

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Case No: CCT 103/10**

In the matter between:

**TERRY CRAWFORD-BROWNE**

Applicant

and

**THE PRESIDENT OF THE REPUBLIC  
OF SOUTH AFRICA**

First Respondent

**THE GOVERNMENT OF THE REPUBLIC  
OF SOUTH AFRICA**

Second Respondent

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**APPLICANT'S SUBMISSIONS**

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## HEADS OF ARGUMENT ON BEHALF OF THE APPLICANT

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### 1. Introduction

- 1.1. This is an application, made in the public interest, for a declarator and mandamus aimed at securing the appointment of an independent judicial commission of inquiry into the arms deals concluded by the government. It is made by way of direct access to the Constitutional Court relying upon the power of the Court to entertain it conferred in terms of s 167(4)(e) of the final Constitution (FC).
- 1.2. In the alternative to the claim for a mandamus, relief is sought on the basis that the refusal and/or failure of the President to appoint a commission of inquiry is reviewable on the grounds that it is illegal and irrational in all the circumstances to fail or refuse to so appoint.
- 1.3. The factual matrix upon which the applicant relies is the fact or, *alternatively*, the reasonable apprehension, that the arms deals may be tainted by misfeasance and/or malfeasance, in the forms

of irregularities, fraud and corruption. This is based, *inter alia*, upon the criminal convictions of one Tony Yengeni, a former African National Congress (ANC) Chief Whip in parliament, and Schabir Shaik, a businessman and financial adviser to Jacob Zuma, the president of both the country and the ANC. The applicant also relies upon the call for a commission of inquiry made, albeit *obiter*, by Nicholson J in the case of **Zuma and Anor. v The National Directory of Public Prosecutions and Others**, 2006 (1) SACR 468 (D). The appeals by the NPA and former President Mbeki against the findings in that matter do not relate to the call for a commission of inquiry. This judicial *obiter dictum* echoes calls made by all political parties except the ANC which are represented in parliament, by faith based organizations, trade unions, the NGO sector and two of South Africa's Nobel Peace Prize winners. IDASA has called the government's response to allegations of wrongdoing in the arms deals the "*litmus test*" of the country's commitment to democracy and good governance.

- 1.4. Further factual background to the apprehension upon which the applicant relies is to be found in three books written as factually researched exposés of the arms deals. The De Lille dossier of

9 September 1999, presented to parliament by a member then representing the Pan African Congress (PAC), is, in terms of the directive of the Chief Justice relating to this hearing, also to be regarded as factually accurate for the purposes of argument before the court. It contains a litany of corrupt activities surrounding the procurement of the arms in question.

- 1.5. The application is opposed by the President on the basis that the refusal to appoint a commission of inquiry is within his (apparently unfettered) discretion, not irrational, not arbitrary and not inconsistent with his constitutional responsibilities and obligations.

## **2. Jurisdiction**

- 2.1. It is submitted that, as the subject matter of his claims is within the exclusive jurisdiction of this Court, the applicant is entitled to direct access.
- 2.2. The President has excepted to Amended Particulars of Claim filed by the applicant in the Western Cape High Court on the

basis that the High Court lacks jurisdiction in the matter, in which substantially the same relief is sought.

2.3. The applicant has conceded the merits of the exception because of the *ratio decidendi* in **Chonco's** case in this Court. (See **Minister for Justice and Constitutional Development v Chonco and Others**, 2010 (4) SA 84 CC at paragraph [43]). This decision came after the action was instituted by the applicant in the Western Cape High Court.

2.4. In these circumstances, it is submitted that this is the only Court to which the applicant can turn for adjudication of the cause of action pleaded and that he should accordingly be granted direct access to the extent that it is necessary to do so.

### 3. The basis for claiming a declarator

3.1. The applicant relies upon the founding provisions of ss 1 and 2 of the FC, read with s 84(2)(f), for claiming the declaratory relief he seeks. His contention is that under the rule of law foundational to South Africa's multi-party system of government, the President is obliged to ensure accountability, responsiveness and

openness. Conduct inconsistent with these foundational values is invalid. Obligations imposed by the FC, which include the responsibility of the President to appoint a commission of inquiry in the circumstances upon which the applicant relies, must be fulfilled. The refusal to appoint a commission of inquiry is accordingly constitutionally invalid.

