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

REPORTABLE

CASE NO. 7390/2008

In the matter between:

TERRY CRAWFORD-BROWNE	**APPLICANT**
And	
TREVOR ANDREW MANUEL	**1ST**
RESPONDENT	
MARIA DA CONCEICO RAMOS	**2ND**
RESPONDENT	

JUDGMENT DELIVERED ON 02 JUNE 2008

DLODLO, J

[1] The Applicant seeks an order directing the Respondents to comply with an Order by Judges Blignault and Davis given on 26 March 2003 under case number 5129/2002 ("the March 2003 Order"), in terms of which it was ordered that discovery be made, within ten (10) days, of documents containing the advice of the International Offers Negotiating Team and Financial Working Group ("the IONT documents") in respect of the Strategic Armaments Acquisition Programme ("the arms deal"). Prayers 2 and 3 of the Notice of Motion seek an order that the Respondents be found to be in

contempt of the March 2003 Order, and an appropriate sanction in respect of such contempt.

[2] The Applicant is a retired international banker previously employed by Nedbank. He was appointed by Archbishop Desmond Tutu in 1994 to represent the Anglican Church at the Cameron Commission of Inquiry into Amscor. In 1996 the Applicant was appointed by Archbishop Njongonkulu Ndungane to represent the Anglican Church at the Defence Review conducted in Parliament during 1996 to 1998. It is in the latter capacity that (according to the Applicant) he gained experience and knowledge of the so-called "arms deal" scandal. The Applicant authored the book entitled "EYE ON THE MONEY". The First Respondent is the Minister of Finance (a senior member of the National Executive Committee) who was a member of the cabinet's sub-committee established to negotiate the arms deal and whose responsibilities in that instance (as I gather from the Founding Papers) were the affordability and financing arrangements for the arms deal. The Second Respondent is a former Director-General of the National Treasury. The Applicant appeared in person whilst Mr Pincus SC (assisted by Mr Goldberg) appeared for both Respondents.

BACKGROUND

[3] The present application has its roots in an application launched out of this Court by the Applicant and ECAAR South Africa as the two (2) Applicants, on 21 November 2001 under case number 9987/2001

("the main Review Application") against *inter alia* the President of the Republic of South Africa (as the First Respondent), The First Respondent in this application (as the Second Respondent) and the National Government of the Republic of South Africa (as the Third Respondent). In the main Review Application, the Applicants sought *inter alia* to review and set aside the First Respondent's (Second Respondent in the main Review Application) decision, as the Minister of Finance, to enter into loan agreements relating to the arms deal and to declare the arms deal null and void.

[4] The Second Respondent (in the present application), in her capacity as Director General of the Treasury, deposed to the Answering Affidavits on behalf of the three (3) Respondents in the main Review Application. Prior to the filing of his Replying Affidavit in the main Review Application, Applicants launched an application ("the discovery application") in terms of Rule 35 (12), for an order compelling First and Third Respondents to make discovery of certain documents referred to in the Answering Affidavits filed in the main Review Application. Included in the documents sought were the International Offers Negotiating Team and Financial Working Group documents referred to in the discovery application as the "eighth category of documents". While the discovery application was brought under a different case number to the main Review Application, the discovery application was interlocutory to the main Review Application. The discovery application was opposed by First and

Third Respondents.

[5] After argument, Judgment was handed down by Blignault and Davis JJ and the March 2003 Order was granted. In terms of this order, First to Third Respondents were directed to make discovery of the International offers Negotiating Team and Financial Working Group documents. It is the March 2003 Order which forms the subject matter of prayer 1 of the Applicant's Notice of Motion in the present application and in respect of which the Applicant now alleges that the Respondents are in contempt of Court.

[6] Thereafter, the Second Respondent, on behalf of the First to Third Respondents, filed an Affidavit in compliance with the March 2003 Order. In such Affidavit of compliance, the Second Respondent stated, in respect of the March 2003 Order, that:

"In compliance with that Order, I produce on behalf of the National Government Respondents the documents annexed hereto marked "MRX" and "MRY" respectively. I confirm that these documents are the documents containing the advice of the International Offers Negotiating Team and the Financial Working Group that were referred to in paragraph 36 of my Answering Affidavit in the main application."

