge Seriti should have distanced himself from the commission altogether.

The late Deputy Judge President of the High Court of Pretoria, Willem van der Merwe had initially been appointed as an additional member of the Commission.[58] What is quite interesting in this regard is that Judge van der Merwe presided over former President Zuma's rape trial, a trial where he was in fact acquitted.[59] On the 6th of December 2011, Judge HMT Musi was appointed to replace Judge van der Merwe as Judge van der Merwe recused himself due to the evident implications of his impartiality.[60] Judge Seriti in this regard should have followed the footsteps of his colleague and recused himself in order to protect the image of all presiding officers in such positions and to guarantee that the impartiality and independence of the judiciary is never put in question.

An aspect to take note of is that although section 84(2)(f) of the Constitution bestows on the president the authority to establish a commission of inquiry, it does not stipulate the method or a standard by which the president should actually establish a commission or provide guidelines in selecting who is eligible for appointment as a chairman of that commission.[61] The Commissions Act also fails to address this crucial aspect.[62] Legislation has not been put in place to ensure that there is no abuse of power by the individual appointing the commission. In my view this omission is one of the biggest obstacles one faces when appointing commissions of inquiry.

The president is able to appoint any competent candidate to serve as chairperson of a commission of inquiry. The concept of competency becomes blurred in these instances. A judge, being chosen to chair a commission is "*competent*" taking the position they hold as members of the judiciary, there is "*an innate need for complete*

[58] *EFF vs The Speaker* (n 46 above) 9.
[59] L Wolf (n 51 above) 25.
[60] Lawrence JK (n 1 above) above 22.
[61] Lawrence JK (n 1 above) 28.
[62] Lawrence JK (n 1 above) 28.

public confidence and impartiality in a judge's competence to perform their judicial role."[63] In terms of Article 14(2)(a) and (3)(a) of South Africa's Code of Judicial Conduct states that:

"(2) A judge may be involved in extra-judicial activities, including those embodied in their rights as citizens, if such activities-

(a) are incompatible with the confidence in, or the impartiality of the independence of the judge […]

(3) A judge must not-

(a) accept any appointment that is inconsistent with, or which is likely to be seen inconsistent with an independent judiciary, or that could undermine the separation of powers or the status of the judiciary […]."[64]

As judges are members of the judiciary, there is an innate need for public confidence and impartiality in a particular judge's ability to perform the judicial role.[65] Considering his role as a judge, it would be correct to assume that Judge Seriti was aware of the aforementioned provision prior to accepting the appointment and would have acted accordingly; however, that was not the case. The appointment itself is not consistent with an independent judiciary as under judicial proceedings, a recusal would be necessary. Judges have always been revered as they have traditionally been relied on to chair in such positions as they possess desired traits such as "*high standing, dignity, impartiality, integrity, and good judgment."*[66] It is only fitting that their reputation as judges is not used inappropriately.

Lawrence further cites Hoexter who notes that before the democratic era, it was acceptable for judges to chair inquiries of all kinds. Hoexter further reiterated that a study published in 1980 stated that a projected "*quarter of four hundred commissions of inquiry appointed since 1910 had been chaired by a judge*" and that there seems to be a distinct preference for using sitting judges as commissioners.[67] Considering the aforementioned, one can see why exactly judges are often appointed to chair

[63] Lawrence JK (n 1 above) 28.
[64] The Code of Judicial Conduct, adopted in terms of s 12 of the Judicial Service Commission Act 9 of 1994.
[65] Lawrence JK (n 1 above) 28.
[66] Lawrence JK (n 1 above) 27.
[67] Lawrence JK (n 1 above) 27.

commissions as "*these qualities associated with a judge would "certainly be conducive to public confidence in a commission of inquiry*"[68] and in the greater scheme of things it may be beneficial as it assists the commission in fulfilling its mandate and ultimately restoring public confidence.[69]

In the decision of *City of Cape Town v Premier, Western Cape, and Others* Swain J reiterated *"[…] that judges may in "appropriate circumstances" preside over commissions of inquiry without infringing the separation of powers, the problem lies in deciding in any particular case whether it is "appropriate" for a judge to involve him or herself, in the particular commission*".[70] I am in agreement with Swain in this regard, sitting judges should have nothing stopping them from presiding over non-judicial proceedings. The most qualified person should in fact be chosen to chair the commission. However, the issue that arises is how do we decide if it would be appropriate for a specific judge to involve himself in a matter? In this instance, the president would be the individual who appoints the chair. The appointment criteria are therefore solely based on his own discretion.

It has become a standard custom to appoint serving judges, retired judges or even senior counsel to preside over commissions of inquiry.[71] The law itself does not place any prohibition on the appointment of judges to chair commissions of inquiry, as a matter of fact the appointment of judges as members of a commission of inquiry was found to be constitutionally permissible in the case of *Heath*.[72] The lawfulness to appoint serving judges to preside over commissions of inquiry however does not automatically mean the practice is desirable.[73]

An interesting aspect to take note of is that in the same breath, Swain J further reiterated that "*it seems to me that at this early stage of our fledgling democracy, and with the vital object of preserving public confidence in the independence of the judiciary, active judges should as a matter of principle, not chair commissions of*

[68] Lawrence JK (n 1 above) 28.
[69] Lawrence JK (n 1 above) 28.
[70] *City of Cape Town v Premier, Western Cape, and Others* 2008 (6) SA 345 (C), 184 (Hereafter "*City of Cape Town*").
[71] De Rebus (n 39 above).
[72] De Rebus (n 39 above).
[73] De Rebus (n 39 above).

inquiry. This would eliminate the risk of judges becoming embroiled in disputes such as the present and the need to define in what circumstances a judge could "appropriately" chair a commission of inquiry."[74]

This brings about a rather interesting aspect. Swain gives us two opposing views regarding the appointment of judges. It has been established that commissions are susceptible to abuse due to the lack of safeguards/risk limiting procedures. The lack of safeguards may have a negative impact on how the public perceives the judiciary and above all, its independence.

It is therefore essential to take note that the appointment of a judge to chair a commission is not unlawful, the subject matter of the commission, the Code of Judicial Conduct, as well constitutional principles such as judicial independence, integrity and most importantly impartiality, must be taken into consideration.[75]

I am of the view that judges are the perfect candidates to chair commissions of inquiry. They are the most qualified individuals considering their experience in adjudicating disputes in court as well as their vast knowledge of the South African legal system and applicable legislation.

[74] *City of Cape Town* (n 70 above) *187.*
[75] Lawrence JK (n 1 above) 30.

Chapter 3

3.1 Overview of the Seriti Commission of inquiry

In the year 1997, a procurement process began which was established to put into effect the Strategic Defence Procurement Package (hereafter the "*SDPP*").[76] At the time, the powers- that-be procured several weapons systems through the SDPP.[77] From the time the SDPP was established, it had been veiled in controversy that arose from allegations of "*corruption and other criminal conduct relating to the procurement process embarked on to acquire a number of weapons systems"*.[78]

Considering the fact that South Africa was transitioning from a period of apartheid to democracy, one cannot help but pose the question as to whether such a deal was necessary at the time? Did the Republic of South Africa need to procure such weapons at the time? More serious concerns such as crime, poverty as well as unemployment still riddled the nation of South Africa, the procurement could not have possibly been a matter of urgency. In this regard, I would like to provide context.

The apartheid government spent a significant amount of the national budget on the military in the 1970s.[79] During the tenure of PW Botha's presidency, South Africa was substantially militarised.[80] This was revealed in the formation of Armaments Corporation of South Africa SOC Ltd (also known as "ARMSCOR") , which was intended to assist the country in ameliorating the impact of the United Nations subsidised arms embargo.[81] Furthermore, the considerable increase in military spending and the implementation of "Total Strategy" by the government amplified the militarisation of South Africa.[82] The military budget gradually increased over the next decade to an extent that the South African Defence Force's (SANDF) operating budget

[76] *Corruption Watch and Another* (n 31 above) 1.
[77] *Corruption Watch and Another* (n 31 above) 1.
[78] *Corruption Watch and Another* (n 31 above) 1.
[79] Corruption Watch "Evidence for the People's Tribunal on Economic Crime- The 199 Arms Deal "The People's Tribunal on Economic Crime 7.
[80] Corruption Watch (n 79 above) 7.
[81] Corruption Watch (n 79 above) 7.
[82] Corruption Watch (n 79 above) 7.

was R44 million, and by 1985/1986 the operating budget had increased to approximately R4 billion.[83]

As a result of defence's considerable expenditure, South Africa had what could be considered a "*substantial weapons stockpile*".[84] Furthermore, at the time the Arms Deal was entered into, South Africa already had an existing defence budget that was greater than the entire Sub-Saharan region, safeguarding that the country had the military capacity to defend itself against any foreseeable threat within its region.[85] Considering that there was no tangible external threat of aggression to South Africa, the military as it stood did not require any significant improvements.[86]

Upon closer analysis, it appears that the procurement of said weapons was not necessarily the best decision at the time as the focus should have been to rebuild the nation. This view is confirmed/shared by Milstein who reiterates that "*When apartheid ended, South Africa needed to heal and rebuild itself in order to successfully transition out of apartheid and become a cohesive national unit.*"[87] The arms deal had what some may consider a "*cataclysmic effect on post-apartheid South Africa as it added to the rising inequality and entrenched poverty*".[88]

When looking at the Arms deal, one should investigate the financial implications that may rise from the deal. When the Arms deal was first announced, the people of the Republic of South Africa were informed that the cost would amount to approximately R30 Billion.[89] The cost of the Arms deal had substantially increased due to factors such as inflation, the cost of financing as well as currency fluctuations.[90] That being said, it is estimated that the Deal costed South Africa between R61.50 billion and R71.685 billion between 2000 and 2020.[91] It should be borne in mind that these

[83] Corruption Watch (n 79 above) 7.
[84] Corruption Watch (n 79 above) 7.
[85] Corruption Watch (n 79 above) 7.
[86] Corruption Watch (n 79 above) 7.
[87] E Milstein "*Nation-Building through Film in Post-Apartheid South Africa*" 178.
[88] Corruption Watch (n 79 above) 3.
[89] Corruption Watch (n 79 above) 56.
[90] Corruption Watch (n 79 above) 56.
[91] Corruption Watch (n 79 above) 56.

estimates do not include any of the life-cycle costs of the equipment that was bought in the arms deal as well as the maintenance costs.[92]

Assuming the given estimates are accurate, the state could have utilised the funds on the following: Installation and connection of a wide range of sanitation units; paid salaries of at least 42 624 state doctors for six years; paid salaries of at least 52 977 state educators for six years; and paid salaries of at least 52 977 state nurses for six years.[93] Moreover, R71.6bn is more than the total planned budget for the National Student Financial Aid Scheme bursaries from 2016 - 2020.[94]

The Republic of South Africa faced no imminent external military threat, in fact its "*greatest threats*" were poverty and unemployment and the social adversities that flowed from this. Granted, a country need not be experiencing any imminent external threat to protect its sovereignty however, given the challenges the country faced at the time, one cannot help but think that it was not the best/most appropriate decision to make at the time. Spending on the country's defence could have been delayed for state resources to be directed towards uplifting South Africa's socio-economic status.[95]

On the 24th of October 2011, former President of the Republic of South Africa Jacob Zuma (hereafter "*President Zuma*") formed the Commission of Inquiry into the allegations of Impropriety, Corruption and Fraud in the SDPP.[96] What is again of particular interest with the formation of this commission is the fact that the former president himself was being investigated for his involvement in the Arms deal.[97]

The Seriti Commission was not only given the task of assessing whether the deal was rational but also to assess if the economic benefits that were to emanate from the deal in fact emerged. [98] Judge WL Seriti was appointed as the chairperson of the

[92] Corruption Watch (n 79 above) 56.
[93] Corruption Watch (n 79 above) 56.
[94] Corruption Watch (n 79 above) 56.
[95] Corruption Watch (n 79 above) 3.
[96] *Corruption Watch and Another* (n 31 above) 1.
[97] Lawrence JK (n 1 above) 22.
[98] The Arms Deal and the Seriti Commission *Open Secrets* (accessed on 03/01/2022).

