

13.

In bringing this application I also respond to the call made by Chief Justice Mogoeng Mogoeng on the 18th August 2016 at the 17th SADC Lawyers Association Conference at the Cape Town International Convention Centre in which he emphasised the importance of the role which lawyers can play in weaning out corruption both in South Africa and on the African continent. I have also taken note of the comments made by the Constitutional Court that the Constitution is the primal source of the duty of the State to fight corruption¹.

HISTORY OF THE LITIGATION GIVING RISE TO THE APPOINTMENT OF THE COMMISSION

14.

During or about November 2010 an application was brought by one Terry Crawford Browne under case number 103/2010 in which he sought *inter alia* an order directing the First Respondent to appoint an independent Commission of Inquiry, in terms of the responsibility vested in him 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 Deal and to report publicly thereon.

¹ *Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)*

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In his affidavit Crawford Browne sets out the background giving rise to the application brought by him and the reason why it was in the interests of justice that the matter be heard by the Constitutional Court. I set out those parts of his affidavit hereunder, where he very eloquently captures the essence of the considerations upon which he was relying in mootng for a Commission of Inquiry:-

".....(f) The scourge of corruption needs to be addressed efficiently and effectively if constitutional democracy in South Africa is to survive. The First Respondent, the Second Respondent and the African National Congress have repeatedly declared that addressing corruption is one of South Africa's top priorities. The reality however, is that public resources, time and energy have been massively squandered on attempted cover-ups of the arms deal scandal. Institutional failures to investigate rigorously the corruption associated with the arms deals have been described by IDASA as "the litmus test of South Africa's commitment to democracy and good governance."

(g) Unless and until a proper, independent and thorough investigation of the matters pleaded in paragraph 7 of my claim annexed marked "TCB1" is undertaken, the allegations of irregularities, fraud and corruption will remain unaddressed to the detriment of the people of South Africa and those against whom the allegations are directed. The credibility of leading politicians and the viability of constitutional democracy and good governance are also threatened by the failure to appoint a commission of enquiry.

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(h) On 4 October 2010 I was informed by Colonel Johan du Plooy, the only member of the Directorate of Priority Crime Investigation ("DIPCI") who still works on the arms deals investigations, that the head of DIPCI, Major General Anwar Dramat, on 30 September 2010 closed police investigations into the BAE and German frigate consortium arms deals.

(i) This decision is perplexing, coming as it does at a time when SAAB has been charged in the Swedish courts with corruption arising out of its role in the BAE arms deal with South Africa.

(j) I further point out that, certainly until the demise of the Directorate of Special Operations, there was good cooperation between the British Serious Fraud Office and the South African National Prosecuting authority. So much so, that the High Court granted search and seizure orders against BAE premises plus Fana Hlongwane, John Bredenkamp and others in November 2008 on the strength of affidavits and documentation setting forth the manner in which 115 million pounds sterling were paid by BAE to its agents to facilitate bribery payments in South Africa.

(k) The DIPCI on 7 September 2010 confirmed before the parliamentary Standing Committee on Public Accounts (SCOPA) that the Scorpions in July 2009 had handed over 460 boxes and 4.7 million computer pages of evidence against BAE for investigation. The case against BAE was referenced as CAS 916/11/2009 Brooklyn. The seizure of documentation in November 2008 was public knowledge. It preceded and motivated the joint appeal on 1 December

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2008 to the former President for a judicial commission of inquiry by Archbishop Tutu and former President de Klerk.

(l) Amongst the documents in my possession are 166 pages of affidavits by Scorpions and British Serious Fraud Office officials detailing how BAE paid bribes of 115 million pounds to secure its arms deal contracts, to whom the bribes were paid, and to which bank accounts. If necessary, the papers filed of record in that matter will be made available at the hearing of this application.

(m) On 8 February 2010 I wrote to First Respondent urging him to deal with the irregularities in the arms deals alternatively to appoint a commission of inquiry. I hand-delivered the letter at Tuynhuys. A copy is attached marked "TCB4". I have had no response to this letter.

(n) On 6 August 2010 I hand delivered to the chairman of SCOPA a detailed motivation, a copy of which is annexed marked "TCB5", for SCOPA to recommend to the President a judicial commission of inquiry into the arms deals in respect of BAE payment of bribes to secure its contracts with South Africa, including the prospect in terms of the "remedies in case of bribes" clauses of the BAE contracts providing Armscor and/or the South African government the right summarily to cancel the contracts and to claim compensation.

