

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE PROVINCIAL DIVISION)

Case number:

In the matter between:

Terry Crawford-Browne

Plaintiff

and

The President of the Republic of South Africa

First Defendant

and

The Government of the Republic of South Africa

Second Defendant

PARTICULARS OF PLAINTIFF'S CLAIM

The parties

1. The Plaintiff is Terry Crawford-Browne, an adult male retired banker, of Sandown Crescent E105, Royal Ascot, Milnerton, Cape Town.
2. The Plaintiff institutes these proceedings in the public interest under section 38 (d) of the Constitution.

3. The First Defendant is the President of the Republic of South Africa, nomine officio, of Tuynhuys, Gardens, Cape Town.

4. The Second Defendant is the Government of the Republic of South Africa, c/o the State Attorney, Liberty Life Building, Long Street, Cape Town. No relief is claimed against it.

The background

5. On or about 3 December 1999 and at Cape Town the Second Defendant entered into a number of contracts concerned with the acquisition of armaments (the arms deals) as follows:

5.1. three submarines from the German Submarine Consortium

5.2. four frigates from the German Frigate Consortium

5.3. thirty utility helicopters from Agusta

5.4. twenty-four Hawk trainer aircraft from BAE

5.5. twenty-eight Saab Gripen JAS39 fighter aircraft from

BAE/Saab

6. It is so, alternatively, there is a reasonable apprehension, that as a matter of public concern, one or more or all of the said contracts are

tainted by fraud, corruption or other impropriety or irregularity (collectively “wrongdoing”), which, if properly investigated, would justify the cancellation of the contracts and the recovery, in the public interest, of all amounts paid under them by the Second Defendant.

7. The said truth, alternatively reasonable apprehension, is based upon the following allegations and/or facts and/or circumstances already in the public domain which, after proper discovery of documents, the issue of subpoenas *duces tecum* and the holding of commissions *de bene esse* in terms of the Uniform Rules of the above Honourable Court, could be supplemented:

7.1 The fact that three books have been published on the topic and authored by the Plaintiff, Andrew Feinstein and Paul Holden, more fully described in the letter of demand addressed to the First Defendant by Plaintiff’s attorneys of record on 7 January 2009 and annexed marked “A”. [The First Defendant is required to plead only to the allegation that the three books have indeed been published and to the specific factual allegations set out in detail in appendix “B” to the Holden book, as annexed and marked “B”.]

7.2 The conviction of former African National Congress Chief Whip Tony Yengeni on a charge of fraud arising from his involvement with an arms dealer and the acquisition by him at a discount of a 4X4 Mercedes Benz sport utility vehicle. This matter was finally disposed of on appeal on 11 November, 2005.

7.3 The conviction in the Durban High Court on 2 June 2005 of Schabir Shaik, former financial adviser to Jacob Zuma ("Zuma"), current president of the African National Congress, and his corporate co-accused, on charges of fraud and corruption arising from his, his companies' and Zuma's roles in the arms deals.

7.4.1 The pending charges against Zuma insofar as they relate to his involvement in the acceptance of money from Thint, a company which was involved in one of the arms deals, to protect it from investigation.

7.4.2 Zuma's threat, uttered orally in March 2008, that if he is convicted on the said charges others will be exposed by him.

7.5 The recommendations concerning the appointment of a commission of inquiry made by Nicholson J in his judgment in the matter

between the said Zuma and the National Prosecuting Authority delivered in the Natal Provincial Division of the High Court on 12 September 2008.

7.6 The institution of criminal proceedings and investigations against persons and entities allegedly corruptly involved in the arms deals contracts in foreign jurisdictions as detailed in the schedule annexed marked "C". [The First Defendant is required to plead to each and every allegation made in the said schedule.]

7.7 The key findings in the Joint Investigating Team report of the Public Protector, the Auditor General and the National Director of Public Prosecutions dated 14 November 2001 and referred to expressly in paragraph 6.8 and its sub-paragraphs of the demand annexed marked "A" [The First Defendant is required to plead to each allegation made in the said paragraph and in its sub-paragraphs.]

7.7.1 The Plaintiff relies upon the insertion into the report, under pressure from the Presidency of the "key finding" numbered 14.1.1 at a late stage and in a manner which contradicts the detailed substance of the report of the Joint Investigating Team.

7.8 The activities of the parliamentary Standing Committee on Public Accounts, including its investigations and its reports on the topic of irregularities in the arms deals. [It is not necessary to plead to the contents of the reports as Plaintiff relies only on their existence in claiming the relief sought in this action].

7.9 The existence of the so-called “de Lille dossier” which was produced to Parliament on 9 September 1999 by the Honourable Patricia de Lille MP. [It is not necessary to plead to the contents of the said dossier, Plaintiff relies only on its existence in claiming the relief sought in this action.]