Commission.[99] Judges M F Legodi and WJ van der Merwe were appointed as additional members of the Commission.[100]

On the 6th of December 2011, Judge HMT Musi was appointed to replace Judge van der Merwe as he had recused himself from the proceedings.[101] The recusal of Judge van der Merwe is of particular interest as similarly, in *S v Zuma* then Judge President Ngoepe (the Presiding Officer) recused himself from the rape trial.[102] Judge President Ngoepe advised the *Mail and Guardia*n that "*the protection of the credibility of the judiciary should weigh with me heavily [when making the decision to step aside]*".[103]

What is intriguing is that the application for recusal of the learned Judge was brought to the honourable court by President Zuma's legal team due to his [*Judge President Ngoepe*] involvement in granting search warrants in another corruption trial that was to be heard in June of the same year.[104] The question that goes abegging is why were the same principles not applied to Judge Seriti? In my view, the same principle should have also been applied as Judge Seriti was compromised as he "*permitted the taping of the telephonic conversations that were leaked to Jacob Zuma [...]*" [105] which in itself required the learned Judge to absolve himself from said proceedings to protect the Commission's credibility and objectivity.

Judge Legodi submitted his resignation from the Commission, almost two years later.[106] The presidency in this regard elected to proceed with the remaining commissioners while reasons behind the Judge Legodi's resignation are unknown to the public.[107] According to the *Mail & Guardian* however, averments were made that his resignation was brought about by his dissatisfaction with the manner in which Judge Seriti was overseeing the Commission.[108] The report stated "*Legodi is known to have been unhappy with the secrecy surrounding the workings of the commission,*

[99] Corruption Watch (n 79 above) 4.
[100] Corruption Watch (n 79 above) 4.
[101] Corruption Watch (n 79 above) 4.
[102] 'Zuma judge recuses himself from trial' Mail and Guardian 13 February 2006 (accessed on 15/04/2023).
[103] Mail & Guardian (n 102 above).
[104] Mail & Guardian (n 102 above).
[105] *Corruption Watch* (n 31 above) 25.
[106] Corruption Watch (n 79 above) 4.
[107] *Corruption Watch* (n 79 above) 4.
[108] Lawrence JK (n 1 above) 22.

the stealthy handling of the documentation, and the fact that Seriti ruled with "an iron fist", according to sources close to the process".[109]

In addition, Judge Mokgale Norman Moabi, former Acting Judge of the Pretoria High Court resigned from his position as the senior researcher for the Commission, as a result of uneasiness on the covertness surrounding its mechanisms and claimed that the Commission was concealing a *"second agenda*" in his resignation letter.[110] Judge Seriti was to a greater extent accused by Judge Moabi of a "*total obsession with the control of the flow of information"* in that he appeared "t*o have other ideas and modus operandi to achieve with the Commission*," which contradicts the mandate clearly set out in the Government Gazette.[111]

Another individual who resigned is the Commission's chief evidence leader, Advocate Tayob Aboobaker.[112] Adv. Aboobaker's reasons behind the resignation were also not given publicly, however, it was reported that he was deeply unhappy with the way the Commission was run.[113] Other key evidence leaders such as Advocate Carol Sibiya and Barry Skinner, in their joint letter of resignation stated that *"[w]e believe our integrity is being compromised by the approach which the commission appears intent on adopting […]."*[114] A noteworthy aspect addressed in the letter concerned the Commission's ruling that evidence leaders were forbidden to cross examine witnesses.[115] What follows is an extract from this joint resignation letter:

'*The Chair has made it clear that in his view the evidence leaders have no right to re-examine a witness after the legal representative of such a witness has re-examined. […] There has been very little cross-examination and accordingly the re-examination of the various civil servants/members of the defence force by their legal representatives, while clearly permissible in terms of the regulations, has naturally been designed to protect the status and credibility of such witnesses. This was all the*

[109] Corruption Watch (n 79 above) 4.
[110] Lawrence JK (n 1 above) 23.
[111] Lawrence JK (n 1 above) 23.
[112] Corruption Watch (n 79 above) 4.
[113] Corruption Watch (n 79 above) 4.
[114] Lawrence JK (n 1 above) 22.
[115] Corruption Watch (n 79 above) 6.

more reason why the evidence leaders should have been permitted to re-examine each witness to point out any discrepancies in the evidence.'[116]

In this instance, they further reiterated that "*the role of evidence leaders has been diminished to the point where they are serving little purpose and are not independen*t."[117] This appears as if they were merely appointed as a formality but not to carry out their functions in searching for the truth. This in itself brings about the interesting question, whether the refusal of re-examination, as alleged by the learned Advocates, was a sign of a lack of independence and impartiality of this commission?

According to Advocate Ngalwana SC (hereafter Ngalwana SC) "*witnesses in a commission of inquiry are questioned, not cross-examined. Cross-examination is a special form of questioning that is governed by its own rules, conventions and ethical standards [...]".*[118] Granted, in the present circumstances what was in issue was "*re-examination*" as opposed to "*cross-examination*" it does not negate the fact that both sides should be offered equal opportunity with the motive of finding the true situation.

Evidence leaders are appointees of the commission and as such perform the tasks that would otherwise have been carried out by the commissioner.[119] Ngalwana SC further points out that "*hypothetically, evidence leaders are an extension of the commissioner's ears, eyes and brain [...]*".[120] The Regulations of the Seriti Commission of inquiry go on to state that:

"*The Chairperson may designate one or more knowledgeable or experienced persons to assist the Commission in the performance of some of its functions, in a capacity other than that of a member. The Commission shall, where necessary, be assisted by officers of any Department of State seconded to its service, or persons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the Commission*."[121]

[116] https://corruptiontribunal.org.za/wp-content/uploads/2018/02/AD5-Skinner-and-Sibiya-seriti-resignationletter.pdf.
[117] Lawrence JK (n 1 above) 23.
[118] V Ngalwana (n 11 above) 4.
[119] V Ngalwana (n 11 above) 4.
[120] V Ngalwana (n 11 above) 4.
[121] Regulations of the Seriti Commission.

In this regard, it is quite evident that said persons refer to the evidence leaders. It was somewhat expected that Judge Seriti should have granted the evidence leaders an opportunity to re-examine the witnesses given the circumstances. As Ngalwana SC aptly put it "*search for the truth does not entail an attack by evidence leaders on witnesses*"[122] and that need not be the case. Cross-examination and in the given circumstances re-examination do not necessarily have to be aggressive in nature. If the legal representatives were given an opportunity to re-examine the witnesses, should the same courtesy not be offered to the individuals whom you/the commission appointed to assist in "*finding the truth*"?

Given the position as the chair of the commission, he had the power to put to a stop whichever line of questioning he may have thought was "*out of line*." In this regard, Judge Seriti placed the impartiality of the Commission in question. According to Probert "*It is proper that this be so, because a Commission of Inquiry is not bound by the rules of evidence applicable to a court of law or trial court. It is entitled to adopt its own procedure, including the receipt of evidence or information relevant to the issues before it which constitutes hearsay evidence, newspaper reports or submissions made without sworn evidence. In this regard, evidence should be scrutinised and allowed for them to use it to the best of their ability*."[123]

In *Corruption Watch*, the court reiterated that "*Various critics, including Mrs de Lille, Mr Crawford-Browne, Dr Woods, Mrs Taljaard and Dr Young, testified before the Commission and could not provide any credible evidence to substantiate any allegation of fraud or corruption against any person or entity. They have been disseminating baseless hearsay, which they could not substantiate during the commission's hearings.*[124] In this regard, the Commission was given wide ranging powers, considering the fact that hearsay evidence is admissible in relation to commissions, it is quite odd the learned Judge would make such a conclusion in his findings.

In *Bongoza v Minister of Correctional Services and Others* the court held that "*Commissions are designed to allow an investigation which goes beyond what might*

[122] V Ngalwana (n 11 above) 4.
[123] V Ngalwana (n 11 above) 4.
[124] *Corruption Watch and Another* (n 31 above) 2.

be permitted in a Court."[125] Judge Seriti could have adopted his own procedure as the chair. By allowing the evidence leaders to effectively execute their mandate, it would have afforded them further opportunity to thoroughly scrutinise the evidence to the best of their ability.

In *S v Le Grange*, Justice Ponnan reiterated that:

"*[...] The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy, it is important that the public should have confidence in the courts. Upon this – social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions.*

In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office.' In common usage bias describes 'a leaning, inclination, bent or predisposition towards one side or another or a particular result.'

In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."[126]

The Learned Justice's view is correct in this regard and should have been strongly considered prior to the appointment of Judge Seriti. The integrity of the commission was placed in jeopardy due to Judge Seriti's method of chairing the commission. It is quite difficult to not draw a negative inference from his conduct.

"*Probably the pre-eminent benchmark for the credibility of a commission of inquiry as an investigative body is that it be impartial as well as independent. Notwithstanding*

[125] *Bongoza v Minister of Correctional Services and Others* 2002 (6) SA 330 (TkH) 17 & 69.
[126] *S v Le Grange* 2009 (2) SA 434 (SCA) 21.

the question before the commission, investigators and investigative mechanisms must be, and must be seen to be, independent of undue influence."[127] Probert quite correctly points out in my view the importance of being seen to be independent from any undue influence. The Commission of inquiry is meant to exhibit characteristics such transparency and above all, impartiality. Judge Seriti not granting the opportunity just begs the question as to why he appointed the evidence leaders in the first place? If said evidence leaders are said to be "*an extension of the Commissioner's ears, eyes and brain [...]"* surely, they should be allowed to re-examine the witness as they may have questions that might have not previously arisen and be crucial in fulfilling the truth finding mandate.

Probert asserts that "*What's more, to any particular technical capabilities that may be required of an investigator, members of a commission of inquiry [...] necessary to be able to perform all of their professional duties without hindrance, improper interference or harassment or intimidation, and should be able to function free from the threat of prosecution or other sanctions for any action taken in spirit of the investigation*." Given the contents of the resignation letter tendered by both Advocate Sibiya and Skinner, one can clearly ascertain that they were not afforded the opportunity to properly investigate through re-examination and this can be seen as "*hindrance or improper interference*" in the process.

Given the circumstances surrounding Judge Seriti's appointment, it is my view that red flags should have been raised prior to the commencement of the commission proceedings. In this instance, my view is in line with Probert's where he asserts that *"allegations raised regarding the partiality of members of the commission, or its terms of reference, especially if raised near the beginning of the commission's work, ought to be taken very seriously by the governing authority*."[128]

Emphasis is often placed on the Commission appearing independent and quite rightly so. Probert further asserts that "*Independence requires more than merely not acting on the instructions of an actor seeking to influence an investigation inappropriately. It means that the investigation's structure or decisions should not be unduly altered by*

[127] T Probert "*Vehicles for accountability or cloaks of impunity? How can national commissions of inquiry achieve accountability for violations of the right to life?*"5.
[128] T Probert (n 127 above) 5.

the presumed or known wishes of any party, or that the outcome of the inquiry does not appear to have been predetermined." It becomes a challenge for one not to assume that the appointment of Judge Seriti appears to have a predetermined outcome. I make this statement as by not granting the evidence leaders, who are considered appointees of the Commission the opportunity to re-examine witnesses, a courtesy which was afforded to the witnesses' legal representative, shows a lack of impartiality and objectivity.

Pertinent issues raised by both Sibiya and Skinner were related to the Commission's attitude towards the documentary evidence.[129] In this regard, the evidence leaders were not granted the opportunity to re-examine witnesses with the objective of accentuating inconsistencies in their testimony.[130] In the final analysis, the Commission's findings were that there was *"nothing was wrong with the Arms Deal in its conception, execution or economic impact, and that there was no evidence of corruption*".[131] What followed, in this particular instance was the acquittal of every person that was implicated in the deal, including former President Zuma.[132]

[129] Lawrence JK (n 1 above) 24.
[130] Lawrence JK (n 1 above) 24.
[131] Lawrence JK (n 1 above) 24.
[132] Lawrence JK (n 1 above) 24.