- 3.2. Under s 84 the President has the powers entrusted by the FC, including those necessary to perform the functions of Head of State and Head of the National Executive.
- 3.3. In these dual capacities the President must, according to s 83 of the FC, uphold, defend and respect the FC as our supreme law and must promote that which will advance the Republic.
- 3.4. Some of the responsibilities gathered in s 84 were previously those of the crown, the governor general, the head of state pre-1994 and some are novel responsibilities included as a consequence of the conversion of the state into a constitutional democratic new order as foreshadowed by the interim Constitution (IC).

3.5. For the purposes of this application it is submitted that the history of the responsibility to appoint a commission of inquiry is irrelevant. It matters not whether the President is acting as Head of State or as Head of the National Executive. What does matter is that all conduct of the President must uphold, defend and respect the Constitution. This can only be achieved if there is respect for the tenets of accountability, responsiveness and openness. The President must promote that which advances the Republic. He is bound by the substantive fundamental fairness element of the rule of law.

3.6. It follows that the responsibility to appoint a commission of inquiry, whether it is best characterized as a constitutional obligation entrusted to the President, a constitutional responsibility, a residual prerogative power of the Head of State or any other category, is expressly a responsibility which has to be discharged in accordance with the obligations of s 83 to uphold, defend and respect the FC.

3.7. The failure to appoint a commission of inquiry is justiciable on the basis that in the dispensation that is the product of the national accord that preceded the adoption of the FC, all conduct (and all

laws) can be subjected to constitutional scrutiny under s 2 of the FC. Power was handed from the sovereign parliament of the old regime to the new Constitution which itself flows from the historic compromise which gave birth to the new order. It is of the essence of constitutionalism that there are limits on power. These include the checks and balances which ensure the proper separation of powers and the elimination of excesses or omissions which undermine the rule of law and the democratic order.

3.8. The responsibility to appoint a commission of inquiry has to be exercised in a way that is constitutional. The failure to discharge the responsibility when the facts cry out for its discharge is equally unconstitutional and, upon being challenged, is susceptible to the granting of the declaratory relief claimed in this application. A President cannot accountably and responsively ignore or refuse well founded requests for the appointment of a commission of inquiry in the circumstances that must, in terms of the Chief Justice's directions of 7 February 2011, be assumed to prevail for the purposes of adjudicating this argument.

3.9. Had there been a proper criminal investigation free from political interference by a unit of fully independent corruption fighters of

the kind contemplated in the United Nations Convention against Corruption to which the country is a party, the need for this application would have fallen away. No such organization exists since the dissolution of the Directorate of Special Operations (DSO) or Scorpions and the law enforcement authorities at present in place have ceased investigating the matters.

- 3.10. Political expedience or, heaven forfend, the protection of those involved nefariously in the arms deals, is not a basis for refusing to appoint a commission of inquiry. Concerns that the interests of the state will not be advanced if the arms deals are cancelled as a result of any findings of the commission of inquiry are misplaced. Ironically, the *in pari delicto* rule will work against the corrupt European arms dealers and in favour of the beneficiaries of bribes. It is the taxpayers that will benefit from cancellation of the deals via the refund of the purchase prices paid. Accountable and clean governance that is openly responsive to the needs of the people requires that there be a commission of inquiry. It is in the national interest as well as in the interests of national security, which is not to be confused or conflated with the security of the ANC, that a commission of inquiry be appointed.

3.11. It is accordingly submitted that it is appropriate that the declaratory relief claimed be granted.

#### 4. The basis for claiming a mandamus

4.1. It is always within the discretion of the Court to grant mandatory relief. This discretion must be exercised judicially and in the light of the facts and circumstances that pertain to the particular matter before the Court.

4.2. The facts which militate in favour of granting the *mandamus* are bound up in the history of the presidency since the retirement of President Nelson Mandela. Both President Thabo Mbeki and the current incumbent were involved in the conclusion and implementation of the arms deals. The latter was regarded by the DSO as a suspect in the arms deals corruption and will be key figure in any proceedings of the commission of inquiry. When corruption charges against him, relating *inter alia* to arms deals corruption, were withdrawn on the flimsiest of technical pretexts, the then acting NDPP, Molokoti Mpshe, insisted that a good case on the merits of the charges so withdrawn exists.

