

IN THE COMMISSION OF ENQUIRY

TERRY CRAWFORD BROWN

Applicant

And

THE ARMS PROCUREMENT COMMISSION

HEADS IN OPPOSITION OF TERRY CRAWFORD BROWN"APPLICATION

INTRODUCTION

1. Mr Terry Crawford Brown ("the Applicant") has addressed a letter dated 19 August 2013 ("the letter") wherein he advances reasons why the Commission should not proceed with its present inquiry but rather make final recommendations to the President which I will fully address hereunder.
2. The letter was initially submitted as an objection to the closed pre-hearing conference session held between the evidence leaders and the legal representatives of the parties. The Applicant alleged that this closed session was in contempt of the Constitutional Court case which required an open and transparent process.

PROCEDURAL MATTERS

3. The request or application made by the Applicant has far reaching consequences when one considers what it seeks to achieve. In this respect I wish to refer to paragraph 22 (a-h) of the letter and wish to read same into the record.
4. It is evident that what the Applicant seeks is for the Commission to make findings of fact and law without the benefit of having heard any oral evidence of the relevant parties at all.
5. The same allegations as per the letter were made by the applicant's letter dated 7 January 2009 and have been repeated in various other correspondence and court actions and applications. To

rely on these allegations at this stage of the hearings without notice and formal application is to undermine this commission.

6. The applicant knew well in advance that the Commission was preparing for the hearings and did nothing and now wishes to bring all the efforts of the Commission to nought
7. According to the Applicant there are already matters of public knowledge upon which the Commission can be able to make findings without inquiring into these matters.
8. The basis of the request is premised on the basis that “after fourteen months, the Commission has been unable to rebut his contentions that the arms deal was unconstitutional and illegal right from inception.
9. He further relies on the opinion of Advocate Geoff Budlender SC attached to his submission to the Commission, and alleges that the Commission has not contested Budlender’s findings¹ that the internationally accepted remedy for fraud is cancellation of the contract, return of the equipment and recovery of monies.

BACKGROUND

10. It is apposite to refer to the following background before dealing with the factual allegations raised by the Applicant and the legal implications of his request.
11. During 2009 the applicant brought an action in the Western Cape High Court , Cape Town under case number 1135/09 against the President of the Republic of South Africa and the Government of the Republic of South Africa wherein inter alia an order order was sought against the President to appoint an independent judicial commission of inquiry within ten days of the granting of the order². **These paragraphs emphasises a need for an investigation.**
12. Before the finalisation of the aforesaid action, on 16 November 2010, the Applicant brought an application in the Constitutional Court against the President of the Republic of South Africa and the Govern ment of the Republic of South Africa seeking direct access to the Court for the purpose of seeking inter alia an order directing the President to appoint within days an independent commission of inquiry in terms of his responsibility under section 84(2)(f) of the Constitution read with the Commissions Act, 8 of 1947, to inquire into allegations of irregularities, fraud and corruption in the arms deals and to report publicly thereon;

¹ See: p 50 of the Submission

² (See paragraphs 6 and 7 of the amended particulars of claim , p30 of the Constitutional Court Bundle).

13. I emphasise that the order sought was an appointment of a commissions to inquire into allegations.

14. In support of his application to the Constitutional Court, the applicant filed a founding affidavit which inter alia stated the following :

(c) As can be seen from paragraphs 5 to 8 of the Amended Particulars of Claim , the background factual matrix upon which I rely is replete with evidence and allegations which cry out for proper investigation with a view to bringing those guilty of possible criminal activity to justice in the criminal courts of the land . I stress that even if all or some of the allegations are ill-founded, their mere existence in the public domain is sufficient justification for a legally and rationally sound exercise of the applicable constitutional responsibility in favour of the appointment of a commission of inquiry. This could serve to clear the names of persons falsely accused of wrongdoing in relation to the conclusion of the arms deals³.