3.2 Analysis of *Corruption Watch and Another v The Arms Procurement Commission and Others*

In 2016, the final report of the Seriti Commission was published. The findings were that there was no evidence of any misconduct in the Arms deal. It was also found that the Arms Deal was in fact a rational government decision.[133]

The Application was brought to the honourable court on grounds that the findings of the Commission be set aside due to the Commission's "*failure to investigate the allegations of corruption, or irregularity and fraud in the SOPP in the legally required manner.*"[134] In terms of section 6(1) of the Promotion of Administration of Justice Act (hereafter "*PAJA*"), "*any person*" may institute proceedings for the judicial review of administrative action".

Sewpersadh and Mubangizi cite Hoexter who reiterates that "*while the courts could not interfere with a decision simply because it disagreed with it, this applied only to rational decisions*"[135] In this regard Chaskalson P reiterates that "*[…] it would be strange indeed if a court did not have the power to set aside a decision that is clearly irrational.*"[136] The rationality of the Commission's findings comes into question given the circumstances surrounding the inception of the Commission.

The *PAJA* clearly states that "*the court may review an administrative action if the decision maker was not authorised by an empowering provision or acted arbitrarily*."[137] In the present matter, it appears to be more of the latter than the former. President Zuma was authorised by an empowering provision to constitute the commission but, the question that arises is could the decision made in such an appointment of the Commission, survive constitutional scrutiny? This matter was brought to the honourable court as the decision was believed to be arbitrary in nature. Chaskalson P

[133] Corruption Watch (n 79 above) 6.
[134] *Corruption Watch and Another* (n 31 above) 3.
[135] P Sewpersadh & J C Mubangizi *Judicial review of administrative and executive decisions: Overreach, activism or pragmatism*? 210.
[136] P Sewpersadh & J C Mubangizi (n 135 above) 210.
[137] P Sewpersadh & J C Mubangizi (n 135 above) 209.

correctly points out that this is a ground for review in terms of section 6(2)(f)(ii) of the *PAJA*.[138]

According to Hoexter "*To say that the wielders of public power must act within their powers, in good faith and without misconstruing their powers is to summarise a considerable number of well-established administrative law grounds*."[139] As previously mentioned, President Zuma appointed Judge Seriti to chair a commission of inquiry into allegations levelled against him [*Jacob Zuma*]. In this instance, he is an individual not only wielding public power in his capacity as the president, but he is also exercising said public power by appointing a chair to such commission.

President Zuma should have appointed an individual who is also suitably qualified and has not previously presided over any matter directly involving President Zuma himself. This would be in line with Hoexter's view that exercising public power must be done in "*[...] good faith and without misconstruing their powers [...].*"[140]

In *The National Treasury v Kubukeli* Van der Merwe cited AJA Chaskalson P who reiterated that:

"*It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action*."[141]

The rationality of the Commission's findings indicate that an arbitrary standpoint was used. There is no justification behind President Zuma's reason to appoint Judge Seriti as chair of the Commission. If anything, the Commission does little to demonstrate that the decision was rationally related to the purpose to which the power was given.

[138] P Sewpersadh & J C Mubangizi (n 135 above) 209.
[139] P Sewpersadh & J C Mubangizi (n 135 above) 209.
[140] P Sewpersadh & J C Mubangizi (n 135 above) 209.
[141] *National Treasury v Kubukeli* (20567/2014) [2015] ZASCA 141 15.

At this juncture, it is quite evident that commissions of inquiry are not like the judicial court proceedings we have become accustomed to. Commissions of inquiry are different from court proceedings to that extent that they are of an inquisitorial nature.[142] In contrast to a South African court of law which is adversarial in nature, commissions take on an active role in the proceedings rather than being an objective arbiter.[143]

Before delving into the case law discussion of *Corruption Watch*, it would be prudent to provide the differences between the two systems to paint a better picture. Lawyer for the *Law Reform Commission of Canada*, Patrick Robardet cites "*Black's Law Dictionary*" which defines the inquisitorial system as "*distinct from the adversary system in which the judge acts as an independent magistrate rather than prosecutor. One having opposing parties; contested, as distinguished from an ex parte hearing, or proceeding. One of which the party seeking relief has given legal notice to the other party and afforded the latter an opportunity to contest it*."[144] Robardet further asserts that "*the latter definition could cover the rules of natural justice and the administrative law notion of judicial or quasi-judicial procedure*."[145]

The Applicants in the matter in the review matter were "*Corruption Watch*" NPC (First Applicant), a Non-profit company as well as "*Right to know Campaign*" (second applicant) which is a voluntary alliance that is registered as a non-profit organisation.[146] The respondents in the matter were the Commission, Justice Willie Legoabe Seriti NO who was cited in his position as the chair of the Commission of inquiry[147] The third respondent was former Judge President Hendrick Mmoli Thekiso NO.[148] The fourth respondent, cited in his position as the Cabinet Minister responsible for the Commission was the Minister of Justice and Constitutional Development.[149]

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[142] https://www.schoemanlaw.co.za/the-legal-standing-of-commissions-of-enquiry/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (accessed on 30/01/2022).

[143] https://www.schoemanlaw.co.za/the-legal-standing-of-commissions-of-enquiry/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (accessed on 30/01/2022).

[144] P Robardet "*Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commissions of Inquiry"*? 113.

[145] P Robardet (n 144 above) 113.

[146] *Corruption Watch and Another* (n 31 above) 4.

[147] *Corruption Watch and Another* (n 31 above) 4.

[148] *Corruption Watch and Another* (n 31 above) 4.

[149] *Corruption Watch and Another* (n 31 above) 4.

The fifth respondent, in his position as the individual who assigned the Commission, the President of the Republic of South Africa and Ministers of Defence and Trade Industry as sixth and seventh respondents, in that order.[150]

The Applicants brought the Application before the Honourable Court in order for the Court to review the findings of the Commission on the basis that it had failed to carry out its statutory and constitutional objective of investigating the allegations of corruption, fraud and irregularity in the SDPP in the method necessitated by the law.[151]

The Applicants alleged that the Commission failed to properly consider and investigate matters that were introduced, failed to gather appropriate material, failed to admit evidence which was highly important to the inquiry and most importantly failed to search for and allow material evidence or information from key witnesses. In doing so the commission failed to test the evidence of the witnesses who appeared before it by putting questions to them with the required open and enquiring mind.[152]

Commissions of inquiry function within definite limits, with specific terms of reference and aptitudes.[153] According to Middleton, when determining the terms of reference of a commission of inquiry and procedure to be followed "*the President of the State may discriminate between persons*".[154] In this instance, Middleton asserts the position as set out in the Constitution that the President may elect a chair. President Zuma in this regard had a choice as to whom to appoint and he decided the criteria according to which the appointment would be made. Furthermore, it should be noted that the State President possesses wide powers which also include the "*power to alter the terms of reference."*[155] In this regard, terms of reference can be defined as "*purpose and boundaries of the inquiry*"[156] or alternatively which aspects will be investigated.

[150] *Corruption Watch and Another* (n 31 above) 4.
[151] *Corruption Watch and Another* (n 31 above) 3.
[152] *Corruption Watch and Another* (n 31 above) 18.
[153] https://www.schoemanlaw.co.za/the-legal-standing-of-commissions-of-enquiry/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (accessed on 30/01/2022).
[154] AJ Middleton (n 8 above) 255.
[155] AJ Middleton (n 8 above) 255.
[156] Document Library | Abuse in Care - Royal Commission of Inquiry (accessed on 29/03/2022).

The terms of reference of the commission must be interpreted strictly as observed in *S v Mulder*.[157] AJ Middleton further reiterates that "[…] *although terms of reference must be defined with a clear degree of certainty, the issues are seldom defined with the exactitude to be found in a criminal indictment or the pleadings* […] "[158]. It should be noted that insofar as a commission wishes to rely on the provisions of the Commissions Act, it is obligated to comply with the regulations which the state president may have made applicable to it.[159]

The inherent right of a commission to establish its own method of investigation is, however, recognised in the very terms of section 1 of the Act. A commission is obligated to determine its own procedure in relation to matters for which express provision is not made in the regulations issued by the State President.[160] Furthermore, it should be borne in mind that there is nothing that may prevent the State President from making "*exhaustive and strict provisions by way of regulation*."[161]

The Commission handed down its final report on the 23rd of December 2015 and according to Advocate Geoff Budlender who acted on behalf of the Applicants, there were "*remarkable failures to test evidence of the crucial witnesses*."[162] Advocate Budlender was of the view that "*the Commission did not investigate properly*" where he further listed specific areas where the inquiry failed to perform its functions effectively.[163] Advocate Budlender argued that of *4.7 million pages that various authorities had collected in evidence relating to the Arms Deal over the years, only 1.3 million were scanned and used in the inquiry. The inquiry had access to shipping containers of evidence it never assessed*."[164] The Applicants alleged that the "*Commission knowingly turned a blind eye to 2.6 million documents in its possession, which had been collected by the authorities in the course of an investigation into this very matter*."[165]

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[157] AJ Middleton (n 8 above) 254; *S v Mulder* 19801 SA 113 (T) at 122 C).
[158] AJ Middleton (n 8 above) 254.
[159] AJ Middleton (n 8 above) 255.
[160] AJ Middleton (n 8 above) 255.
[161] AJ Middleton (n 8 above) 254.
[162] *Corruption Watch and Another* (n 31 above) 20.
[163] Reversing the whitewash: Seriti Commission inquiry slammed in court' Daily Maverick 12 June 2019.
[164] Daily Maverick (n 163 above).
[165] Daily Maverick (n 163 above).

Advocate Budlender quite correctly pointed out that *"commissions of inquiry have a similar role to the Office of the Public Protector and their findings should be set aside if they do not fulfil their mandate*."[166]

In New Zealand, in the case of *Peters v Davison* it was held that reports of a commission of inquiry do nothing more than state conclusion and give recommendations with no binding effect.[167] Findings of Commissions of inquiry are not binding in the way that court rulings are, and they can only be subject to administrative review.[168] This view was affirmed in the Canadian decision of Canada *(AG) v Canada Commission of Inquiry on the Blood System,* supra, where it was held that "*findings of a commission of inquiry are simply findings of fact or statements of opinion reached by a commission at the end of the inquiry and that no legal consequences can be attached to the recommendations of a commission, in that its findings are not enforceable and cannot bind Courts which might consider the same subject matter*".[169]

At this stage it is trite that commissions merely give findings that are of no binding effect. In this regard, the question that arises is considering the magnitude of the matter, should this matter not have been dealt with in a more comprehensive manner?

In earlier chapters, it was canvassed that cross examination is not an essential requirement in commissions, however I submit that a thorough investigation could have sufficed, and a further re-examination should have been entertained. Commissioners are given a wide discretion to investigate within the terms of reference and to make recommendations based on those findings, however the main purpose of a commission is to *"restore public faith in the state"*[170] which is highly unlikely when said recommendations arise from an investigation that was not rigorous or comprehensive.