Mpshe's decision to withdraw is the subject of a challenge that will be finally adjudicated in this court. The "recall" of President Mbeki is a reminder that in the ANC party discipline trumps compliance with constitutionally ordained methods of interaction with any incumbent president.

4.3. There is accordingly a danger that the political party to which the current president belongs will instruct him not to appoint a commission of inquiry, or that he will not do so for obvious personal reasons that are in conflict with his constitutional responsibilities and obligations. He threatened, in March 2008, that he would bring others down with him if he were successfully prosecuted.

4.4. In these circumstances, a serious risk exists that the President may choose to disregard a declaratory order. The President cannot necessarily be relied upon "to do the right thing" upon the granting of a declarator. [Compare **Nyathi v The MEC for Department of Health**, Gauteng, 2008 (5) SA 94 (CC)] The Court, which is answerable only to the law and the FC, will be exercising its functions judicially by granting the mandamus claimed.

5. **The entitlement to relief on review**

5.1. The alternative claim, which asks that the decision not to appoint a commission of inquiry be set aside on review, is inserted as an alternative to the declaratory and mandatory relief claimed. It is only proceeded with should the Court for any reason decide that the declarator and *mandamus* are not available to the applicant.

5.2. The basis for reviewing the decision not to exercise the constitutional responsibility is that it is arbitrary, capricious and irrational not to do so and that the President in so refusing has acted unreasonably and in a manner lacking in *bona fides*.

5.3. The response of the President to the allegations made in this regard is instructive, in that he has eschewed deposing to any affidavit and has studiously avoided dealing with the specifics of the factual matrix upon which the applicant relies.

5.4. The submission of the applicant is that the refusal to appoint a commission of inquiry is reviewable on the normal basis under PAJA but that, in the circumstances, this type of review need not

be resorted to as the breaches of the FC are so plain and egregious that the main declaratory and mandatory relief should follow from the unconstitutionality of the refusal to so appoint.

6. **The defences foreshadowed in the answering affidavit**

- 6.1. The President seems to suggest that he has some sort of unfettered personal discretion to appoint any commission of inquiry. This suggestion is unconstitutional.
- 6.2. The unconstitutionality of this posited unfettered discretion flows from the misguided underlying notion that too great a concentration of power is placed in the hands of the President. This conflicts with the basic tenets of constitutionalism.
- 6.3. If there is some form of unfettered discretion to appoint a commission of inquiry in discharge of the responsibility in question, then the foundational values of accountability, openness and responsive governance are undermined as is the substantive fundamental fairness requirement of the rule of law.

- 6.4. Constitutionalism is based upon checks and balances between the branches of government.
- 6.5. The royal prerogative, to appoint a commission of inquiry, is not part of our law and has no place in a constitutional state in which the FC is supreme and the rule of law a cornerstone value of the dispensation in place.
- 6.6. If none of the declaratory, mandatory or review relief is available to the applicant, too much power is left concentrated in the hands of the President. There are no proper checks and balances upon the exercise of his responsibility to appoint a commission of inquiry, either in the present circumstances or in general.
- 6.7. Unrestrained executive power of this kind is fundamentally inconsistent with our FC and the values according to which it should be regarded as the supreme law of the land. The rule of law, which includes what this court has described as including the substantive requirements of “*fundamental fairness*” in **Masethla’s** case would be breached if the unfettered discretion contended for by the President were to be recognized by the court. (See **Masethla v President of the Republic of South**

**African and Another** 2008(1) SA 566 (CC) at [179], [186] and [190])

- 6.8. Accordingly, it follows that there would be a flaw in the nature of the responsibility placed on the President in s 84(2)(f) which would render the provision inconsistent with the foundational values of s 1 if the “*unfettered discretion*” argument is accepted.
- 6.9. It is apparent from the answering affidavit filed on behalf of the President that his advisors have narrowly construed the words “*the application for direct access*” as they are used in the Chief Justice’s first directions in this matter. This is surprising, and perhaps disingenuous, in the light of the President’s most recent exception filed in the Western Cape High Court, in which the President takes the point that only this court has jurisdiction to entertain a claim of the nature here in issue. The applicant has conceded the validity of the point and has filed his consent to judgment on exception as regards the merits. The only issue left in the exception is the question of costs. This is an issue which does not concern this court in these proceedings.