It is clear that the point being made by the Second Respondent was that she had deposed to the Answering Affidavit wherein she referred to the said advice given and the documents containing the said

advice; and she accordingly knew what documents she had been referring to in such Affidavit; and "MRX" and "MRY" constituted such documents.

[7] The Affidavit of compliance was filed at Court and sealed, pending an application ("the confidentiality application") launched subsequently by the Respondents in the main Review Application for an order directing that the March 2003 Order be supplemented by directions ensuring the confidentiality and protection of the documents disclosed and produced. The confidentiality application was opposed by the Applicants to the main Review Application but was eventually resolved by agreement between the parties, which agreement was incorporated in an Order of Court dated 8 September 2003. In terms of this order, the confidentiality application was withdrawn by the Respondents and the applicants provided various undertakings relating to the protection and confidentiality of the discovered documents. The documents were then handed to the Applicants.

[8] Thereafter and on 12 September 2003, the Applicants launched yet a further application *inter alia* for an Order declaring that the documents which formed the subject matter of the March 2003 Order "were constituted by the whole International Offers Negotiating Team and Financial Working Group's research, investigation and advice" and compelling discovery thereof in terms of Rule 35 (7)

("the Rule 35 (7) application"). In this application, Applicants alleged that First to Third Respondents had failed to comply with the March 2003 Order and that the compliance Affidavit did not in fact constitute compliance. The Rule 35 (7) application was opposed by the Respondents and the Second Respondent in the present application (in her capacity as Director-General of the National Treasury) and again on behalf of First and Third Respondent in the main Review Application, deposed to an Answering Affidavit.

[9] In this Answering Affidavit, the Second Respondent stated that (through the Affidavit of compliance already filed), there had been full compliance with the March 2003 Order. Further, the Applicant was provided with the document entitled 'Affordability Report' which dealt extensively with the matters, which Applicants had contended, ought to have been part of the documents referred to in the 26 March 2003 Court Order. There were no further interlocutory applications relating to discovery and the main Review Application was then argued. In the result the main Review Application was dismissed with costs. Subsequent applications by the Applicants for leave to appeal against the dismissal of the main Review Application, both to the court *a quo* and the Supreme Court of Appeal were dismissed.

[10] On 11 February 2008, and under case number 2471/2008, the First Respondent launched an application in this Court against the

Applicant (as Respondent) wherein he sought an interim interdict restraining the Applicant from *inter alia* publishing any matter in which it is alleged that he is corrupt or has committed the crime of corruption or any other criminal conduct in connection with the arms deal, pending an action for a final interdict. This application was opposed by the Applicant. On 6 March 2008, Judge Le Grange handed down Judgment in this matter and in terms of which the Applicant was restrained in the terms sought and referred to above. It was further ordered that the First Respondent launch an action for a final interdict within 20 days. The First Respondent (as Plaintiff) instituted the said action on 28 March 2008 under case number 5156/2008. The Applicant has filed a notice of intention to defend and was due to file his plea in the action by 14 May 2008.

THE ISSUES

[11] The issue which must be determined is whether or not the First and Second Respondents complied with the March 2003 Order. If answer to the aforegoing is in the negative, that is, if this Court reaches a conclusion that the March 2003 Order was not complied with, then the next enquiry becomes whether or not the Respondents have rendered themselves guilty of contempt of Court. In view of the nature of this application, I am of the view that it remains prudent to summarize the contents of the Affidavits.

[12] **THE FOUNDING AFFIDAVIT** was deposed to by the Applicant

himself. He prefixed the Founding Affidavit by stating that he is the Defendant in case number 5156/2008 wherein summons were issued against him by the First Respondent on 25 March 2008. The latter seeks a final interdict restraining the Applicant from publishing any matter alleging corruption against him and/or that the first Respondent committed the crime of corruption or any other criminal conduct in connection with the arms deal. The Applicant ("Mr Crawford-Browne") averred in this Affidavit that he intended to file a plea and a counterclaim and that consequently this application is urgent in that it is material to his intention. Confirming that the Second Respondent deposed to an Affidavit in the Review Application referred to above Mr Crawford-Browne proceeded to quote what she had stated in paragraph 53, namely:

"the loan agreement he signed are self-standing loan agreements with binding force and not dependent on any other agreement entered into by government".