7.10 The economic and legal irrationality of purporting to expend R30.3 billion on arms in order to obtain the supposed benefits of off-set deals worth R104 billion which would create 65 000 jobs. In this regard:

7.10.1 The costs of the arms deals have increased from the originally announced amount of R30.3 billion to over R50 billion notwithstanding the fact that the August 1999 Affordability Team report to the Ministers’ Committee on the Affordability of the Defence Strategic Armaments Packages recommended in paragraph 5.5.1, expenditure of not more than R 16,5 billion in order to stay within what the said report described

as “internationally recognized safety levels” while warning in paragraph 6.1.1.4 that the benefits related to the acquisitions were “not nearly as certain as their costs”.

7.10.2 The 65 000 jobs, or most of them, have not materialized, as anticipated by the Affordability Team.

7.10.3 The off-set deals themselves, alternatively most of them, have not materialized, as so anticipated.

7.10.4 The immediate cost of any supposed benefits of the arms deals have by far outweighed such possible benefits as may have accrued, or may in future accrue, to the nation as a consequence of the supposed off-sets negotiated by Second Defendant and, indeed, from the acquisition of the armaments in itself.

7.10.5 There was no need for any of the arms acquired in terms of the arms deals in that there has at all material times been no identifiable threat to the national security of South Africa, either current or future, for which they could possibly be used.

7.10.6 The armaments actually acquired have either been useless or have been underutilized.

7.10.7 The prescripts of section 217 of the Constitution have been breached in that the system (if any) by which the arms deals were concluded was not in any way fair, equitable, transparent, competitive and cost-effective.

7.10.8 Accordingly, the arms deals were, or may have been, unconstitutionally concluded, are, or are possibly, invalid under section 2 of the Constitution, and fall, or may fall, to be set aside as such.

7.11 The announced costs of the arms deals of R30.3 billion did not include -

7.11.1 the costs to the nation of financing the deals by way of loans,

7.11.2 appropriate provision for currency exchange rate fluctuations
and

7.11.3 appropriate provision for inflation

in arriving at the costs of the arms deals so announced by Second Defendant in 1999 at the time of their conclusion.

7.12 Some of the assets of Fana Hlongwana, an adviser to the then Minister of Defence, the late Joe Modise, have been frozen pursuant to an order of Court obtained in November 2008 apropos his involvement in corrupt dealings and illegal commissions in the arms deals.

7.13. The Sunday Times published a front page report in August 2008 to the effect that former President Mbeki (“Mbeki”) received a bribe of R30 million in the arms deals, of which bribe he passed on an amount of R28 million to his party, the African National Congress, and R2 million to Zuma.

7.14 No defamation or other proceedings of any kind have since been instituted against the Sunday Times by reason of its publication of the said report by -

7.14.1 Mbeki, who has been quick to litigate to protect his alleged reputation and dignity in a lesser context concerning Nicholson J’s finding of improper interference in the independence of the National

Prosecuting Authority in its prosecution of Zuma on, inter alia, charges of corruption emanating from the arms deals,

7.14.2 Zuma, despite his predilection for defamation litigation against the fourth estate aimed at protecting his alleged reputation and dignity (there are at least seven such actions pending, none of which concern allegations as serious as those made in the said Sunday Times report pleaded in paragraph 7.13 above),

7.14.3 The African National Congress, which has not made its own 2008 fact gathering exercise concerning the arms deals public, an exercise initiated properly to inform its new leadership on the topic following changes in its leadership after its Polokwane conference in December 2007.

7.15 The African Peer Review Mechanism's Country Review Report Number 5 on the Republic of South Africa recommends in its paragraph 940 on page 283 that the private funding of political parties requires attention if the fight against corruption is to achieve maximum success.

7.16 The said recommendation has been ignored by the Second Defendant and no steps to regulate the private funding of political parties have been taken by it.

7.17 The report of the Independent Panel Assessment of Parliament published in January 2009 concludes at page 46 that Parliament should continue to exercise its oversight role with respect to the arms deals and should revisit the arms deals and take such steps as are necessary, including a debate on the adoption of a resolution calling for the appointment of a judicial commission of inquiry into the arms deals.

7.18 The Chairman of the parliamentary Standing Committee on Public Accounts, Themba Godi ("Godi"), complained in public on or about 16 January 2009 that the attempts of his committee to obtain answers from government departments, Armscor and the National Prosecuting Authority to its questions concerning the arms deals had been met with a refusal of co-operation. Godi threatened to summon the National Prosecuting Authority, Armscor and the Department of Trade and Industry to appear before his committee on the basis that, in his own words: "If they can't write, perhaps they can talk".