6.10. The failure of the President to deal with the merits of the matter in his answering papers, while perhaps attributable to the narrow interpretation given to the words “*application for direct access*” referred to above, raises procedural difficulties for the President. Strictly speaking, he is precluded from now dealing with the merits as he has chosen to content himself with technical defences without pleading over on the merits. However, as the direction of the Chief Justice is arguably ambiguous in this regard, the President ought to be afforded the opportunity of regularizing his papers by dealing on oath with the factual matrix upon which the applicant relies, preferably before the hearing scheduled for 5 May 2011. This aspect is dealt with in greater detail below.

6.11. The first point taken by the President is the *lis pendens* defence. This defence is inapplicable in the light of the facts set out in the preceding paragraph. The only reason for not withdrawing the action instituted in the Western Cape High Court is that the possibility exists that any material disputes of fact which the President may raise can, in the discretion of this court, be referred to that court to take oral evidence and to determine such

disputes of fact along the lines foreshadowed in paragraphs (e) and (f) of the notice of motion in this application.

**Record, pages 3 and 4**

6.12. It should be noted that the mere referral of the material disputes of fact to the High Court would not constitute an encroachment upon this court's sole jurisdiction in the matter, as the determination made in respect of the disputed facts would, as in the case of a commissioner, have to be placed before this court when it deals with the merits of the applicant's claims on the basis of the facts as so determined. At this stage it is premature to speculate upon the question of whether the President will be able to raise sufficient genuine and material disputes of fact to justify a referral to oral evidence, whether before the High Court or a commissioner as contemplated in prayer (e).

6.13. The advice given by the President's legal advisors regarding direct access to this court, as set out in paragraph 6 of the answering affidavit, is not applicable in cases such as this, in which this court has sole jurisdiction to adjudicate upon the conduct of the President. It is also fundamentally at odds with the line taken in the exception as to jurisdiction.

**K L G Terry, paragraph 6, record page 137**

6.14. The reasoning in paragraph 7.2 of the answering affidavit is both disingenuous and misconceived. The President is trying to have his cake and eat it. He excepts to the action in the High Court and then contends that, because of disputes of fact which he threatens to raise but does not actually raise, it is inappropriate to apply for direct access. This circuitous reasoning loses sight of the type of relief claimed in prayers (e) and (f) of the notice of motion. At this stage it is simply not clear whether the disputes of fact which may be raised will justify the referral of the matter to oral evidence before a commissioner or the High Court, because the President has been astute to avoid dealing on oath with the specifics of the allegations made in the particulars of claim as regards the merits of the claims in this matter.

**K L G Terry, paragraph 7.2, record page 138**

6.15. The *res judicata* point taken in paragraph 7.3 of the answering affidavit is misconceived as there was no previous attack upon the legality and rationality of any presidential decision declining or failing to appoint a commission of inquiry.

**K L G Terry, paragraph 7.3, record pages 138 – 139**

6.16. The allegation in paragraph 7.6 that “*the continuous litigation by the applicant on the subject matter of the arms deal borders on the vexatious*” is not helpful to the President as a defence, in that an abuse of process of the sort the President seeks to raise requires that the conduct complained of actually be vexatious. It is insufficient that the conduct might merely border on the vexatious. The attempt to create an atmosphere adverse to the applicant is deplorable. The applicant is certainly a *determined* litigant in the public interest. This is a far cry from being vexatious or abusing the process of the court.

**K L G Terry, paragraph 7.6, record page140**

6.17. His failure to pay costs orders is legally irrelevant. The fact that he has beggared himself in the process of attacking the propriety of the arms deals to the point that a *nulla bona* on a writ of execution was issued is not germane to the issues in this case, nor is the unsuccessful attempt on the part of the former Minister of Finance to sequester him.