The above statement was attacked by Mr Crawford-Browne and labelled as patently false tantamounting to insisting that a mortgage has nothing to do with the purchase of a house. According to Mr Crawford-Browne, the First Respondent's legal counsel verified before Blignault and Davis JJ that these documents were authentic. Judges were, according to Mr Crawford-Browne, referred to *"Representation, covenant and Default clauses" and it was confirmed that their terms were "potentially catastrophic for South Africa."* The Judges made an order for discovery in 2003. In Mr

Crawford-Browne's view the Judges considered and rejected arguments by the Second Respondent on behalf of the First Respondent that it was not in the public interest to reveal how the Government conducts its financial business.

[13] Mr Crawford-Browne referred to ***"an Affidavit of compliance"*** subsequently filed in the Review Application and bitterly complained that he was barred from viewing the documents and his legal advisers were neither to copy them or communicate the contents thereof to Mr Crawford-Browne. He stated that he, however, subsequently came to realize that these were not the International Offers Negotiating Team and Financial Working Group papers ordered by the Court. According to him these were in fact the executive summary of the arms deal affordability study which had been appended to Mr Crawford-Browne's own application made in 2001 to have the arms deal loan agreement set aside.

[14] According to Mr Crawford-Browne, the Second Respondent, in contempt of Court and with deliberate intent to frustrate the Court's ruling, had returned his own documents to his legal advisers instructing that they were neither to copy nor communicate its contents to Mr Crawford-Browne. Mr Crawford-Browne made two applications for an order that the First and Second Respondents were in contempt of Court. It was, according to Mr Crawford-Browne, as a result of his second application that eventually the full arms deal

affordability study of two hundred and twenty four (224) pages that went to cabinet in August 1999 was produced. In his view this still fell far short of the documents of which discovery had been ordered by the Court.

[15] Elucidating further on these documents Mr Crawford-Browne stipulated that the International Offers Negotiating Team (IONT) papers are referred to in chapter eight (8) of the Joint Investigation Report into the Strategic Defence Procurement Packages (the JIT report) and these are listed in paragraph 8.3.2 as *inter alia*:
minutes of the meetings held by IONT; minutes of meetings held by the Ministers; Committee, the report submitted by the Affordability Team of the IONT; minutes of cabinet meetings; the terms of reference of IONT; reports by IONT to the Ministers' Committee; the special review of the SDP by the Auditor-General. In apparently a further endeavour to facilitate the Court's understanding, Mr Crawford-Browne explained that the Financial Working Group papers are referred to in chapter nine (9) of the JIT report regarding the costs to the State and the financial and fiscal implications of the strategic defence packages.

[16] Mr Crawford-Browne remarked that by the end of 2003 he was mentally and financially exhausted by what he termed, the Respondents' unlawful behaviour and could not continue his efforts to obtain discovery of the documents to which he was entitled. He

mentioned that as a direct result of that mental and financial exhaustion, his application to have the arms loan agreements set aside, failed. An order of costs made against him resulted in two (2) unsuccessful applications to sequestrate him. Emphasizing the importance of the documents called for in the 2003 Order Mr Crawford-Browne referred to statements made by Archbishops Tutu and Njongonkulu Ndungane respectively wherein they called for the judicial investigation of the whole arms deal saga. Through Campaign Against Arms Trade (CAAT) in London, Mr Crawford-Browne had asked the British Government to investigate. He was, however, infuriated by the response from Britain that it was not illegal to bribe foreigners and they consequently refused to investigate. He proceeded to quote from a book written by Andrew Feinstein (the former ANC MP) entitled ***"After the Party"*** where an allegation is contained that certain members of the African National Congress are quoted as having admitted some wrongdoings in the arms deal saga.