Failure to not only investigate thoroughly but also a lack of evaluation of the evidence may lead to other severe repercussions. This should be considered in this sense: A

[166] Daily Maverick (n 163 above).
[167] *Corruption Watch and Another* (n 31 above) 6; *Peters v Davison* [1999] 2 NZLR 164 (CA).
[168] https://www.schoemanlaw.co.za/the-legal-standing-of-commissions-of-enquiry/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (accessed on 30/01/2022).
[169] *Corruption Watch and Another* (n 31 above) 12.
[170] Lawrence JK (n 1 above) 22.

thorough investigation into the allegations of corruption was not conducted and as such, those who have been implicated, may or may not be prosecuted for their acts. This in my view is an indication of a lack of accountability. Accountability is an aspect that has been canvassed as a value in the Constitution as per section 1(d) and is of paramount importance in the sense that the failure to address issues of holding members of the public accountable can have a negative impact on the fabric of our very democracy.[171] In *Magidiwana v President of the Republic of South Africa* the court held that:

"[i]t is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission's search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too."[172]

The Seriti Commission was awarded considerable public powers through the Commissions Act[173] to investigate and make recommendations on a matter of immense public significance.[174] This was done to bring finality to a controversy which had puzzled South Africans for an extensive period of time.[175] A significant amount of taxpayers' money (approximately R 137 million) was spent to enable the commission to fulfil its mandate.[176]

The Commission ought to have acted within the limits of legality in the exercise of its functions as observed in *Albutt v Centre for the Study of Violence and Reconciliation*.[177] The Commission could-not, for instance, conduct its tasks by demonstrating a form of bias, breaching fundamental principles of fairness, or committing significant errors of law such as refusing to admit evidence on noticeably

[171] Lawrence JK (n 1 above) 7-8; The Constitution (n 14 above).
[172] Lawrence JK (n 1 above) 11.
[173] The Commissions Act (n 8 above).
[174] *Corruption Watch and Another* (n 31 above) 51.
[175] *Corruption Watch and Another* (n 31 above) 51.
[176] *Corruption Watch and Another* (n 31 above) 51.
[177] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) 49.

incorrect legal grounds.[178] In *Corruption Watch*, the court also focused on two individuals' alleged involvement in the Arms Deals. The individuals in question being Mr. Shamin "Chippy" Shaik, brother of Mr. Schabir Shaik[179] as well as Advocate Fana Hlongwane. What follows is a discussion of these parties and their involvement in the Arms Deal.

Mr. Shamin "Chippy" Shaik

As a point of departure, it is prudent to set out Mr. Schabir Shaik's involvement with President Zuma (for the sake of clarity in this segment, the Schaik brothers will be referred to by their first names). Mr. Schabir was involved with President Zuma in another court case, *Schaik v The State*.[180]

The first appellant, Mr. Schabir was cited as the first appellant in his occupation as a businessperson.[181] The other appellants were corporate bodies in which he either had a major interest in or companies which he controlled.[182] It was common cause that between October 1995 and September 2002, Mr. Schabir in his personal capacity as well as some of his corporate bodies made a number of payments of a considerable amount of money on behalf of or to President Zuma.[183] Commissions of inquiry are established to seek the truth. All this information was easily accessible to the general public. One would assume that this would warrant a thorough investigation into Mr. Shamin's involvement with President Zuma in the Arms Deal as their interaction comes across as a conflict of interest.

In *Corruption Watch*, Mr. Shamin Shaik was the Chief of Acquisitions for the Department of Defence and was a key role player in the entire SDPP process.[184] There

[178] *Corruption Watch and Another* (n 31 above) 51.
[179] https://www.iol.co.za/news/politics/band-of-brothers-in-the-thick-of-things-117369 (accessed on 27/04/2023).
[180] *Shaik v The State* (1) [2006] SCA 134 (RSA).
[181] *Shaik v The State* (n 176 above) 2.
[182] *Shaik v The State* (n 176 above) 2.
[183] *Shaik v The State* (n 176 above) 2.
[184] *Corruption Watch and Another* (n 31 above) 21.

were a number of allegations of misconduct which included but were not limited to the following:

> *"It was alleged that he requested a bribe to the value of $3 Million from a member of "German Frigid Consortium" (GFC). Mr Cristoph Hoennings recorded the bribe request, and it was stored in a memorandum. There was a further memorandum that indicated that the amount had been paid. The memorandum in question was part of documents that emanated from the findings of a German Police Report which encompassed Mr Hoennings Memorandum dated 03 August 1998."*[185]

Advocate Sello, one of the appointed evidence leaders examined Mr. Shaik and none of the documents which supported the alleged allegations of corruption were advanced.[186] According to the Court, Advocate Sello asked nothing more than "*extremely generalised questions*."[187] What follows is a segment from the exchange:

> *"'ADV. SELLO: And lastly and this issue I raise because [inaudible] raised quite often and to give you an opportunity to deal with it if you are able to. There is an allegation that you solicited or caused to be paid to yourself from one of the bidders an amount of 3 million dollars for efforts allegedly made by you in ensuring that such bidder is successful in this SOP. What is your comment to that?*
>
> *MR SHAIK: I solicited no such offer, nor did I receive no such money as described in these various allegations.*
>
> *ADV. SELLO: And was any money associated with the SDP's received by any company that you own or have a share in or any interest in?*
>
> *MR SHAIK: No, I have no such interest in any company.*
>
> *ADV. SELLO: And the question is....; is your answer that no such company in which you have an interest has received or solicited a payment of such ... [intervenes]*

[185] *Corruption Watch and Another* (n 31 above) 21.
[186] *Corruption Watch and Another* (n 31 above) 22.
[187] *Corruption Watch and Another* (n 31 above) 22.

MR SHAIK: That is correct.

ADV. SELLO: Chair and Commission Musi that is the evidence of Mr Shamin Shaik."[188]

At this juncture, it should be noted that the Commission was given wide-ranging powers of investigation, an extended period as well as substantial resources in order to successfully carry out the inquiry.[189] The line of questioning observed from the learned Advocate demonstrates that the Commission failed to exploit the powers bestowed upon it.

The court was correct in its findings, the Commission indeed failed to thoroughly test the evidence before, this view is affirmed in *S v Mulder* where it was held that the "*Act may confer upon a commission appointed by the State President to investigate matters of public interest the power to summon witnesses and cross-examine them […]".*[190]

This was a matter of public interest and given the powers conferred upon Judge Seriti as the chair of the Commission, one cannot help but question the credibility of the Commission as a whole. I am in support of the court's view that the line of questioning exhibited by Advocate Sello was in fact "*extremely generalised."* The veracity of the evidence given by Mr. Shaik was in no way challenged by the learned Advocate as an evidence leader. Does this line of questioning fall within what can be considered reasonable for a commission of this magnitude? The line of questioning exhibited resembles more of an interview and not a truth finding investigation.

Advocate Budlender further argued that the second Respondent in the matter, being the chairperson of the Commission, posed questions to Mr. Shaik.[191] In this regard, what follows is a segment of the conversation:

'CHAIRPERSON: Mr Shaik besides what Advocate Sello has dealt with is there any out of the bidders that would asked money from because if I am not

[188] *Corruption Watch and Another* (n 31 above) 22.
[189] Corruption Watch (n 77 above) 4.
[190] AJ Middleton (n 8 above) 256; *S v Mulder* 19801 SA 113 (T) at 121 E, Garment *Workers Union v Schoeman NO & Others* 1949 2 SA 455 (A) at 4h3-4).
[191] *Corruption Watch and Another* (n 31 above) 21.

wrong there is an allegation that one bidder's [inaudible] was requested to pay a bribe and when he failed to pay the bribe then they ended up losing the bid and if I recall it was Bell Helicopter. Did you at any stage ask for any money from Bell Helicopter?

MR SHAIK: No sir at no stage I requested money from any other bidder including Bell Helicopter. On the Bell Helicopter matter that was a matter relating to the involvement of the Canadians and the United States. My understanding at that time was that Bell Helicopter from the US, Chicago, could not tender directly; they had to go via Bell Helicopter Canada and allegations were made. The Joint Investigative Team did an investigation on that, and it was found not to be true because the ultimate decision not to select Bell Helicopter was an Air France decision and had nothing to do with me.

CHAIRPERSON: Yes, I just thought let me put this submission to you so that you can respond. You know we are aware of the fact that Bell Helicopter went right through the whole process.

MR SHAIK: Yes sir.

CHAIRPERSON: They were evaluated like all the others and unfortunately, they could not make it at the end.

MR SHAIK: That is correct sir.

CHAIRPERSON: I just thought that you know because we are aware of this allegation maybe we should give you an opportunity to respond to that.'[192]

Advocate Budlender was of the view that the allegations levelled against Mr. Shaik were of a serious nature to necessitate a scrupulous investigation and diligent questioning from the Commission itself. As the chair of the Durban Riots Commission, Van den Heever JA reiterated that "*The proper function of a commission of inquiry is to find the answers to certain questions put (by the State President) in the terms of reference. A Commission is itself responsible for the collection of evidence, for taking statements from witnesses and for testing the accuracy of such evidence by*

[192] *Corruption Watch and Another* (n 31 above) 23.

inquisitorial examination […]."[193] I am in support of Advocate Budlender's view. The collection of evidence would imply that the Commission had to have had knowledge of the familial relationship between Mr. Schabir and Chippy Shaik. The existence of the relationship in itself, *prima facie,* required a scrupulous investigation into Mr. Chippy's involvement in the Arms Deal.

Given the Commissions' wide-ranging powers of investigation, the evidence ought to have been tested. Testing the accuracy of the information requires questions to be put to an individual to ascertain if there are any inconsistencies that may assist in finding the truth. Because of commissions' inquisitorial nature, Judge Seriti should have conducted a thorough investigation into Mr. Chippy's involvement in the deal as he was bestowed the necessary power to do so.

The inquisitorial system as defined in *Black's Law Dictionary* makes use of the word "*contested*."[194] Contesting evidence in an investigation requires evidence before the commission to be challenged or disputed at the very least. It should be borne in mind that the questions put to Mr. Chippy were in relation to an aspect that was set out in the Seriti Commission's terms of reference.

According to the Commission's terms of reference, the Commission was tasked with investigating whether any person (natural or juristic) within or outside the borders of South Africa improperly influenced the awarding or conclusion of any of the contracts concluded in the Arms Deal.[195] In this regard, the questions posed by Judge Seriti were in relation to alleged bribery between Mr. Chippy and United States company, Bell Helicopters. The Commission had a truth finding mandate and as such, one would assume the questions posed to Mr Chippy would be done explicitly with the intention of finding the truth however, that was not the case as his evidence was barely challenged. As Bishop correctly points out that "*the two primary rationales concerning the purposes of commissions of inquiry [...] namely, truth-seeking and the restoration of public confidence in the state*."[196]

[193] AJ Middleton (n 8 above) 257.
[194] P Robardet (n 142 above) 113.
[195] *Corruption Watch and Another* (n 31 above) 1.
[196] Lawrence JK (note 1 above) 11.

The evidence before the Commission "*compelled*" the Commission to scrutinise all aspects to get to the truth however, as Advocate Budlender pointed out "*[...] only the most general questions were put, all of which did no more than to provide Mr Shaik with an opportunity to make a general denial."* [197] Advocate Budlender further argued that it appeared as if Judge Musi's line of questioning "*appeared designed*" in order to afford the Commission as well as Mr. Chippy a "*blanket reason*" for not addressing any of the specific allegations that were directly levelled against him.[198]

Mlambo JP criticised the manner in which members of the Commission and evidence leaders approached key witnesses, Mr. Chippy and Advocate Hlongwane in particular. He further emphasised that it "*exhibited a complete failure to rigorously test the versions of these witnesses by putting questions to them with the required open and enquiring mind.*"[199] The court correctly asserts that the witnesses were not confronted effectively in order to get the relevant information in respect of the allegations of wrongdoing and corruption.[200]

In *Corruption Watch* the Court held that the Commission failed to enquire copiously and methodically into the issues which it was expected to investigate based on its terms of reference.[201] The Seriti Commission sparked major controversy as it was criticised for the way witnesses were handled.[202] A lawyer who was engaged as a consultant for the French arms dealer, Thales was willing to testify that former President Zuma received hundreds of thousands of rands from the arms company during his spell as the deputy president of South Africa.[203] He was also willing to give evidence that that President Zuma was allegedly invited to Paris to be a spectator at the Rugby World Cup semi-finals where he was also given €25 000 "spending money" for the duration of the trip and that Thales donated €1 million to the ANC as a kickback after it was given a R2.6 Billion contract in 1997.[204] The lawyer approached the

[197] *Corruption Watch and Another* (n 31 above) 25.
[198] *Corruption Watch and Another* (n 31 above) 25.
[199] *Corruption Watch and Another* (n 31 above) 53.
[200] *Corruption Watch and Another* (n 31 above) 53.
[201] *Corruption Watch and Another* (n 31 above) 53.
[202] L Wolf (n 51 above) 26.
[203] L Wolf (n 51 above) 26.
[204] L Wolf (n 51 above) 26.

commission twice despite Zuma's alleged requests that he not testify at the commission however he never received a response.[205]

At this particular juncture, emphasis would like to be placed on the truth finding mandate of the Commission. There was simply an inordinate amount of evidence in question that there could be no justification behind the Commission's failure to thoroughly scrutinise the evidence before it. This begs the questions, Was the decision to appoint a Commission rational as decided by the Court? Why do we have Commissions of inquiry if the outcome seems predetermined? Do they serve a legitimate purpose for the people of South Africa?