(o) The meeting of SCOPA on 7 September 2010, which I attended, confirmed to me by its disinterested and defensive majority attitude that there was no political will either in Parliament or in the DIPCI to pursue investigations into the arms deals. SCOPA's attitude and the decision by DIPCI to close its investigations mock official professions about any intentions of addressing allegations of corruption.

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(p) *The matter has also been brought to the attention of the Public Protector by me, but without response. A copy of my letter to her is annexed marked "TCB6".*

(q) *I therefore affirm that all other fora have been investigated and exhausted, hence this application to this Court.*

13. *In all the circumstance set out above, I respectfully contend that it is in the interests of justice that the fundamental fairness at the core of the rule of law be upheld by granting direct access insofar as necessary and dealing with the substance of the main relief sought in the notice of motion to which this affidavit is attached."*

16.

Crawford Browne's application was heard in May 2011. The application was postponed to allow further time for the submission of supplementary affidavits by Crawford Browne, and answering affidavits by the respondents. The Respondents did not file the anticipated answering affidavits. Instead the First Respondent decided to appoint a judicial commission of inquiry into the SDPP, which was announced on 15 September 2011. Crawford Browne withdrew his application, and the First Respondent agreed to pay his costs.--

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17.

This application constitutes essential background information, upon which I rely and in order not to burden this application, I will ensure that a copy of the application papers are placed before the court at the hearing of this application.

18.

Pursuant to this agreement the First Respondent duly appointed a Commission of Enquiry the establishment of which was promulgated on the 4th of November 2011 in Government Gazette No. GNR926. Three Judges of the High Court were appointed Commissioners and Mr Justice W Seriti was appointed as Chairperson.

19.

It is axiomatic that the First Respondent in appointing such a Commission of Inquiry can only do so in circumstances where there is no conflict of interest on his part, it being vital that the independence of such a Commission of Inquiry cannot be brought into question.

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20.

I have grave reservations for the reasons set forth hereinafter as to whether the First Respondent acted properly in appointing a Commission of Inquiry given that he had a serious conflict of interest, details of which I will set out in this affidavit and whether this conflict of interest influenced his decision in appointing the Commissioners chosen by him to constitute the Commission. I fully acknowledge that the persons appointed are Judges of the High Court and I do not question their integrity. However it is vital in my submission that insofar as public perception is concerned, that the Commissioners appointed to the Commission are perceived as independent.

21.

I set out hereunder the facts and circumstances upon which I rely in making the allegation that the First Respondent had a conflict of interest which he failed to disclose at the time when the Commission was appointed.

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THE CONFLICT OF INTEREST BY THE FIRST RESPONDENT

22.

To assemble all the facts which I rely upon, in support of the relief which I seek in the Notice of Motion has proven to be a challenge. It will be unduly burdensome to attach copies of some of these documents to this affidavit given the volume thereof. Some of the information has been derived from judgments given by the courts as well as affidavits submitted in court applications and other documents which are public documents and which can easily be accessed. I will accordingly only refer to those extracts from these documents which are relevant but will ensure that these documents are available for the perusal by the court at the hearing of this application and are made available to the Respondents upon request therefore.

23.

I have personal knowledge of a number of matters to which I refer hereunder. However there are other matters which are not within my personal knowledge but which I can speak knowledgably about resulting from my involvement with the Fifth Respondent which I refer to hereunder during the period 2003 to 2009. This knowledge is derived from my extensive reading of documentation relating to the Arms Procurement Process in particular relating to the involvement of the Fifth and Sixth Respondent therein and other information which was made available to me during the discharge of my functions and which I refer to hereunder. I am therefore well placed to provide the information contained in this

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affidavit and I am conversant with the issues and the facts – even if they were not within my personal knowledge at the time.

24.

During September 2003 I was the managing director of a company bearing the name African Non-Destructive Testing Centre (Pty) Ltd. I was also at the time registered as a legal consultant with a firm of attorneys S Rampersad and Associates which is based in Durban.

25.

During September 2003 I met one Pierre Moynot ("Moynot") who was at the time the managing director of the Fifth Respondent through one of my business associates the late Gibson Thula ("Thula"). The meeting was initiated by Moynot.

26.

It is relevant to indicate at this stage that Thula was aware that I shared close relationships with a number of persons in the higher echelons of the African National Congress. These included the Minister of Justice at time Mr Penuell Maduna, the Minister of Defence Mr Patrick "Terror" Lekota, the Treasurer General of the ANC Mr Mendi Msimang and the Secretary General of the ANC Mr Kgalema Motlanthe.