[17] Mr Crawford-Browne stated that he proceeded against the First Respondent because the latter is not only the Minister of Finance and a senior member of the ANC's National Executive Committee, but because of his capacity as Minister of Finance, he bears a particular Constitutional responsibility to ensure that public administration meets the criteria set out in section 195 of the Constitution. In Mr Crawford-Browne's assertion, the first Respondent's loyalties to his

colleagues in the ANC and the Party itself, clouded his greater responsibilities to the people and the citizenry of South Africa. Mr Crawford-Browne referred to the recent Judgment by Lord Moses and Mr Justice Sullivan in Britain the final paragraph of which reads:

"The Court has a responsibility to secure the rule of law. No one, whether within this country or outside is entitled to interfere with the course of our justice. It is the failure of Government and the defendant (the Director of the Serious Fraud Office) to bear that essential principle in mind that justifies the intervention of this Court. But we intervene in fulfillment of our responsibility to protect the independence of the Director and our criminal justice from threat. On 11 December 2006, the Prime Minister said that this was the clearest case for intervention in the public interest he had seen. We agree."

Given the above quoted Judgment in London on 10 April 2008, argued Mr Crawford-Browne further, the documents which were the subject matter of the March 2003 order and which were unlawfully withheld from him, have now assumed new and vital importance necessitating this urgent application for *"a writ of mandamus"*.

[18] Mr Crawford-Browne submitted that as the former British Prime Minister and Attorney-General abused their powers of public office, similarly the First and Second Respondents abused their powers. In Mr Crawford-Browne's assertion the International Offers Negotiating Team (IONT) and Financial Working Group papers will lay a trail for forensic auditors and financial investigators to track BAE's bribery payments that were landed through Red Diamond Trading Company registered in the British Virgin Islands, and other front companies that are maintained by BAE for such purposes.

[19] **THE ANSWERING AFFIDAVIT** was deposed to by Minister Trevor Andrew Manuel ("Minister Manuel"), the First Respondent in the present proceedings. Minister Manuel as a point of departure stated categorically that the present application is procedurally defective and in his view, no case is made out at all on the merits and the application constitutes an abuse of process. He remarked that most of the allegations made by the Applicant in the present application are either irrelevant to the relief sought or scandalous and vexatious and fall to be struck out. In Minister Manuel's view, what appears from the Applicant's Affidavit is that the latter has used the mechanism of the Court process (through the present application) to perpetuate his "crusade" in respect of the arms deal and against Minister Manuel in particular. Minister Manuel dealt at some length with the background which is made up of facts and circumstances that are common cause. This will not be repeated in this summary because I have already set out the background to the present application earlier on in this Judgment.

[20] However, Minister Manuel invited my attention as to how the March 2003 Order was worded, particularly the reasons why the Applicant sought those documents. Blignault J quoted from the Applicant's Affidavit wherein he stated:

"31. The documents are relevant and essential because-

31.1. the documents referred to in the opposing affidavit and in subparagraphs (1) to (5) and in (7) to (9) above are necessary

to enable the Applicants to reply to the contention in the opposing affidavit that the Minister of Finance did not sign international guarantees ("the guarantees") on or about 24 January 2001. The question whether the agreements which were signed are guarantees are questions of substance and cannot be responded to without discovery of these documents;

31.2. The documents referred to in opposing affidavit and subparagraphs (6) to (9) above are required to enable Applicants to assess whether to amend their Notice of Motion in the main case or, alternatively, file a Replying Affidavit and to assist in arranging for an expeditious hearing."

Minister Manuel contended that what is readily apparent from the above is that the Applicant stated that the documents requested, were required by him in relation to the conduct of the main Review Application. The March 2003 Order was therefore made for that purpose and clearly interlocutory to the main Review Application, he argued.