Mlambo JP goes on to reiterate that "*the questions posed to these individuals were hardly the questions of an evidence leader seeking to test extremely serious allegations that went to the heart of the reason for the establishment of the Commission […] This is hardly an investigation whose objective is to get to the bottom of the allegations".*[206] The question in this regard would be what is the relevance or even the importance of having commissions of inquiry if they are conducted with such objectives in mind? When a commission is conducted, truth finding should be at the top of the agenda, however, merely accepting witness statements without interrogating them carefully cannot fulfil the objects of truth finding.[207]

In *Corruption Watch*, it was held that not only was the evidence before the court uncontested, the Commission failed to execute its mandate in a manner that is to "*be expected of a reasonable Commission.*"[208] The court held that the Commission failed to acknowledge the fact that in relation to commissions, the rules of evidence are applied in a *liberal sense* as the rules of evidence are less strict when it comes to Commissions.[209]

The court alluded to the fact that commissions are not bound by rules of evidence in the manner in which courts are so bound. .[210] The court further alluded to that

[205] L Wolf (n 51 above) 26.
[206] *Corruption Watch and Another* (n 31 above) 54.
[207] *Corruption Watch and Another* (n 31 above) 62.
[208] *Corruption Watch and Another* (n 31 above) 69.
[209] *Corruption Watch and Another* (n 31 above) 69.
[210] *Corruption Watch and Another* (n 31 above) 69.

commissions may make use of different sources of evidence and use it in a manner it so pleases and as such Commissions can make use of "*hearsay evidence, newspaper reports or representations or submissions without sworn evidence.*"[211] They are designed to allow an investigation which goes beyond what might be permitted in a Court.[212] This in itself asserts the position that the Commission could have thoroughly investigated the matter and go beyond ordinary rules of evidence to get to the truth. In this instance leading questions could even validly have been asked as a commission is not bound by the rules of evidence and pleadings.[213]

Mlambo JP made an order setting aside the first respondent's findings and his *ratio* can be attributed to the uncontested evidence revealing palpable errors of law, a refusal to consider documentary evidence which included grave allegations which found relevance in the purview of this inquiry, a failure to thoroughly test the evidence of key witnesses in the Commission and the adherence to the principle of legality.[214] I am in full agreement with Mlambo JP in this regard, although the findings indicate that the Arms Deal was rational, the court was correct in finding that at that time, it cannot be reasonably considered as rational.

Advocate Fana Hlongwane

Advocate Hlongwane was another person of interest in the matter. He was also considered a principal witness as there were allegations of corruption levelled against him involving the negotiation of certain SDPP contracts.[215] In this regard, Advocate Hlongwane had been affiliated with two other investigations conducted by the Scorpions and the Asset Forfeiture unit.[216] Not only was it alleged that he played "*the middle man*" in the SDPP process but also that he was connected to quite an expansive number of corruption cases.[217]

[211] *Corruption Watch and Another* (n 31 above) 69.
[212] *Bongoza v Minister of Correctional Services and others* 2002 (6) SA 330 (TkH) at 17 & 69.
[213] https://www.findanattorney.co.za/content_commission-of-enquiry-definition (accessed on 27/04/2023).
[214] *Corruption Watch and Another* (n 31 above) 70.
[215] *Corruption Watch and Another* (n 31 above) 26.
[216] *Corruption Watch and Another* (n 31 above) 26.
[217] *Corruption Watch and Another* (n 31 above) 26.

Mr. Gary Murphy, an investigator who was employed by the British Serious Fraud Office (SFO), deposed to an affidavit that BAE systems (British Aerospace Systems) made use of "*covert and overt*" advisors to ease its participation in the SDPP process.[218] It was alleged that covert advisors entered into contracts and were repaid by Red Diamond, an offshore entity that was controlled by BAE Systems.[219] According to Mr Murphy's affidavit, Advocate Hlongwane had entered into both overt and covert arrangements with BAE systems to receive funds relating to the Hawk and Gripen aircraft contract that was concluded through the SDPP.[220]

The overt arrangements consisted of consulting agreements which were entered into on the 9th of September 2003 between Hlongwane Consulting as well as BAE systems.[221] Another one of the agreements in question was that between Hlongwane Consulting and SANIP, a company based in South Africa and under the control of BAE, the agreement of which commenced on the 1st of August 2003.[222] It was alleged that during September 2003 and January 2007, Hlongwane Consulting received funds to the value of over £10 million as payment for the first consultancy agreement and R51 Million for the second consultancy agreement.[223] Mr. Murphy's report concluded with the following statement "*BAE has not provided the SFO with any written report to justify the size of these payments*."[224]

The allegations levelled against Advocate Hlongwane were buttressed by an affidavit deposed by Advocate Johan Du Plooy.[225] Advocate Du Plooy was employed by the Directorate of Special Operations (DSO) to underpin the Application for a search warrant instituted in terms of the National Prosecuting Authority Act[226] against Mr. John Bredenkamp as well as Advocate Hlongwane.[227] Advocate Du Plooy deposed to an affidavit alleging that Advocate Hlongwane committed offences involving racketeering,

[218] *Corruption Watch and Another* (n 31 above) 26.
[219] *Corruption Watch and Another* (n 31 above) 27.
[220] *Corruption Watch and Another* (n 31 above) 27.
[221] *Corruption Watch and Another* (n 31 above) 27.
[222] *Corruption Watch and Another* (n 31 above) 27.
[223] *Corruption Watch and Another* (n 31 above) 27.
[224] *Corruption Watch and Another* (n 31 above) 27.
[225] *Corruption Watch and Another* (n 31 above) 30.
[226] The National Prosecuting Authority Act No 32 of 1998; Sections 29(5) and 29(6).
[227] *Corruption Watch and Another* (n 31 above) 30.

corruption, money laundering and fraud to name but a few in the conclusion of the Arms Deal.

Advocate Hlongwane was asked only one question regarding the allegations in his oral testimony to the Commission.[228] According to the Court, Advocate Hlongwane answered "*[...] in broad generality without referring to any specific document, allegation or evidence*."[229]

The Court further held that the Commission failed to confront Advocate Hlongwane with the very evidence before it and that he was neither re-examined nor cross examined at the least. [230] As Ngalwana SC asserted, "*witnesses in a Commission of Inquiry are questioned, not cross-examined [...].*[231] It should be borne in mind that the evidence before the Commission included approximately 4.7 million pages that were collected by various authorities over the years; however, only 1.3 million pages were scanned and utilised in the inquiry. [232]

In this particular instance, of the 1.3 million pages that were scanned into the inquiry, Advocate Hlongwane had only one question directed to him regarding the corruption allegations. The Court correctly points out that he was not confronted with the evidence the Commission referred to. I am of the opinion that asking Advocate Hlongwane "*one question*" cannot reasonably be associated in any way with conducting an investigation of this magnitude, and comprehensively investigating the situation as per the Commission's mandate.

The questions posed to witnesses in commissions play an integral role in the investigation process. In this regard, I find it necessary to explore what word the "*investigation*" entails as the word has become synonymous with commissions. The Court cited the dictum of Nugent JA in *Public Protector v Mail and Guardian*[233] where he reiterated that "*there is nonetheless at least one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind – which is that the investigation must have been conducted*

[228] *Corruption Watch and Another* (n 31 above) 32.
[229] *Corruption Watch and Another* (n 31 above) 32.
[230] *Corruption Watch and Another* (n 31 above) 32.
[231] V Ngalwana (n 11 above) 4.
[232] Daily Maverick (n 163 above).
[233] *The Public Protector v Mail & Guardian Ltd* (422/10) [2011] ZA SCA 108 21.

with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all […].[234] Nugent's use of the words *"open and inquiring mind*" demonstrates an approach to questioning that lacks bias and is open to possibilities which is imperative in commissions of inquiry.

To merely ask the learned Advocate one question cannot be considered reasonable in any investigation. The Seriti Commission had a plethora of evidence as there was quite a substantial number of documents for perusal and use in the Commission. Nugent JA goes on to further elaborate on *his* understanding of the term "*open and enquiring mind*" as he reiterates that.

"*[...] That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious, but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first, they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry, then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit [...] But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring.*[235]

The learned Judge quite correctly points out that an inquiring mind is not one that is "*[...] unduly suspicious, but it is also not one that is unduly believing [...].*"[236] How can the chair of the Commission make a finding on evidence that has not been thoroughly evaluated? In this instance, can asking a "*principal witness*" in a matter just one question relating to allegations of impropriety against him suffice in an investigation? I think not. The chair cannot reasonably make a finding based on the evidence given as it is insufficient to say the very least. Emphasis is placed on the learned Judge's dictum, that *"[...] it is also not one that is unduly believing [...]."*[237] The Commission's

[234] *The Public Protector* (n 233 above) 21.
[235] *The Public Protector* (n 233 above) 22.
[236] *The Public Protector* (n 233 above) 22.
[237] *The Public Protector* (n 233 above) 22.

lack of thorough investigation regarding allegations levelled against Advocate Hlongwane demonstrates that the Commission was "*duly believing.*"

In this regard, Advocate Budlender quite correctly argued that "*the Commission had failed to evaluate this critical evidence of a most important witness against whom a series of detailed allegations of corruption had been made, all of which went to the heart of that which the Commission was enjoined to investigate fully and with an open mind*.

Chapter 4

4.1 The nexus between the law and morality

The question of the appointment of Judge Seriti brings about a rather indispensable question in South Africa's jurisprudence, what is the link between morality and the law? It is generally accepted that there are three norms that regulate human conduct: the law, religion and morality. For purposes of this dissertation however, only the law and morality will be discussed. It should further be noted that henceforth, the word "*law*" and "*Constitution*" will be used interchangeably as the Constitution is the supreme law of the land.[238] In this regard, scholars Igwe and Udoh correctly assert that morality and the law are important notions that primarily regulate human life.[239]

What the law and morality have in common is that they guarantee harmony, peace and justice through effectively regulating human relations and conduct in society.[240] Austrian jurist, Hans Kelsen correctly points out that "*there is no clear distinction made between law and morals*."[241] In as much as there are similarities between the two norms, the most notable difference between the law and morality is that the law imposes a sanction for violation of a law whereas morality merely weighs on one's conscience.

Igwe and Udoh criticise Hart's view that the law is "*[...] basically a system of rules which must not satisfy the demands of morality.*"[242] Igwe and Udoh are of the view that morality symbolises moral standards or norms of behaviour that are largely accepted as right or proper by a nation, state, society, class or group.[243]

English Philosopher John Locke asserts that people have rights such as the right to liberty, property and life "*that have a foundation independent of the laws of any*

[238] The Constitution (n 14 above).
[239] DE Igwe & G Udoh *Hart on Law and Morality: Implications for Socio-Political Development* 230.
[240] DE Igwe & G Udoh (n 239 above) 232.
[241] H Kelsen *Pure Theory of Law* 59.
[242] DE Igwe & G Udoh (n 239 above) 232.
[243] DE Igwe & G Udoh (n 239 above) 232.

particular society".[244] Locke argues that the foundation of the aforementioned rights is independent of the laws of any society and in this regard, this could mean morality or ethics.