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27.

The Fifth Respondent is a subsidiary of the South African arm of Thales SA (SOCIÉTÉ ANONYME) namely Thint Holding Southern Africa (Pty) Ltd (hereinafter referred to as Thint) at the time when the events described in this affidavit occurred. I point out that the acronym S.A (SOCIÉTÉ ANONYME) is the is the designation of a French Company and is not a reference to South Africa. I annex hereto and marked "A" an organogram which explains the structure under which the Thales Group operated.

28.

Thales SA is involved in aerospace, space, defence, security and transportation industries. In terms of information which it provided to the Arms Procurement Commission it employed 65 000 people, it had sales in 2013 of €14.2 billion and as at 31st December 2013 it had an order book of €29.5 billion.

29.

Prior to the year 2000, Thales SA was called Thomson-CSF. In 1982 the business was nationalised the French state being the sole shareholder. In 1998 the company was privatised by virtue of some of the shareholding being taken up by Groupe Dassault. It was then renamed Thales SA in 2000. Accordingly, any reference to Thomson-CSF is a reference to Thales

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SA. The French Government however retained a 29% stake and the right to appoint the Chairman of the Sixth Respondent.

30.

From about 1998 the Thales Group was active in South Africa and acquired an interest in a company known as Altech Defence Systems (Pty) Ltd (which later became a Thales controlled entity called African Defence Systems (Pty) Ltd – and which is now called Thales Defence Systems (Pty) Ltd.

31.

I shall for ease of reference refer to both Thomson-CSF as well as Thales SA as Thales SA and I shall simply describe the South African subsidiary as the Fifth Respondent to distinguish these entities. Where I refer to the Thales Group it is the reference to the Fifth and Sixth Respondents and all their associated companies and subsidiaries.

32.

The Thales Group played a significant part in the South African Arms acquisition process (which has become popularly known as "the Arms Deal") in 1998 and was awarded a significant contract worth R2,6 billion the details of which are not relevant for purposes of this application. One of the contracts awarded was given to the German Frigate Consortium GFC - a

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consortium which subsequently included the Thales Group. I annex hereto marked "B1"- "B2" a report of Standing Committee on Public Accounts ("SCOPA") which is a parliamentary committee appointed to investigate irregularities in the Arms Deal.

33.

I point out that annexure "B1"- "B2" points to various investigations relating to criminal conduct implicating the German Frigate Consortium, the Sixth Respondent, the Second Respondent, Pierre Moynot and Jean-Paul Perrier amongst others.

34.

Annexure "B1" in relation to the Second Respondent under the heading "Recommended Investigations Scope" states the following:-

"Investigation into corruption related to payments received by Mr Zuma from Thomson (France) in return for political support for the bid of the GFC and Thomson-CSF, as well as protection from any future investigations, as part of a criminal conspiracy to benefit himself, Thomson/Thales, GCF and Nkobi Holdings."

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35.

Moreover it is clear from annexures "B3"- "B10" that serious allegations were being made against the Second Respondent and other members of the ANC in relation to their involvement in the Arms Deal some of which were supported by extracts from evidence given at the trial of Schabir Shaik. Annexures "B1"- "B10" also set out what is described in reference to Thomson-CSF being "*known for propensity for bribery and corruption on an international scale*". An example of such unlawful conduct is a bribe paid in Taiwan which was facilitated by Jean Paul Perrier who was at the time the Chairman of Thales International and Thetard who was a high ranking official of the Sixth Respondent. Annexed hereto marked "C" is a copy of a press article the contents of which speak for itself.

36.

The history of events which took place prior to my being approached by Moynot is conveniently summarised in an affidavit deposed to by Moynot in an application brought under case number: CC273/07 in which the relief sought by Thint Holding ("Fifth Respondent") and Thint (Pty) Ltd was an order seeking *inter alia* a permanent stay of prosecution against them based on certain undertakings upon which they relied. I annex hereto marked "D1"- "D6" that portion of the affidavit of Moynot which summarises the historical events of relevance to this application during the period prior to my

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involvement by the Fifth Respondent. I paraphrase the contents of annexure "C" hereunder.

37.

After conducting a preparatory investigation, the National Prosecuting Authority (NPA) decided to conduct an investigation relating to corruption and fraud in connection with the acquisition of Armaments by the South African Department of Defence in respect of negotiations and /or contracts concluded in respect of the purchase of Corvettes, Submarines, Light Utility Helicopters, Marine Helicopters and advanced light fighter aircraft.