[21] Minister Manuel concluded that it was readily apparent from the above quoted text that the Applicant stated that the documents were required by him in relation to the conduct of the main Review Application. In Minister Manuel's understanding the March 2003 Order was therefore made for that purpose. He stated categorically that on 9 April 2003, the Second Respondent, on behalf of the First to

the Third Respondents in the discovery application, filed an Affidavit in compliance with the March 2003 Order. He referred me to the copy of the said Affidavit now annexed to the Answering Affidavit and marked as annexure "TAM2". According to Minister Manuel, as a result of such Affidavit of compliance, he was satisfied and he bona fide believed that the documents provided therein were in full compliance with the March 2003 Order. Minister Manuel invited my attention particularly to the following statement made by the Second Respondent in that Affidavit of compliance:

"In compliance with that order, I produce on behalf of the Respondents the documents annexed hereto marked "MRX" and MRY" respectively. I confirm that these are the documents containing the advice of the International Offers Negotiating Team (IONT) and the Financial Working Group that were referred to in paragraph 36 of my Answering Affidavit in the main application."

[22] According to Minister Manuel the Affidavit of compliance (Annexure "TAM2") was filed at Court but sealed pending an application launched subsequently by the Respondents in the main Review Application for an order directing that the March 2003 Order be supplemented by directions ensuring the confidentiality and protection of the documents disclosed and produced. According to Minister Manuel the confidentiality application was opposed but was resolved by agreement between the parties and this agreement was incorporated in an Order of Court on 8 September 2003. The copy of this latter Order is attached to the Answering papers and is marked "TAM3" and my attention is invited thereto. In terms of this Order

the confidentiality application was withdrawn and the Applicants provided various undertakings relating to the protection and confidentiality of the discovered documents.

[23] The Applicants in the main Review Application (according to Minister Manuel) launched an application *inter alia* for an order declaring that the documents which formed the subject matter of the March 2003 Order "were constituted by the whole IONT and Financial Working Group's research, investigation and advise" and compelling discovery thereof in terms of Rule 35 (7) ("the Rule 35 (7) application"). In that application, explained Minister Manuel further, the Applicants alleged that the First to the Third Respondents had failed to comply with the March 2003 Order and that the compliance Affidavit did not in fact constitute compliance. In the Founding Affidavit to that application, the Applicant stated the following:

> "It is respectfully submitted that First to Third Respondents have deliberately frustrated the Court Order of 26 March 2003 by failing to discover the 'voluminous affordability assessment document, which is the IONT and Financial Working Group's report".

[24] The Rule 35 (7) application, according to Minister Manuel, was opposed by the Respondents and on 28 October 2003, the Second Respondent in the present application (in her capacity as Director-General of the National Treasury) and on behalf of the First to Third Respondents in the main Review Application, deposed to an

Answering Affidavit, copy of which is attached to the present Answering papers as "TAM4". Minister Manuel drew my attention to various allegations made by the Second Respondent in the said Affidavit, *inter alia* the followng:

"In compliance with that Order, I produced on behalf of the National Government Respondents the documents annexed hereto marked "MRX" and "MRY" respectively. I confirm that these are the documents containing the advice of the International Offers Negotiating Team and the Financial Working Group that were referred to in paragraph 36 of my Answering Affidavit in the main application."

"12. …it is clear that I dispute that the documents I referred to in paragraph 36 of the main affidavit are the documents referred to by the applicants. I further state as already stated that "MRX" and "MRY" are the documents I referred to.

13.I therefore contend that by making available "MRX" and "MRY" I am in full compliance with the orders of Judges Davis and Blignaut."

"Consequently, the National Government Respondents offer the document entitled 'Affordability Report" which deals extensively with the matters, which applicants contend, ought to be part of the documents referred to (in) the 26 March 2003 court order."

[25] Minister Manuel concluded that to the extent that there had not yet

been compliance with the March 2003 Order, (an averment which he denied) the provisions of the above quoted document rendered the First to the Third Respondents fully compliant with the March 2003 Order. Minister Manuel hastened to add that on 17 November 2003, the Rule 35 (7) application was resolved by agreement between the parties on the basis that the Applicants would use the documentation provided, for no purpose other than for the main Review Application. Minister Manuel brought it to my attention that the main Review Application was argued and Judgment was handed down by Blignault and Yekiso JJ on 4 March 2004. The main Review Application was dismissed with costs. I have been supplied with the copy of the order dismissing the main Review Application as same is attached to the Answering Affidavit as "TAM5". My attention was particularly invited to the following portion of the Judgment dismissing the main Review Application:

"After receipt of respondents answering affidavits and before filing their replying affidavits, applicants brought an application in terms of rule 35(12) in which they sought discovery of various categories of documents referred to in respondent's answering affidavits. The eighth category of documents was subsequently produced by first, second and third respondents."