6.18. It is the President who is misdirected in alleging, as his deponent does in paragraph 17 of the answering affidavit, that it would be wrong that “*this court [will] sit as a court of first and last instance*”

in the matter. As this court is the only court which has jurisdiction in this matter, it will have to sit as a court of first and last instance and may have to refer material disputes of fact, if any, and if they are sufficiently substantive and germane to justify so doing, for the hearing of oral evidence, either before a commissioner or the High Court. The applicant did not proceed by way of action in the High Court merely because disputes of fact were anticipated. He did so also in order to take advantage of the discovery, subpoena and commissions *de bene esse* procedures available in actions.

**K L G Terry, paragraph 17, record pages 148 – 149**

6.19. For example, a subpoena *duces tecum* on the Treasurer General of the ANC to produce records of all donations made to the ANC could be illuminating and extremely relevant.

6.20. Whilst it is correct that s 84(2)(f) of the Constitution confers a discretion upon the President, it is a discretion that must be exercised in a manner which accords with the rule of law and is thus consistent with the principles of legality and rationality. This appears to have been conceded by the President's deponent in paragraph 21 of the answering affidavit.

**K L G Terry, paragraph 21, record page 150**

6.21. The defence of former President Motlanthe's refusal to accede to former President De Klerk's and Archbishop Tutu's request for a commission of inquiry is misplaced. In the circumstances set out in paragraph 12 of the Amended Particulars of Claim (**record, pages 45 – 47**), the refusal is both irrational and arbitrary in that it completely fails to appreciate, or even deal with, the civil law consequences of an investigation of the arms deals. Furthermore, the former President's invitation to refer matters to the police at a time when the police had neither the capacity nor the will to investigate matters of high level corruption is cynical and capricious. When the request was made, the DSO was in the process of being dismantled, its tame successor, DPCI, had not yet been formed and, as it is not under independent control, there is no prospect of high level corruption properly being investigated by it.

6.22. The fact that General Dramat has decided to close police investigations into the arms deals shows that no reliance can be placed upon SAPS to investigate corruption in high places. DPCI simply lacks the necessary sapiential authority to do so. Indeed, it has been conceded that the DSO was closed because it was prepared to so investigate.

**Record, page 20, paragraph 18**

6.23. The joint report of the 14<sup>th</sup> November 2001 has the conclusion that no evidence was found of any improper or unlawful conduct by the government but its actual content is very much to the contrary. Furthermore, 3 books have been written since its publication, all of which point to grossly improper and unlawful conduct in the procurement process.

6.24. It is fallacious to suggest that this court cannot receive oral evidence. It is well able to do so, either via a commissioner or by referring disputes of fact to trial in the High Court. As this court is the only court with jurisdiction and the High Court is no longer seized with the merits of the matter, this is the only court to which the applicant can turn for the type of relief he seeks.

**7. Analysis of the factual matrix upon which the applicant relies**

7.1 The applicant relies on the various facts and circumstances set out in his founding affidavit and in paragraphs 7 and 8 of the Amended Particulars of Claim annexed to his affidavit in this matter.

**Record, page 30 et seq.**

7.2 The applicant avers in the introductory words to paragraph 7 of his amended particulars of claim that after proper discovery of documents and the issue of subpoenas *duces tecum* as well as the holding of commissions *de bene esse*, there could be a supplementation of the allegations upon which he relies. The President has not responded in any way to these averments and they should be regarded as common cause in this application.

**Record, pages 30 - 31**

7.3 In this regard, the admissions made in the British House of Commons regarding “*commissions*” in the BAE/Saab deal, details of the criminal investigations elsewhere in Europe and the receipts records reflecting donations to the ANC could all be of assistance. The DSO files of its investigation of wrongdoing in the arms deals would also be instructive.

7.4 Having regard to the nature of the relief claimed in these proceedings, it is submitted that, for the purposes of compelling the appointment of a commission of inquiry, it would be sufficient for the applicant to do no more than *prima facie* establish that there was corruption, malfeasance or misfeasance in the

procurement process relating to the acquisition of the arms in question.

7.5 The applicant is setting out to show that there are good grounds for appointing a commission of inquiry, sufficiently good to render the refusal to so appoint arbitrary and irrational.