38.

During July 2001, summons were served upon one Christian Louis Pelser an employee of Thint Holding Southern Africa (Pty) Ltd and Moynot in his capacity as the director of African Defence Systems (Pty) Ltd ("ADS") who were questioned and loads of documents were seized at and removed from the premises of Schabir Shaik and African Defence Systems (Pty) Ltd in Pretoria, Midrand and Mt Edgecombe in KwaZulu-Natal.

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39.

During September / October 2001 the headquarters of the Sixth Respondent in Paris and certain of its employees were searched and numerous documents were seized.

40.

Similarly an order was granted by the Supreme Court of Mauritius authorising the search of the office of Thales Africa in Mauritius. The home of certain of its employees were also searched and numerous documents and records were seized.

41.

The impact according to Moynot in his affidavit were serious for the reputation of the Sixth Respondent because its subsidiaries and associated companies in South Africa, Mauritius and other parts of the world had come under scrutiny and were seriously and adversely affected. As a result the business of the Thales Group was seriously affected particularly in relation to the submission of tenders and competitors used this to their advantage.

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42.

Moynot also made reference in his affidavit to the publicity that was given in 2002 to the existence of what became known as the "encrypted fax" which contained details of an attempt by Second Respondent to solicit a bribe from Thales International a subsidiary of the Sixth Respondent.

43.

The allegation was made by the State in the indictment against Schabir Shaik, that one Thetard, an official of the Fifth Respondent was the author of the encrypted fax which bore his handwriting and that Thetard after preparing it, had instructed his secretary, one Sue Delique to type it out and fax it in an encrypted form to Thetard's superiors abroad. Thetard was the managing director of the Fifth Respondent prior to Moynot's appointment to this position.

44.

It was against this historical and factual background that Moynot made contact with me in September 2003. I will not go into all the details of that discussion. Suffice it to say that Moynot on behalf of the Fifth Respondent engaged my services in relation to a variety of matters including marketing the business of the Fifth Respondent and its subsidiary African Defence Systems (Pty) Ltd outside the Republic.

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Although the details of the agreement were not spelt out it became clear to me in the course of time that I was required to provide the following services for the Fifth Respondent and the Thales Group of companies namely:-

- (a) in relation to marketing the business of the Defendant and its subsidiary, African Defence Systems (Pty) Ltd outside the Republic;
- (b) negotiating for the acquisition of shares in other companies;
- (c) at a more general level in any matter which the Fifth Respondent required my services.

46.

In due course my mandate was extended by Moynot to include the representation of the Thint (Pty) Ltd and the Fifth Respondent in my capacity as an attorney when criminal charges were preferred against them.

47.

It was a condition of the agreement that I was to relocate from Pretoria to Durban and that the Fifth Respondent would pay all the costs therefore.



48.

With the passage of time it became clear that I was required to play an important role in drawing the Sixth Respondent closer to high ranking personalities within the African National Congress and in particular the Minister of Defence and the Minister of Justice and Constitutional Development.

49.

During the course of my employment with the Fifth Respondent there was a great deal of interaction between me and the Second Respondent which gave me some insight into the nature of their relationship and the benefits to him accruing thereby particulars of which are set forth in this affidavit.

50.

At the time of our discussion a particular matter of concern to Moynot was the fact that the National Director of Public Prosecutions Mr B Ngcuka ("Ngcuka") had made a public announcement in August 2003 at a press conference that the NPA was proceeding with charges against Schabir Shaik and companies under his direct control one of which was Thint (Pty) Ltd (in which Shaik had a 25% interest). Moynot was concerned about the implications of the criminal charges and a possible conviction and the ramifications thereof internationally. In particular he was fearful of the implications for the Sixth Respondent in the United States of America and

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the ramifications in that country of any criminal conviction by a South African Court. He was also mindful of the Foreign Corrupt Practices Act of 1977, a United States enactment, and the Prevention and Combatting of Corrupt Activities Act 12 of 2004, the provisions of which have serious implications for companies involved in corrupt and irregular transactions.

51.

At the request of Moynot, I read through all the historical documents relevant to the Fifth and Sixth Respondents in preparation for the task which I had been entrusted with.

INDIA DELEGATION

52.

During October 2003 I informed Moynot that a delegation headed by the State President at that time Thabo Mbeki and fifteen ministers / deputy ministers were going on an official visit to India. Moynot thought it was a good idea to join the delegation in order to get closer in particular to the Minister of Defence and the Minister of Justice and Constitutional Development who were part of that delegation.

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