8.1 The Plaintiff has laid criminal complaints concerning perjury in the cover up of impropriety in the arms deals. The Plaintiff's complaint is dated 20 August 2008.

8.2 A businessman, Richard Young, has by way of a letter dated 26 March 2008, requested the National Prosecuting Authority to investigate corruption in the arms deals.

8.3 The said Young claims to be a victim of the corruption in the arms deals.

8.4 Young's company CCII has been paid R15 million by the Second Defendant in settlement of its damages claims relating to the allegations of corruption.

8.5 In addition ECAAR-SA, of which Plaintiff is chairman, has drawn the attention of the Public Protector to alleged wrongdoing in the arms deals by way of a letter dated 26 January 2007, a copy of which is attached marked "D".

8.6 No discernible progress of whatsoever nature has been made in the investigation of the said matters pleaded in paragraphs 8.1, 8.2 and 8.5 above despite acknowledgement of receipt thereof.

The requests and demand

9. On 1 December 2008, Archbishop Emeritus Desmond Tutu and former President FW de Klerk jointly wrote an open letter to the First Defendant requesting the appointment of a commission of inquiry into the arms deals. A copy of their request, setting out their motivation for it, is annexed marked "E". Eminent South Africans supported this request, among them the late Helen Suzman and Mamphela Ramphele, who is a former Vice Chancellor of the University of Cape Town. The Plaintiff also joined in making the request.

10. The said request is but one of many similar requests made since 1999 by all significant opposition political parties (with the exception of the newly formed COPE), Cosatu, the SA Communist Party, non-governmental organizations, civil society groups and churches as well as ordinary citizens all of whom are, in the circumstances, reasonably concerned about the effects of possible wrongdoing in the arms deals on the fabric of society and the impairment of accountability and

responsiveness to the needs of the people on the part of those involved in alleged wrongdoing in the deals and those who have allegedly covered up the alleged wrongdoing in the deals.

11. On 12 December 2008 the First Defendant replied to the request refusing it. A copy of the reply is annexed marked "F".

12. On 7 January 2009 the Plaintiff's attorneys wrote a letter of demand to the First Defendant a copy of which is annexed marked "A". From this letter and subsequent developments it is apparent that there is no substance or merit in the reasons given by First Defendant for refusing the request at a time when -

12.1 the National Director of Public Prosecutions was in the process of being dismissed by him,

12.2 the only appropriate unit of the National Prosecuting Authority tasked with investigating corruption, the Directorate of Special Operations or "Scorpions", was in the process of being disbanded and its replacement did not yet exist,

12.3 the National Commissioner of Police was under investigation on charges of corruption himself and on suspension after his contract of service was inexplicably extended while so suspended by the predecessor of the First Defendant,

12.4 the criminal justice system was dysfunctional according to the Deputy Minister of Justice, Advocate Johnny de Lange,

12.5 the prospects of the police investigating the allegations of wrongdoing in the arms deals successfully are remote, given that the Minister of Safety and Security, who is a leading loyal member of the African National Congress, is responsible for policing and for determining national policing policy in terms of section 206(1) of the Constitution,

12.6 the civil law ramifications of the constitutional irregularity and wrongdoing alleged in the arms deals fall beyond the scope of the mandate and competence of the police but remains a vital aspect of the investigation that has been requested and demanded - an aspect completely overlooked and not dealt with by the First Defendant in the said reply which is annexed marked "F".

12.7 there has been no progress in respect of the matters pleaded in paragraphs 8.1, 8.2 and 8.5 above and

12.8 there has been a refusal of co-operation by government departments, Armscor and the National Prosecuting Authority in respect of the questions raised by Godi's parliamentary committee, as pleaded in paragraph 7.18 above.

13. The First Defendant has failed, refused and/or neglected to comply with the demand so made on 7 January 2009 despite the hand-delivery thereof on 8 January 2009 and has not responded thereto in writing.

Salient legal provisions

14. In terms of section 84 (2) (f) of the Constitution it is the responsibility of the First Defendant to appoint commissions of inquiry.

15. The said responsibility is a constitutional obligation which the First Defendant, in his official capacity either as Head of State or as head of the national executive, or in both such capacities, is obliged to discharge in a manner which accords with the tenets of legality and rationality and is consistent with the Constitution as prescribed in section 2 thereof

Alternatively, and in any event, any failure, refusal and/or omission to appoint a commission of inquiry is, when the tenets of legality and rationality so require in any given set of circumstances, invalid conduct upon a proper interpretation of the said section.

16. The various general obligations of the First Defendant are set out in section 83 of the Constitution. They include the obligations to “uphold, defend and respect the Constitution as the supreme law of the Republic” and to “promote the unity of the nation and that which will advance the Republic”.