Fourie points out an interesting aspect to take cognisance of, that "*the Constitution is a legal document that writes moral principles into law. It is therefore a document which cannot be applied without recourse to moral reasoning.*"[245] I agree with Fourie's view as the Constitution affords people freedom. The Constitution sets out the moral principles of the people of the land and in turn, adherence to these moral principles becomes law. Section 12(2)(b) of the Constitution provides that "*Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.*"[246] Section 15(1) further provides that "*Everyone has the right to freedom of conscience, religion, thought, belief and opinion*."[247] The Constitution clearly states that everyone has the right to security and control over one's body. Everyone has bodily autonomy, one's freedom of conscience implies that they have a choice as to what they consider as right and wrong, they have a right to make their own decisions.

Locke suggests a thought experiment he termed a "*state of nature*." In a state of nature, there is no legitimate political authority that is able to adjudicate disputes within that society.[248] This is equivalent to a country which has no laws governing it which cannot be an ideal setting as; without laws, there can be no order. The South African Constitution in this regard not only provides the law, it also provides the relevant bodies dispensed to give effect to the law and adjudicate disputes i.e., the judiciary which acts as one of the three branches of government.

In order to establish some form of order, there has to be uniformity in the rules that apply to the people in the state of nature. Locke argues that a conditional transfer of

[244] E N Zalta & U Nodelman Locke's Political Philosophy Stanford Encyclopaedia of Philosophy (2020).
[245] P Fourie *The SA Constitution and Religious Freedom: Perverter or Preserver of Religious Contribution to the Public Debate on Morality?* 105.
[246] The Constitution (n 14 above).
[247] The Constitution (n 14 above).
[248] E N Zalta & U Nodelman (n 244 above).

rights occurs in a state of nature where the people transfer some of their rights to the state and in turn, the state ensures the comfortable and stable enjoyment of their liberty, their property and their lives as a whole.[249] By conditionally transferring some of their rights, the citizens concede that although everyone has their individual rights, they cannot truly exercise said rights without having an authority to adjudicate any possible disputes that may arise when exercising such rights.

The conditional transfer of rights implies that there exists a relationship or agreement between the state and the citizen(s). According to English Philosopher Thomas Hobbes a social contract can be defined as "*[...] a rational agreement between self-interested individuals to submit to a central authority: the sovereign. This sovereign power would enforce a common law, affording rights and bestowing certain duties upon its citizens*."[250] Given the fact that the Constitution is the supreme law of the land, it is the sovereign authority to which individuals submit. The Constitution is the social contract that has been entered into by the citizens of South Africa and the state. Rights and duties are bestowed upon the citizens as the citizens concede that the Constitution is indeed the highest law in the land and as such, submit to its authority.

Locke correctly argues that *"men are naturally free [...]."*[251] The existence of a government relies heavily on the consent of the people.[252] By consenting to the government's authority, the people allow the government to rule, maintain order and peace within society. Consent can also be withdrawn in this regard as governments which the people are displeased with are often resisted then subsequently replaced with new governments.[253] The Constitution regulates human conduct however, it should be borne in mind that all individuals have a choice as to how they would like to exercise the rights set out in the Constitution, whether in an ethical or unethical manner. If the Constitution mandated all individuals to exercise its provisions in an

[249] E N Zalta & U Nodelman (n 244 above).
[250] R Adams *South Africa's social contract: the Economic Freedom Fighters and the rise of a new constituent power?* 104.
[251] E N Zalta & U Nodelman (n 244 above).
[252] E N Zalta & U Nodelman (n 244 above).
[253] E N Zalta & U Nodelman (n 244 above).

ethical manner, it would inadvertently infringe upon one's right to freedom as envisaged in the Constitution.

A noteworthy aspect to take cognisance of is that the exercise of the constitutional provisions depends on an individual's autonomy, morality in this regard is relative.[254] The universal application of morals would not be feasible as "*[...] different societies and cultures have their respective moral practices. Thus, what is right in a particular society might be wrong in another.*[255]

South Africa is known as the rainbow nation as it is an ethnically diverse and multilingual country.[256] Cook affirms this view as he reiterates that *"[...] There are no universally valid, absolute moral standards. All morality is relative. Right and wrong depend on where you happen to be, the time in which you happen to exist, the setting and the situation [...]."*[257] South Africa has 11 official languages and is divided into nine provinces. This demonstrates how the different cultures may influence the law of the land. In this regard, what is considered moral to the Xitsonga people based in the Limpopo province may be immoral to the Xhosa people in the Eastern Cape.

The notion that *morals* are *relative* would be something that is deeply rooted in our human genetic makeup. The universal application of morals implies that all cultures and societies endorse the same values such as love, kindness, justice and honesty while they feel dismayed by and discourage acts such as theft, wickedness, falsehood, adultery, incest, bribery, dishonesty.[258] In this regard, Igwe and Udoh correctly argue that if morality was indeed a universal notion, this would mean that humans are *"enjoined to do good and refrain from evil."*[259] Although most societies are indeed enjoined to do good and discourage these acts, do they generally refrain from evil?

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[254] P Fourie (n 245 above) 105.
[255] DE Igwe & G Udoh (n 239 above) 232.
[256] https://www.sahistory.org.za/article/people-and-culture-south-africa#:~:text=As%20South%20Africa%20is%20a,the%20crossroads%20of%20southern%20Africa. (accessed on 20/06/2023).
[257] E D Cook *Moral Relativism Schools and Societies* 2.
[258] DE Igwe & G Udoh (n 239 above) 232.
[259] DE Igwe & G Udoh (n 239 above) 232.

Kelsen points out that "*in addition to legal norms, there are other norms regulating the behaviour of men to each other, that is social norms*. *These social norms are also referred to as morals, and their discipline directed toward their perception and description, ethics.*"[260] In this regard, Kelsen buttresses the view that morals are indeed a norm that regulates human conduct. He further argues that "*[...] in the common usage of language, morals are often mixed up with ethics [...].*[261] At this juncture it should be noted that the morals, ethics, and norms are often used interchangeably and purport to have a similar meaning.

According to Kelsen "the *behaviour of the individual, which these norms recommend, refers directly* ***only to this individual****, but* ***indirectly to the other members of the community****. For this behaviour becomes the object of a moral norm in the consciousness of the community, only because of its consequences. Even the so-called obligations toward oneself are social obligations, they would be meaningless for an individual living in isolation.*"[262] In this regard, Kelsen correctly points out that morals are not only applied in a communal context, they also emanate from the community. The community determines what is acceptable conduct or moral behaviour. Furthermore, the community to a large extent shapes and affects one's reasoning. Morals apply to the community at large and not necessarily to oneself as *no man is truly an island*.

Kelsen, like many moral philosophers believed that "*the "internal behaviour" that is put forward morally is supposed to consist in a behaviour which, in order to be qualified as "moral", must be directed against one's inclinations or against one's egoistical interest*."[263] In this regard, Kelsen argues that moral behaviour usually relates to acts where one does not put themselves first, but rather puts the needs of others first. The suppression of your own moral inclinations or desires for the good of the community is what is considered moral. Kelson further argues that in order for an individual's conduct to be moral, it must be against one's predilection or against oneself interest.

[260] H Kelsen (n 241 above) 59.
[261] H Kelsen (n 241 above) 59.
[262] H Kelsen (n 241 above) 60.
[263] H Kelsen (n 241 above) 60.

In this regard, he may be alluding to the aspect of "*selflessness*" or putting others first. In a situation where one has to make a decision between himself and the community, it would be moral to put the community first as it would not be considered selfish. It should be borne in mind that "*not every behaviour is moral when it is performed against inclination and egotistical interest.*"[264] If an individual obeys someone else's command to commit the act of murder the act itself lacks moral value.[265] Despite it being performed against his own egoistical interests, all things considered, murder remains forbidden.[266]

Kelson asserts that "*[...] only a behaviour directed against one's inclination or egoistical interest has any moral value. Since "to have a moral value" means to conform with a moral norm, the doctrine implies that morals suggest that one must suppress his own inclinations and not realise those egotistical interests but rather to act from other motives.*"[267] This is what the Constitution and the people of South Africa required from President Zuma under his Constitutional Oath. Appointing a chair in a matter where he has a substantial interest was acting to his benefit as the outcome could only possibly be in his favour. He ought to have suppressed his own inclinations and not realised his egoistical interests as this would have truly been to the benefit of the nation.

More often than not, morality can be described as a western concept. In an African context, the concept of morality can be seen as Ubuntu. Nussbaum defines *Ubuntu* as the "*capacity to express compassion, reciprocity, dignity, harmony and humanity in the interests of building and maintaining community with justice and mutual caring*."[268] In the final analysis, the appointment of the chair determined the outcome of the Commission. The appointment of Judge Seriti did not afford the people of South Africa dignity as they would never know whether there was misappropriation of public funds. It was not in the interests of building and maintaining the community as the appearance of bias creates a rift between the state and the people. The state loses credibility in

[264] H Kelsen (n 241 above) 61.
[265] H Kelsen (n 241 above) 61.
[266] H Kelsen (n 241 above) 61.
[267] H Kelsen (n 241 above) 61.
[268] B Nausbaum *African Culture and Ubuntu Reflections of a South African in America* 4.

the eyes of the people as wrongdoers are not held accountable for their transgressions, this ultimately undermines the rule of law.

Nausbaum further reiterates that Ubuntu speaks to the interconnectedness of people, our common humanity and the responsibility we all owe to each other that emanates from the deeply felt connection.[269] The idea of Ubuntu beseeches all to imagine and feel that: "*Your pain is My pain, My wealth is Your wealth, Your salvation is My salvation. Umuntu Ngumuntu Ngabantu - A person is a person because of others Ubuntu is a social philosophy, a way of being, a code of ethics and behaviour deeply embedded in African culture*."[270] In the appointment of Judge Seriti as chair, President Zuma should have considered the principle of Ubuntu and chosen an individual whose appointment will not put the Commission's findings into question. Considering the apparent conflict of interest and the manner in which Judge Seriti ran the commission, can one conclude that justice was indeed served? I think not. The outcome of the Seriti Commission appeared predetermined from the onset and the court was correct in setting aside the Commission's findings.

The Constitution places a duty on one to exercise its provisions ethically and as such, President Zuma ought to have chosen an individual who would have thoroughly investigated the allegations without fear or favour. In this regard, President Zuma would have sacrificed himself in order for the truth to come to light regarding the Arms Deal. Kelsen argues *"It is unavoidable that a" social order" will prescribe a behaviour that is possibly directed against some inclinations or egoistical interests of the individuals whose behaviour the order regulates. People follow their inclinations or try to realise their interests even without being obliged to do so. [...]."*[271]

Kelsen refers to a social order, which in essence can be the moral inclinations of a specific community or country. Kelsen correctly argues that one cannot expect an individual to put the interests of others before their own personal interests as it has been established, morality is relative. To some the act of putting others first can be

[269] B Nausbaum (n 268 above) 4.
[270] B Nausbaum (n 268 above) 4.
[271] H Kelsen (n 241 above) 60.

considered moral and as such, may compel an individual to act accordingly however, such a sentiment may not be shared by all. Although the moral inclinations of society at large and the Constitution require an individual to make the right decision, more often than not people realise their own personal interests "*without being obliged to do so*." Kelsen further buttresses this view as he reiterates that:

"*A man may have contradictory inclinations or interests. His actual behaviour then depends on which inclination is more intensive, which interest is stronger. No social order is able to eliminate man's inclinations and egotistical interests as motives of his actions and omissions. The social order can only create, if it is to be effective, the inclination or the interest to behave according to the social order and oppose them to inclinations and egoistical interests that would be present without that order."*[272]

I agree with Kelsen's view, an individual may possess inclinations that are different from those of the community. The significance of the desire or inclination to the individual, its strength as well as its intensity determines his or her behaviour or conduct. The question that arises is, in a world where morality is relative, can one expect all to hold the tenets of the social order in higher regard than one's personal desires?

Section 1 of the second schedule of the Constitution, provides the Oath or solemn affirmation of the President and Acting President.[273] The Constitutional Oath or solemn affirmation declares that:

"*The President or Acting President, before the Chief Justice, or another judge designated by the Chief Justice, must swear/affirm as follows:*

In the presence of everyone assembled here, and in full realisation of the high calling I assume as President/Acting President of the Republic of South Africa,

[272] H Kelsen (n 241 above) 61.
[273] The Constitution (n 14 above).