15. Paragraphs 5 to 8 of the amended particulars of claim speaks for themselves⁴. The allegations set out in the letter before the Commission are not new, but forms part of the allegations in paragraphs 5 to 8 of the amended particulars of claim. The question to be posed is what has changed to convince the applicant that these allegations do not need any further investigation by a judicial commission of inquiry. Is there no longer any necessity for implicated persons to clear their names?

PUBLIC INTEREST

16. Section 1 of the Commissions Act 8 of 1947 provides

(1) Whenever the Governor-General has, before or after the commencement of this Act, appointed a commission (hereinafter referred to as a 'commission') for the purpose of investigating a matter of public concern, he may by proclamation in the Gazette-

(a) declare the provisions of this Act or any other law to be applicable with reference to such commission, subject to such modifications and exceptions as he may specify in such proclamation; and

(b) make regulations with reference to such commission-

³ See paragraph C of the Founding affidavit p 11 Concourt Bundle

⁴ See: p 30 to 43 of the Concourt Bundle

- (i) conferring additional powers on the commission;
- (ii) providing for the manner of holding or the procedure to be followed at the investigation or for the preservation of secrecy;
- (iii) which he may deem necessary or expedient to prevent the commission or a member of the commission from being insulted, disparaged or belittled or to prevent the proceedings or findings of the commission from being prejudiced, influenced or anticipated;
- (iv) providing generally for all matters which he considers it necessary or expedient to prescribe for the purposes of the investigation.

17. The President has appointed this Commission with specific terms of reference and declared that the provisions of the commissions Act to be applicable. Regulations has been promulgated and directives issued by the Chairperson of the Commission.
18. The directives have called for interested parties and members of the public to make submissions under oath and 10 submissions including that of the applicant have been received.
19. The allegations made in the letter have been repeated in the submission of the applicant attaching an opinion of Adv Budlender SC.
20. According to the letter of the applicant, the Commission should only consider his submission and matters raised therein to the exclusion of others and solely on his submissions make the requested recommendations. This is absurd and inconsistent with the reasons and purpose for the establishment for the Commission.
21. The extent of public interest in the appointment of the Commission of Inquiry is set out in paragraphs 9 and 10 of the applicant's amended particulars of claim and I wish to read same into the record⁵.
22. The applicant in seeking the Commission to grant or entertain his request as per the letter, however, does not profess to be acting for the persons and entities referred to in these paragraphs. Should the Commission ignore the pleas of these persons and civil society and solely make its findings on untested allegations set out in the submission of the applicant?
23. The applicant's request is surely not in the public interest and having considered the allegations made in his founding affidavit and the amended particulars of claim, is not bona fide and seeks to prejudice the proceedings of the Commission within the meaning of Regulation 16, which provides that no person shall insult, disparage or belittle the Chairperson or any member of the Commission or prejudice the proceedings or findings of the Commission.

⁵ See: p 43 to 44 of the Concourt bundle

24. A commission of enquiry appointed by the State President and to which the Commissions Act, 8 of 1947, has been made applicable is not a quasi-judicial tribunal but a fact-finding body⁶.

“..Die eintlike funksie van 'n kommissie van ondersoek is om die antwoorde te vind op sekere vrae wat in die Opdrag gestel is. Soos gesê is in die verslag waarna verwys is:

'Die Kommissie is elf daarvoor verantwoordelik om getuienis te versamel, getuies se verklarings af te neem en om die juistheid van sulke getuienis deur inkwisitoriale ondersoek te toets ..- inkwisitoriaal in die Kanonieke sin en nie in die Spaanse sin nie.'