## 8. **The technical defences put up by the President**

8.1. It is unfortunate that the President has found it necessary to resort to obfuscatory technicalities in so important a matter. There is no merit in any of the technical defences put up on his behalf. They have been ignored in the directive of the Chief Justice, quite rightly so.

8.2. The *lis pendens* point has been disposed of finally by the filing of the consent to judgment on exception in the Western Cape High Court. Any *lis* relating to costs of the exception is irrelevant to the determination of the issues in this matter because this is public interest litigation.

- 8.3. Reliance on the doctrine of *res judicata* is misplaced as the issues relating to the compelling of a commission of inquiry have not previously been canvassed in any shape or form.
- 8.4. If the President wishes to insist upon a ventilation of the factual disputes which may exist before the appointment of a commission of inquiry then it will be necessary either to appoint a commissioner to determine the disputes or to refer the matter to the Western Cape High Court for the purpose of adjudicating the specific and material disputes which arise from a proper response on oath to the facts set out in the particulars of claim.
- 8.5. At this stage it may be premature to give consideration to these procedural matters as an affidavit dealing in specific detail with the facts has not been forthcoming. It may be prudent to direct the President to respond on oath and in detail so that the applicant can be apprised of the specific disputes of fact that may be raised and the Court can determine whether or not these disputes render it necessary to delay the granting of substantive relief pending the determination of any material factual issues.

9. **The Chief Justice's Directions Dated 7 February 2011**

9.1. The Chief Justice issued directions on 7 February 2011, in paragraph 3 of which he asked that six specified issues be dealt with in the written and oral Heads in this matter.

9.2. Applicant deals with the questions seriatim.

9.3. *In what circumstances is this Court empowered to scrutinize the exercise by the President of his powers to appoint a commission of inquiry in terms of section 84(2)(e) of the Constitution?*

9.3.1. This question has been exhaustively and extensively discussed in broad terms in a note written by **Alistair Price** in the **South African Law Journal**, Vol 127, Part 4, 2010, pages 580 – 591.

9.3.2. In essence the executive decision of the President to refuse to appoint a commission of inquiry is being subjected to a rationality review because, in a constitutional democracy under the rule of law, such as that envisaged in section 1 of the FC, conduct which is

inconsistent with constitutional obligations is invalid under section 2 of the FC.

- 9.3.3. It is necessary for the applicant to establish that, in all the circumstances, it was irrational of the President to refuse to appoint the commission of inquiry requested by two of South Africa's living Nobel Peace Prize winners on 1 December 2008.

**Record, pages 78 – 79 (the request);  
Record, pages 80 – 81 (the refusal  
of the request)**

- 9.3.4. The said request has been followed up on by the applicant by way of letter to the current President dated 8 February 2010 to which the President has not directly responded notwithstanding the elapse of more than 1 year.

**Record, pages 119 – 120**

- 9.3.5. In the factual circumstances set out in the exchange of correspondence of Archbishop Emeritus Tutu and former President De Klerk with former President Motlanthe, as well as the follow-up request by the

applicant, it is necessary to prove that it is irrational to refuse to appoint a commission of inquiry. Any refusals to exercise public powers or exercise public law responsibilities are subject to rationality review, as in **Albutt's** case. [See **Albutt v The Centre for the Study of Violence and Reconciliation, and Others**, 2010 (3) SA 293 (CC)]. It cannot be said that the presidential refusals in this case were "*rationality connected or related to a legitimate government purpose*", as they were not aimed at some legitimate purpose and did not serve any such purpose. Indeed there is no explanation on record setting out what legitimate purpose was served by the refusals. In the absence of a proper purpose irrationality is (or will, after disputed facts are dealt with, be) proved.

9.3.6. The factors upon which the applicant relies for proof of irrationality, are these:

9.3.6.1. There is no current South African investigation of the allegations of corruption and misfeasance in relation to the public

procurement process carried out in relation to the arms deal. In the light of the convictions of Yengeni and Shaik, the investigation of Zuma, and the foreign criminal investigations based in Europe of the very deals and the same arms dealers who dealt with the government, it is impossible to escape the conclusion that the rule of law will be negatively impacted if these allegations of corruption are true.