I, A.B., swear/ solemnly affirm that I will be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

- *promote all that will advance the Republic and oppose all that may harm it.*
- *protect and promote the rights of all South Africans.*
- *discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience.*
- *do justice to all; and*
- *devote myself to the well-being of the Republic and all of its people.*

(In the case of an oath: So, help me God.)"[274]

The Presidential Oath is another Constitutional provision that beseeched President Zuma to make an ethical decision in the appointment of the Chair. It provides that the President solemnly promises to do justice to all, consistently through the guiding principles of what he believes is right. In this instance, the Constitution not only makes reference to the notion of justice, but also the president's conscience. One's conscience can be defined as *"the sense of right and wrong that governs a person's thoughts and actions."*[275] In this regard, President Zuma's sense of right and wrong, that governs his thoughts and actions ought to have known that the right thing to do is to ensure that the judiciary and its independence is maintained, that the credibility of judiciary remains intact and not advance one's egoistic interests.

Given Judge Seriti's appointment as chair of the Commission, he should have followed the examples set by Judges Ngoepe and van der Merwe, respectively. As soon as there appeared to be doubt regarding his objectivity in his position as chair, Judge Seriti should have recused himself. Judge Ngoepe recused himself, although conveniently at the request of President Zuma's legal team. Judge Ngoepe emphasized that "*the protection of the credibility of the judiciary should weigh heavily with me [when making the decision to step aside]*" and Judge Seriti ought to have followed suit and recused himself considering his duties and obligations as a judge. Judge van der Merwe also recused himself due to the evident implications of his

[274] The Constitution (n 14 above).
[275] https://www.collinsdictionary.com/dictionary/english/conscience (accessed on 25/05/2023).

impartiality. In this regard, the learned judges ensured that the independence and impartiality of the judiciary remain intact in respect of their own individual positions.

Okpaluba and Maloka cite *Black's Law Dictionary* which defines "*recusal*" as the process "*by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self-interest, bias or prejudice*."[276] The process of the recusal of a judge is derived from the common law over the years and as a result, no individual can be a judge in their own cause, a judge cannot preside in a matter where he or she has a financial interest or any other type of interest that may raise a reasonable apprehension of bias in the mind of a reasonable observer and where a judge's conduct or his or her remarks in adjudication may raise an apprehension of bias.[277]

The manner in which Judge Seriti ran the Commission was questionable to many parties involved in the Commission. The resignation of Judges Legodi and Moabi set somewhat of a benchmark in ethical standards and should have been followed by the learned judge; however, that was not the case.

In a Supreme Court of Canada judgement, *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* It was held that "*the test for a reasonable apprehension of bias is what a reasonable, informed person thinks*."[278] In this regard, the aim is to ensure that public confidence in the legal system is protected by not only ensuring the appearance of a fair adjudication process, but also ensuring that a fair adjudicative process ensues in reality.[279] Okpaluba and Maloka correctly argue that the absence of bias and Impartiality have developed both as ethical and legal requirements.[280] A reasonable apprehension of bias existed in the Seriti Commission as observed by the resignation of Advocates Sibiya and Skinner. As reiterated, according to their joint resignation letter, *"[w]e believe our integrity is being*

[276] MC Okpaluba & TC Maloka *The Fundamental Principles of Recusal of a Judge at Common Law: Recent Developments* 277; Black and Nolan Black's Law Dictionary 6th ed.
[277] MC Okpaluba & TC Maloka (n 276 above) 297.
[278] MC Okpaluba & TC Maloka (n 276 above) 297; *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2013] 2 SCR 357.
[279] MC Okpaluba & TC Maloka (n 276 above) 297.
[280] MC Okpaluba & TC Maloka (n 276 above) 297.

compromised by the approach which the commission appears intent on adopting […]."[281]

The Commission itself was plagued with a plethora of resignations, a reasonably informed person would doubt the credibility of the findings as in essence, the recusals and resignations were ethically motivated. According to Article 4 of the *Judicial Service Commission Act* a judge must "*(a) uphold the independence and integrity of the judiciary and the authority of the courts; [...].*"[282] Judge Seriti put the independence and the integrity of the judiciary into question due to his failure to do the ethical thing and recuse himself from the proceedings. In this regard, he failed to honour the Article 4 of Judicial Service Commission Act.

Article 13 of the Judges Code of Conduct further provides that "*A judge must recuse him- or herself from a case if there is a-*
(a) real or reasonably perceived conflict of interest; or
(b) reasonable suspicion of bias based upon objective facts and shall not recuse him- or herself on insubstantial grounds."[283]

Article 13 makes use of the word "**must**" which in essence is mandatory. There is no discretion that can be applied in this instance. Prior to acceptance of the position as chair, Judge Seriti ought to have considered the implications. A reasonably perceived conflict of interest existed due to the fact that Judge Seriti might "*have authorised the taping of the phone conversations that led to the dropping of Arms Deal corruption charges against President Jacob Zuma."*[284] An ethical act in this regard would be recusal as Judge Seriti's involvement with President Zuma also ultimately led to the creation of a "*reasonable suspicion of bias" on the part of the commission.*

Ethical standards in leadership roles are of paramount importance for the progression of a just society. As former Chief Justice Mogoeng Mogoeng reiterated, "*South Africa*

[281] Lawrence JK (n 1 above) 22.
[282] The Judicial Service Commission Act 9 of 1994 (hereafter "*The Judicial Service Commission Act*").
[283] The Judicial Services Commission Act: Code of Judicial Conduct (n 282 above).
[284] Underhill G 'Arms deal: Conflict of interest twist raises alarm' Mail & Guardian 19 October 2012.

needs ethical leaders who are not corrupt."[285] Cheteni and Shindika refer to ethical leadership and define it as "*the demonstration of normatively appropriate conduct through personal actions and interpersonal relationships, and the promotion of such conduct to followers through two-way communication, reinforcement, and decision making*."[286] Scholars; Barling, Turner, Kanungo, Butcher, Epitropaki, Butcher and Milner collectively debate ethical leadership "*as a pressure exerted on officials to choose between the good and the bad, referred to as altruistic and egoistic motives.*"[287] Ethics plays a major role, normatively appropriate conduct would imply not "*abusing*" Constitutional provisions. An important aspect to take cognisance of is that President Zuma did not act illegally by opting to choose his own Chair for the Commission, he exercised the Constitutional provision in an unethical manner as the outcome was in all likelihood predetermined.

Ethical leaders engage in behaviour that is considered appropriate, such as honesty and openness, all driven by a leader's selflessness.[288] Ethical leaders make "*organisational decisions carefully aligned with ethical values and consider that the right decision is always that which falls on the ethics side*."[289] Igwe and Udoh criticize Hart's approach, that the law is indeed separate from morality. They believe divorcing morality from the law will only give rise to injustice and other disagreeable immoral acts.[290] I agree with their view in this regard as the Constitution not only sets out people's rights, it also represents their values.

The law brings order, it maintains safety and stability in society, the very reason the social contract exists. The law largely consists of views that are agreeable to arguably the vast majority of the populus. Abiding by provisions of the Constitution can be interpreted as an individual respecting the community at large as more often than not, a Constitutional infringement tends to be an infringement on another individual's rights. Take the Common law crime of murder for example; It is considered a crime as well

[285] P Cheteni & ES Shindika *Ethical Leadership in South Africa and Botswana Privilege 3.*
[286] P Cheteni & ES Shindika (n 285 above) 5.
[287] P Cheteni & ES Shindika (n 285 above) 5.
[288] P Cheteni & ES Shindika (n 285 above) 6.
[289] P Cheteni & ES Shindika (n 285 above) 5.
[290] DE Igwe & G Udoh (n 239 above) 232.

as an immoral act to take the life of an individual. Section 11 of the Constitution buttresses the view that *"Everyone has the right to life."*[291] Adhering to this provision would mean that an individual respects his fellow man and would not take his life. Submission to the authority of the Constitution is one taking morality into account in the exercise of one's freedom. A Constitutional infringement on one individual, is indirectly an infringement on the community at large as order and peace have been disturbed in society, a breach of the social contract. Igwe and Udoh maintain that "*morality remains the core foundation of law*" to the extent that they guarantee the socio-political development of any nation or society.[292]

Morality in this regard cannot truly be divorced from the Constitution, in using the Constitutional provisions one should still consider what is morally just. This would be a true representation of acting within the spirit, purport and objects of the Bill of Rights as set out in section 39(2) of the Constitution.[293]

[291] The Constitution (n 14 above).
[292] DE Igwe & G Udoh (n 239 above) 238.
[293] The Constitution (n 14 above).

Chapter 5

5. Recommendations and conclusion.

Commissions are truth seeking instruments however, author Adam Ashforth considers commissions of inquiry as "r*eckoning schemes of legitimation that serve in constituting a realm of discourse through which collective action vis-á-vis Society by those who act in the name of the State becomes thinkable, and thereby organizable*".[294] Ashforth makes quite a bold assertion however it is not without merit as he argues that commissions provide nothing more than a "*stamp of approval*" on a serious social issue that is in the public eye.[295] In this instance, the findings of the commission are to a larger extent legitimized as the commission was chaired by a judge. This is an expected outcome considering the role Judges' play in civil society.

Malan describes the judiciary as the "*custodian of the right to access to justice and [...] They must be wise and competent enough to deserve our trust and respect as public office bearers [...]."*[296] I agree with this view as whether civil or criminal, the general public looks to the courts and in turn, presiding officers to assist in the adjudication of the disputes and ultimately aid in the administration of justice. To the ordinary South African, presiding officers are seen in high esteem and as such, more often than not their opinions are considered by the general public. Maintaining independence even in quasi-judicial proceedings is of paramount importance as the risk image of the judiciary coming into question is becoming prevalent.

An aspect to take cognisance of is that people do not only believe Judges purely because they are morally just and the reliance on the enforcements of right, but also because the judiciary is a branch of the government, a party to the social contract. This view is affirmed by Malan who asserts that judges earn respect and high esteem and as such, command moral authority and this is done through their wisdom, knowledge and reasoned decision-making.[297]

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[294] SA Peté *Commissions of inquiry as a response to crisis: the role of the Jali Commission in creating public awareness of corruption* (part 1) 908.
[295] Peté (n 294 above) 908.
[296] K Malan *Reassessing Judicial Independence and Impartiality against the backdrop of judicial appointments in South Africa* 2022.
[297] K Malan (n 296 above) 2022.

What can be taken from the Seriti Commission and from the events that unfolded during its lifespan, neither the Constitution nor the Commissions Act have the necessary safeguards against instances of conflicts of interest. One cannot mention a conflict of interest without mentioning the cancer that is, cadre deployment. It is quite prudent to briefly discuss this issue as it is also a threat to the independence of the judiciary. According to Malan, under the ruling party's (African National Congress or the *"ANC"*) *transformation ideology*, the judiciary reflects the national demographic but also requires a close relationship between the ruling party and the judiciary.[298] This sentiment expressed in the latter comes into conflict with the principle of separation of powers as transformationalists are predominantly members of the ANC.[299]

There can be no close relationship between the ruling party (executive) and the judiciary as it is in fact an infringement on the principle. The purpose of separation of powers is to restrict the centralization of power in the hands of either of these spheres of government and to also facilitate political accountability.[300] In this instance, a close relationship between the ruling party and the judiciary does not restrict power but rather allows it to permeate to other branches of government where it may be susceptible to abuse. Judges being compromised in this regard paints the reputation of the judiciary in an unflattering light as it implies that the judiciary is biased and partial, even in judicial proceedings. The fundamental purpose of the principle of separation of powers is to limit corruption and maladministration, and to ensure that the government is prevented from acting arbitrarily.[301]

To achieve accountability, a Constitutional amendment could be a possible solution. A Constitutional amendment can be effected in terms of section 74(3) of the Constitution which provides that any other provision of the Constitution may be amended by a Bill passed by the National Assembly with a supporting vote of at least two thirds of its members.[302] The Constitutional provision in question would be section 84(f) of the Constitution as it empowers the President to appoint a Commission. Too much power has been vested in one individual and has proven to be to the detriment

[298] K Malan (n 296 above) 1968.
[299] K Malan (n 296 above) 1971.
[300] K Malan (n 296 above) 1975.
[301] R Mashele *Transformative Constitutionalism in South Africa: 20 Years of Democracy* 892.
[302] The Constitution (n 14 above).

of the nation as President Zuma's appointment of a chair to investigate his own malfeasance was a conflict of interest. It should be noted that this amendment would not remedy the issue we presently face as the responsibility will merely shift to another individual. In this instance, another individual's moral inclination will determine who will chair a commission and there are still no safeguards against potential conflicts of interest.