25. The Commission has been appointed to inquire into and make recommendations , which presupposes that recommendations must be preceded by an investigative inquiry.
26. As I mentioned, the applicant is making far reaching allegations against persons and entities who will be adversely affected if this Commission simply makes recommendations without an inquiry.
27. In **Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others**⁷ Farlam J noted that 'experience shows that there is no better way of getting at the truth than a hearing where the witnesses who hold and espouse conflicting views can testify under oath and in public and where they are subject to interrogation' (at 306E).
28. The applicant is not a litigant but a witness of this Commission, he seems to be confusing his role.
29. It is apposite to refer to a passage from Wigmore, quoted with approval in extenso in *Schermbrucker v Klindt NO*⁸ (at 615G-H) by Rumpff JA, and in part in *Attorney-General, Transvaal v Kader*⁹ (at 738G) by E M Grosskopf JA:

'From the point of view of society's right to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole - from justice as an institution, and from law and order as indispensable elements of civilised life . . . The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness.

⁶ See: *Bell v Van Rensburg*, NO 1971 (3) 693

⁷ 1996 (1) SA 283 (C)

⁸ 1965(4)SA 606 (A)

⁹ 1991 (4) SA 727

Whether the achievements of the past shall be preserved, the energy of the present kept alive, and the ambitions of the future be realised, depends upon whether the daily business of regulating rights and redressing wrongs shall continue without a moment's abatement, or shall suffer a fatal cessation. The business of the particular cause is petty and personal but the results that hang upon it are universal. All society, potentially, is involved in each individual case; because the process itself is one of vitality. Each verdict upon each cause, and each witness to that verdict, is a pulse of air in the breathing organs of the community. The vital process of justice must continue unceasingly; a single cessation typifies the prostration of society; a series would involve its dissolution. The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that present cause, but to the community at large and for ever'

30. In *Du Preez and Another v Truth and Reconciliation Commission*¹⁰ at 218 the court correctly stated:

The Court of first instance appears to have approached the matter as if it entailed a judicial proceeding based on the adversarial format (and even then, as has been shown, to ascribe procedural rights which have never been recognised in our law). As was said by Lord Denning MR in *Maxwell v Department of Trade and Industry* [1974] 2 All ER 122 (CA) at 126-7) in the passage applied by the Court below: '. . . It is a very special kind of inquiry. It must not be confused with other inquiries which we have had to consider. Remember what it is not. It is not a trial of anyone, nor anything like it.' This approach is powerfully supported by the recent paper, 'Procedures at Inquiries - The Duty to be Fair' by Sir Richard Scott, formerly Lord Justice and now Vice-Chancellor of the Supreme Court ((1995) *Law Quarterly Review* 596). This article draws upon his Matrix-Churchill Inquiry into the Sale of Arms to Iraq. Its essence is this (at 598-9):

'In an inquisitorial inquiry there are no litigants. There are simply witnesses who have, or may have, knowledge of some of the matters under investigation. The witnesses have no "case" to promote. It is true that they may have an interest in protecting their reputations, and an interest in answering as cogently and comprehensively as possible allegations made against them. But they have no "case" in the adversarial sense. Similarly, there is no "case" against any witnesses. There may be damaging factual evidence given by others which the witness disputes. There may be opinion evidence given by others which disparages the witness. In these events the witness may need an opportunity to give his own evidence in refutation.'

Scott V-C then gives consideration to the 'six cardinal principles' formulated by Lord Justice Salmon in the Report of the Royal Commission on Tribunals of Inquiry (Cmnd 3121 (1966)). The second of the six principles is formulated thus:

¹⁰ 1997 (3) SA 204

'Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.'

31. Commenting on this principle, Scott V-C observes at 602-3: H

'If the evidence is potentially damaging to those affected by it, and is relevant to the matters being investigated by the Inquiry, those affected must be given notice of the evidence and invited to give their responses. If an individual against whom damaging evidence has been given is himself invited to give evidence on the matter in question, he should, unless there is some special reason to the contrary, be referred to the damaging evidence and to relevant background documents.'

32. The persons implicated by the applicant including Government departments and entities local and overseas have a legitimate expectation to be called to refute allegations made against them.

33. The applicant's application or request has no merit and should be refused.

Adv Moss Mphaga SC

Chambers

Pretoria