9.3.6.2. The Directorate of Special Operations, was the last State institution to seriously investigate the arms deal and it has been disbanded since July 2009. The last person with the necessary sapiential authority and personal independence to drive such an inquiry was the National Director of Public Prosecutions, Vusi Pikoli, who was suspended in September 2007 and eventually dismissed without good reason to do so. He has been exonerated and paid a

handsome settlement but has been lost to private sector employment. Neither of his successors has displayed his appetite for complying with the duty to act without fear, favour or prejudice in the investigation of the arms deals.

9.3.6.3. DPCI, the successor to the DSO, has closed its files. Yet it is the only unit which could theoretically investigate criminality (not the civil consequences) in the arms deals. As there are manifestly both civil law and criminal law aspects to the inquiry, it is submitted that an independent commission of inquiry is the only rational means to serve the dual purposes of investigating the criminal and civil ramifications of the allegations of corruption, malfeasance and misfeasance in the procurement of the arms in question. This would promote our democracy, given the need for openness and accountability as contemplated by s 1 of the FC.

9.3.6.4. The Public Protector has remained unresponsive to the overtures of the applicant sent by e-mail on 30<sup>th</sup> August 2010 (record p 121).

9.3.6.5. The Standing Committee on Public Accounts in Parliament has been thwarted by the decision of DPCI to close its files and by the general unwillingness of the National Director of Public Prosecutions to investigate the matter. There has been no response to the applicant's letter to the chairman of SCOPA dated 6<sup>th</sup> August 2010 (record p 123 – 131).

9.3.6.6. The appointment of the commission of inquiry is not necessarily dispositive of the matter. The President has by his refusal to so appoint erred procedurally, not substantively. This is because an inquiry is not the final word in the matter. The President is not bound by any findings and recommendations

that the inquiry may make and the commission itself will not take action as a result of its findings. It could even be clothed with powers of granting indemnity against prosecution to witnesses who co-operate with it in its functioning. As there is no substantive failure in issue, there can be no question of the usurpation of executive power by the court and it would accordingly not be inappropriate to order the President to take the procedural step of so appointing.

9.3.6.7. The fact that the post Polokwane ANC leadership has confidentially held an internal inquiry into the arms deals and has not made the findings of that inquiry public is of significance in that a clean bill of health would surely have been given publicity.

9.3.7. In these circumstances, the inference is inescapable that there is no political will actually and openly to get to grips with the allegations of impropriety surrounding the

arms deals. By compelling an inquiry this court will immeasurably enhance the public confidence it already enjoys and will bolster its legitimacy as the main bulwark against the abuse of power by serving the law and the FC as a check on the incorrect and improper exercise of procedural executive power which is inherent in the refusals to appoint a commission of inquiry in circumstances which cry out for the appointment to be made.

9.4. *Does the Constitution oblige the President to exercise his power to appoint a commission of inquiry whenever there are indications of corruption, malfeasance and misfeasance in relation to public procurement?*

9.4.1. It is not the applicant's case that there is an obligation on the President to so exercise his power. The power derives from the responsibility placed upon the President in terms of section 84(2)(e) of the FC and is a power which has to be exercised in accordance with the precepts of the rule of law which entail legality, rationality and fairness. This can be seen from the

various cases cited in Alistair Price's note, supra and from Masethla's case, supra.

9.5. *If not, in what circumstances do indications of corruption, malfeasance and misfeasance in relation to public procurement oblige the President to appoint a commission of inquiry?*

9.5.1. The applicant contends that the circumstances sketched in the papers filed of record and, in particular, those referred to in paragraph 9.3.6 above, create a factual matrix in which it is patently irrational to fail or refuse to appoint a commission of inquiry.

9.5.2. The failure of the criminal justice administration, the Office of the Public Protector and SCOPA, to actually get to grips with the serious allegations of corruption, malfeasance and misfeasance, which were first aired in Parliament as long ago as the 9 September 1999, is reason enough to oblige a President acting in terms of the rule of law and the precepts of legality, rationality and fairness to appoint a commission of inquiry.

9.5.3. It is submitted that, in the highly unusual (perhaps unique) circumstances of this case, an independent commission of inquiry is the only rational means to serve the dual purposes of investigating the criminal and civil ramifications of the allegations of corruption, malfeasance and misfeasance in the procurement of the arms in question.