What has been established is that there is no uniformity regarding the criteria in the appointment of a chair or a standard that will be applied across the board. This comes about as the President uses his own discretion to appoint a chair that can be based on the President's moral inclination, which is *relative*. The lack of uniformity manifests into a lack of certainty as there is no definite standard to hold people accountable. As the use of morality failed in the exercise of the aforementioned legislative provisions, a strong need to address the existing legislation is required as we look to the law for redress.

Ngalwana SC is of the opinion that a possible solution is to ensure that commissions of inquiry comprise a panel when they are established, wherever it may be appropriate and feasible.[303] These panellists would have a different role as compared to evidence leaders as their duty would be "*reign in an over-zealous commissioner*"[304] which in a sense can be interpreted as the panellists playing somewhat of a supervisory role. The panellists would ensure that the commissioner's conduct does not lead to the commission being successfully challenged in review proceedings.[305] The panellists' function would be a manifestation of the separation of powers principle as power would not be centralized in the commissioner. The panellists would ensure that the commissioner does not exercise the powers conferred upon him or her arbitrarily. This approach ensures that the credibility of the findings and recommendations presented by the commissioner remains intact.

Looking to the law for the solutions is not limited to domestic law, we can also look to international law to be the light at the end of what appears to be a dark tunnel for commissions of inquiry in South Africa. Tladi describes the South African Constitution

[303] V Ngalwana (n 11 above) 5.
[304] V Ngalwana (n 11 above) 5.
[305] V Ngalwana (n 11 above) 5.

as *international law friendly* as it provides for the application of international law.[306] Tladi makes this assertion as he reiterates that the Constitution provides that: in the interpretation of the Bill of Rights, international law must be considered; in the interpretation of any legislation, any reasonable interpretation that would be consistent with international law must be preferred over the legislation in conflict with international law and; Customary international law is considered as the law in the Republic provided it does not come into conflict with an Act of Parliament or the Constitution.[307]

An interesting aspect to take note of is the relationship between international law and the Constitution. It appears that South Africa looks to international moral standards set by members of the international community (other countries) for guidance in the adoption and application of laws, however still maintaining its sovereignty. Yet again, moral standards are used as a yardstick to determine what is acceptable and unacceptable conduct although it is within the international community. International law can be considered and applied provided it does not come into conflict with the Constitution.

Probert quite correctly points out that commissions of inquiry are often established according to antecedent legislation and as such, they are less *ad hoc*.[308] He further argues that the establishment of a commission in this manner wards off possible abuse of the commission's independence, provided the legislation is drafted correctly.[309] The Commissions Act's preamble provides that it aims to "*make provision for conferring certain powers on commissions appointed by the Governor-General for the purpose of investigating matters of public concern, and to provide for matters incidental thereto*"[310] and this in itself demonstrates that the legislature intended that there be a structure or procedure in the running of Commissions. The Act makes provision for aspects such as the Act's scope of application, the commission's sittings as well as sanctions for hindrances or obstructions the commission may face.[311] A clause safeguarding against potential conflicts of interests should be considered in this regard

[306] D Tladi *Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga* 310.
[307] D Tladi (n 306 above) 310.
[308] T Probert (n 127 above) 9.
[309] T Probert (n 127 above) 9.
[310] The Commissions Act (n 8 above).
[311] The Commissions Act (n 8 above).

and would be most appropriate. Since the Commissions Act's establishment in 1947, it has only undergone three amendments.[312] It appears an amendment addressing this pertinent issue is overdue considering commissions of inquiry and their fast-growing popularity in South Africa.

Drawing from Probert's view, which is buttressed by Sections 39, 232 and 233 respectively, we should consider looking at international standards that do not come into conflict with Constitutional provisions. The Minnesota Protocol could be a starting point. It was aimed at protecting the right to life and advancing justice and accountability and the right to a remedy, by promoting the effective investigation of potentially unlawful death or suspected disappearance.[313]

According to the *Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (the Minnesota Protocol)* training should be provided for individuals involved in the commissions.[314] When a commission is established, individuals who will be involved in the commission should be thoroughly trained in understanding the ethical dilemmas that may arise during the commission's existence.[315] More often than not, society would also have the most qualified individual to be appointed as chair. As confirmed, in South Africa a judge will in all likelihood be appointed to chair a commission and judges tend to have similar qualifications however, different areas of expertise. The candidate selection criteria should be based on merit and not on the President's discretion. Meritocracy should prevail in such circumstances as commissions of inquiry are usually appointed for matters of high public importance. One can argue that in the case of Judge Seriti, he was the *best* candidate according to President Zuma's discretion. The argument would fall short as it fails to address the subject matter of this dissertation, the existence of a conflict of interest.

The *United Nations: Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* requires candidates during the selection process to disclose information that may lead to questions being

[312] Commissions Act 8 of 1947 | South African Government (accessed on 05/06/2023).
[313] The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1.
[314] T Probert (n 127 above) 10.
[315] T Probert (n 127 above) 10.

raised about their impartiality, integrity and independence.[316] In a South African context, a similar approach should be employed in commissions of inquiry. This would buttress the approach inspired by the Minnesota Protocol.

Requiring all individuals involved in the commission to disclose any information that can put the commission's findings into question can assist in ensuring that the findings of the commission are credible. This in itself contributes to the transparency in the commission as disclosure will lead to the right candidates being selected. The commission in turn will not have its reputation tainted from its inception. Amending the Commissions Act to include such a provision and not leaving it to one's moral inclinations to compel one to disclose such would be beneficial.

I am of the view that a provision in the Commissions Act that expressly states that a "*candidate is disqualified from being appointed as Chair of a commission of inquiry if the appointment may lead or potentially lead to the integrity of the commission being compromised*" should be considered. The Act should provide a set ethical standard for the appointment of a chair and by doing so, safeguards are put in place against individuals who may have a different ethical view on the application of the Act. The inclusion of a provision of such a nature coupled with a list of criteria setting out instances of disqualification will surely limit the occurrences of conflicts of interest. Disclosure is significant in this instance as it allows for an informed decision to be made regarding the individuals involved in the commission. This could ensure that the integrity of the judiciary is not compromised, and the findings of the commission are credible.

South Africa's most recent commission of inquiry, the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State[317] (also known as the Zondo Commission) was also not without controversy as a result of this "trend." President Zuma established it in 2018 and appointed Chief Justice Raymond Zondo (then Deputy Chief Justice) to chair the commission.[318] The Commission was established to conduct an investigation into the

[316] *Commissions of inquiry and fact-finding missions on International Human Rights and Humanitarian Law: Guidance and Practice* 21.
[317] https://www.statecapture.org.za/ (accessed on 27/06/2023).
[318] Zuma appoints a state capture commission, to be headed by deputy chief justice' News24 09 January 2018.

allegations of state capture, fraud and corruption in the government.[319] The first part of the six part report was published on the 4th of January 2022, with part six being published at the end of April 2022.[320] To date, the Zondo Commission's recommendations like the Seriti Commission's findings are yet to be affected, it raises a rather concerning question, is the lack of accountability in civil servants fast becoming a norm in present day South Africa?

An interesting aspect in the Zondo Commission is the fact that President Zuma, similarly to the Seriti Commission, brought an Application for the recusal of Chief Justice Zondo due to an alleged conflict of interest.[321] The conflict of interest arose as Chief Justice Zondo fathered a child with Ms. Thobeka Madiba, a sister of one of President Zuma's wives, albeit more than two decades ago.[322] In this regard, Chief Justice Zondo released a statement confirming that the relationship came to its end in the 1990's.[323] Chief Justice Zondo dismissed President Zuma's Application for recusal on the grounds that President Zuma "*failed to meet the test for a reasonable apprehension of bias*" in the proceedings.[324]

I am of the view that in instances where commissions are established for matters of high public importance, we cannot afford to risk bias let alone the reasonable apprehension of bias to the reasonable observer. There are a multitude of legal minds at the state's disposal to assist in the adjudication of disputes with no conflicts of interest whatsoever, the recusal of one individual to ensure that the image of the judiciary is not tarnished should not be up for debate as the outcome has far reaching consequences. The fact that conflicts of interest exist in quasi-judicial proceedings chaired by judges who preside in judicial proceedings creates the impression that commissions are tools the government utilizes to whitewash its misconduct.

In conclusion, for the sake of clarity, the use of the word "*limited*" as opposed to "*prevented*" in relation to conflicts of interests was intentional. This is because it is argued that human beings are not perfect, as urban poet Kendrick Lamar aptly stated

[319] The state capture inquiry: what you need to know' News24 20 August 2018.
[320] James E 'An introduction to the Zondo Commission in South Africa' Pinsent Masons 14 June 2022.
[321] The secret is out! Zondo had a child with a sister of one of Zuma's wives' Times Live 29 October 2020.
[322] Times live (n 321 above).
[323] Times live (n 321 above).
[324] https://www.enca.com/news/zondo-dismisses-zuma-application-recusal (accessed on 26/06/2023).

"*See, in the perfect world, I would be perfect, world.*"[325] It is built within us as human beings. In the case of President Zuma, it was unethical for him to appoint a chair to a commission in which he had a substantial interest. In this instance, society's moral standards required him to disclose that there was an apparent conflict of interest and as such, he cannot be expected to appoint a chair as this would in no way aid the commission in fulfilling its mandate.

Religion, the last of the three norms that regulate human conduct confirms this view. The Christian faith is an example as observed in The Holy Bible. The famous story of Adam and Eve brings us to the book of Genesis chapter 2 verses 16-17 which states that "*And the Lord God commanded the man, "You are free to eat from any tree in the garden; but you must not eat from the tree of the knowledge of good and evil, for when you eat from it you will certainly die*."[326] The book of Genesis is highly revered in the Christian faith as it speaks of the origin of creation, the *origin of man* and consequently, civilization. It finds its relevance in the present matter as it is a record of one of the first instances of a law or rule being made in a *state of nature*. In this passage, God is not only affirming that man is indeed free, he is giving them a choice between life and death. People are faced with the challenge of making choices in their everyday lives, regardless of the circumstances and in the case of Adam and Eve, we all know how the story ended. It begs the question, if man was capable of disobeying his divine Creator, what more of society's moral inclinations?

What all three norms that regulate human conduct have in common is that they acknowledge that man is not perfect and is bound to act immoral at some point in their lives. In this regard, the adage, *you cannot legislate morality* is fastly becoming a fact. One can argue that commissions of inquiry should be done away with completely as it is susceptible to abuse and all at the expense of the fiscus however, based on the above analysis they serve a legitimate purpose *if used correctly*.

The Constitution is not cast in stone and is a living document and has given us the necessary tools to ensure the social contract is used for the benefit of the community at large. Amending the applicable legislation to give effect to this tool would truly

[325] K L Duckworth https://genius.com/Kendrick-lamar-pride-lyrics (accessed on 06/06/2023)
[326] https://www.biblegateway.com/passage/?search=Genesis+2&version=NIV (accessed on 07/06/2023).

promote the spirit, purport and objects of the Bill of rights as set out in section 39(2) of the Constitution.[327] Commissions are a great forum to seek the truth and if the manner in which they are conducted is not addressed it ultimately undermines the rule of law as accountability will not be achieved.

[327] The Constitution (n 14 above).

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