17. The multi-party democratic order in South Africa is founded on values which “ensure accountability, responsiveness and openness” in terms of section 1 of the Constitution and the obligations imposed by it must be performed “diligently and without delay” in terms of section 237 of the Constitution.

18. According to section 2 of the Constitution -

18.1 conduct inconsistent with the Constitution is invalid and

18.2 the obligations imposed by it must be fulfilled.

The main claim

20. By refusing or failing or neglecting to comply with the request annexed marked “E” and the demand annexed marked “A”, the First Defendant conducted himself in a manner which is inconsistent with the Constitution and invalid in the following respects:

19.1 He failed validly to discharge his responsibility under section 84 (2) (f) aforesaid in that he should, in accordance with the principles of legality and rationality, have acceded to the request and/or the demand that he appoint a commission of inquiry that is patently required in the circumstances pleaded above and can be appointed by his invoking the machinery of the Commissions Act, 8 of 1947 (“the Act”).

19.2 He failed to uphold, defend and respect the Constitution as required by section 83 aforesaid in that the facts, allegations and circumstances pleaded in paragraph 7 above cry out for the appointment of a commission of inquiry.

19.3 He neglected to promote the unity of the nation and that which will advance the Republic as further required by section 83 aforesaid, in

that he put his personal interests and those of the political party of which he is deputy president, the African National Congress, as well as personal loyalty to those involved and/or those reasonably suspected of complicity in wrongdoing in the arms deals above, alternatively in conflict with, his public constitutional obligations by forsaking the opportunity of a duly appointed commission of inquiry investigating the possibility of recovering more than R50 billion of taxpayers' money for the advancement of the common good in a manner which is responsive to the needs of the people.

19.4 He failed to conduct himself in a manner which is accountable, responsive and open as required by section 1 aforesaid when he should have done so by making use of the machinery of the Act which was available to him at all material times.

19.5 His failure to appoint an independent commission of inquiry in all the circumstances does not accord with the principles of rationality and legality which ought to inform all of his conduct in his capacity as Head of State and head of the national executive.

19.6 His failure to respond positively to the requests and/or demand puts First Defendant in breach of section 237 of the Constitution which

requires him to perform his obligations diligently and without delay in that any delay in getting to the bottom of the concerns pleaded herein does not serve the public interest whether or not wrongdoing is uncovered by a duly appointed commission of inquiry.

The alternative claim.

20. In the alternative to paragraph 19 above, and in any event, for the reasons pleaded in sub-paragraphs 19.1 to 19.6 above, the First Defendant has a constitutional obligation, in all the circumstances, to appoint a commission of inquiry into the arms deals and is in breach of the said obligation in that, in terms of section 2 of the Constitution, obligations imposed by it must be fulfilled.

Conclusion

21. In the premises the Plaintiff is entitled, as against the First Defendant, to the relief set forth in the prayers below as a matter of semi-urgency in view of the public importance of the matter and the long lapse of time since the arms deals were concluded, with the possible loss of relevant evidence through the death of witnesses and the disappearance of documents.

22. No relief is sought against the Second Defendant, which is joined in these proceedings by reason of its legal interest in the matter, in particular its legal interest in the possible recovery for the public benefit of amounts paid out in terms of contracts entered into by it in circumstances tainted by the alleged wrongdoing.

WHEREFORE Plaintiff claims as against First Defendant only [on an accelerated date for hearing to be arranged with the Acting Judge President after the close of pleadings, alternatively by way of a chamber book application] -

- (a) an order declaring that the First Defendant's conduct in failing and refusing to appoint a commission of inquiry into the arms deals is inconsistent with the Constitution, in breach of the proper discharge of his constitutional responsibility under section 84 (2) (f) of the Constitution and/or in breach of his obligations under sections 83 and 84 (2) (f) read with sections 1 and 2 of the Constitution,

(b) an order directing the First Defendant so to appoint an independent judicial commission of inquiry into the arms deals within 10 days of the granting of this order,

(c) in the alternative to prayer (b) and only in the event of the relief so claimed not being granted -

an order directing the First Defendant to reconsider his refusal to appoint a commission of inquiry into the arms deals,

(d) an order that the First Defendant pay the Plaintiff's costs of suit, including the costs attendant upon the engagement of two counsel,

(e) further or alternative relief.

Dated at Cape Town on this 21st day of January, 2009

Paul Hoffman SC

Peter St C Hazell SC

Abrahams Kiewitz Attorneys
Plaintiff's Attorneys

Per

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To:

The Registrar
High Court
Cape Town

And to:

The First and Second Defendants
Care of the State Attorney
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