9.6. *More particularly, in the circumstances alleged by the applicant, and assuming that all the allegations of fact he advances are true, does it follow that the President is constitutionally obliged to exercise his power to appoint a commission of inquiry?*

9.6.1. The applicant submits that it would be irrational and accordingly unconstitutional conduct on the part of the President to persist in the failure and refusal to appoint a commission of inquiry in the face of the mountain of evidence contained in the founding papers filed by him, read with the 3 books, court records, judgments and records of investigation to which he refers as part of the allegations of fact which he advances.

9.6.2. It is once again submitted that, in the highly unusual (perhaps unique) circumstances of this case, an independent commission of inquiry is the only rational means to serve the dual purposes of investigating the criminal and civil ramifications of the allegations of corruption, malfeasance and misfeasance in the procurement of the arms in question.

9.6.3. Accordingly, the applicant submits that the answer to this question is yes.

9.7. *If the answer to (d) is yes, what steps should the Court take to resolve the disputes of fact?*

9.7.1. As the President has contented himself with a bare denial of the allegations of fact advanced by the applicant, and has not specifically responded to paragraphs 7 and 8 of the Amended Particulars of Claim filed of record, it is, with submission, perhaps premature to ask this Court to take steps to determine whether there are indeed material disputes of fact until

such time as a proper response on oath to the Amended Particulars of Claim has been filed.

9.7.2. An appropriate step to take at this stage, could be to order the President to file an affidavit responding to the substance of the applicant's claims and to give the applicant leave to approach the Court for directions, should this be required.

9.7.3. The relief set out in prayer (e) and, in the alternative, prayer (f) of the Notice of Motion in this matter is predicated upon the President raising material disputes of fact in respect of the averments made by the applicant in his Amended Particulars of Claim. As no affidavit traversing the averments made in the Particulars of Claim has been placed before this Court, notwithstanding the request that this be done, it is impossible for the applicant, and indeed the Court, to determine whether there are any material disputes of fact to refer to trial, either before a commissioner or for hearing in the Western Cape High Court.

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9.7.4. In these circumstances, the President should be ordered to respond formally on oath to the averments so made in order that both the applicant and the Court can determine whether there are any material disputes of fact which need to be resolved prior to a hearing on the merits of the matter.

9.8. As the answer to (d) is yes, the last question falls away.

9.8.1. It is, however, possible that such disputes as may be raised in a proper response on oath to the Amended Particulars of Claim may not be sufficiently material to require their resolution prior to the Court being able to dispose of the application. Ideally, the applicant would be appreciative of a further direction (as anticipated in paragraph 6 of the directions dated 7 February 2011) requiring the President to file an affidavit dealing with the Amended Particulars of Claim within such period as the Chief Justice directs **before the hearing of this matter on Thursday 5<sup>th</sup> May 2011**. This may create

greater clarity as to whether or not there are material disputes of fact that will need to be resolved prior to the application being disposed of by the Court. The matter could then possibly be determined finally at the hearing scheduled for 5 May 2011.

9.8.2. Once an affidavit dealing with the merits of the claims is available, it will be feasible to determine whether the relief claimed in prayers (e) and (f) needs to be considered, or whether there is sufficient that is common cause to found the granting of the substantive relief which the applicant seeks.

## 10. **Conclusion**

10.1. Upon a proper conspectus of all the facts and circumstances, it is submitted that the most appropriate way of dealing with this application, should the Court not be minded to give the President the opportunity of dealing with the allegations of fact contained in the Amended Particulars of Claim, is to grant the declarator and *mandamus* set out in prayers 1 and 2 of the Notice of Motion.

*Alternatively*, the President should be directed to deal on oath *seriatim* with the allegations made in the Amended Particulars of Claim attached to the founding affidavit, preferably in advance of the hearing scheduled for 5 May 2011, so that it can more accurately be determined whether there are material disputes of fact that need to be referred to oral evidence along the lines suggested in prayer (e), *alternatively* prayer (f), of the Notice of Motion.

**Paul Hoffman SC**

**Peter St Clair Hazell SC**

11 March 2011