The eighth category of documents was the IONT documents detailed above, Minister Manuel clarified. Minister Manuel explained that the Applicants then exhausted the remedies available to them in that they unsuccessfully applied for leave to appeal. They subsequently

petitioned the Supreme Court of Appeal. The petition was also not successful.

[26] Minister Manuel stated that it is true that on 23 June 2005, he launched an application to sequestrate the Applicant in that the latter failed to pay the costs awarded against him in the main Review Application. The sequestration application was resisted successfully by the Applicant. Minister Manuel mentioned how, on 11 February 2008, he launched an application in this Court wherein he sought an interim interdict restraining the Applicant from *inter alia* publishing any matter in which it is alleged that Minister Manuel is corrupt or have committed the crime of corruption or any other criminal conduct in connection with the arms deal, pending an action for a final interdict. The interdict application was opposed by the Applicant. That matter was, however, disposed of on 6 March 2008 when Le Grange J handed down Judgment in favour of Minister Manuel. According to that Judgment, Minister Manuel was ordered to institute an action for a final order within twenty (20) days. It is this action which Minister Manuel has instituted under case number5156/2008. The Applicant is resisting that action. This is evidenced by his filing an appearance to defend and the present application in respect of which he alleges he wants certain information which he would use in preparing a plea in the pending matter.

[27] Dealing with the question of urgency, Minister Manuel brought the Court's attention to the fact that the March 2003 Order was made five (5) years ago. It comes as something difficult to understand to him why after so long and in his own words:

> "if the Applicant genuinely harboured under the impression that discovery in compliance with the aforesaid order had not yet been made, he provides no explanation for his inactivity for 5 years."

He contended that the matter is not, in his view, urgent. According to Minister Manuel and according to the March 2003 Order, it was the First to the Third Respondents in the main Review Application who were required to make discovery of the IONT documents. No order was made against the Second Respondent at all, understandably, because she was not a party to that application. Minister Manuel reiterated that the Second Respondent was simply the deponent to the Answering Affidavit filed on behalf of the First to the Third Respondents in the main Review Application in her then capacity as Director-General of the National Treasury (she no longer holds that position). Concluding on this aspect, Minister Manuel emphasized as follows:

> "As there was no order made against Second Respondent, there is no basis upon which the applicant can seek compliance by Second Respondent with the March 2003 Order, nor is there a basis upon which she can be in contempt of a Court Order which was not made against her".

[28] In Minister Manuel's view, it is readily apparent that the Applicant seeks the relief he does in the present application for an ulterior purpose. Responding to the averment by the Applicant that the present urgent application is material to his intentions to file his plea and counterclaim in the action instituted by Minister Manuel, the latter stated that the March 2003 Order and the compliance or otherwise is irrelevant to the Applicant's plea and counterclaim in the action. He described the present application as misconceived and

labelled same as an abuse of process. Minister Manuel dealt exhaustively with the content of paragraph 42 of the Founding Affidavit wherein the Applicant *inter alia* averred that *"the (IONT documents) will lay a trail for forensic auditors and financial investigators to track BAE's bribery payments that were laundered through Red Diamond Trading Company registered in the British Virgin Islands, and other front companies that are maintained by BAE for such purposes."* Minister Manuel responded as follows, *inter alia*:

"What is apparent from the above paragraph is that the Applicant seeks the relief sought in the present application in order to assist him in his continued crusade in respect of the arms deal. Quite plainly, the relief sought has nothing at all to do with the main review application. I state that the threat of contempt must be seen as one in terrorrem against me. That Applicant has not sought to have the respondents in the main review application declared to be in contempt of the March 2003 Order for approximately 5 years since the Order was made would suggest strongly that even Applicant believes that there is no merit in such an application."

[29] In any event, Minister Manuel is of the opinion that no case is made out for contempt of Court. On the merits of the application, Minister Manuel maintained that the March 2003 Order was complied with. Reiterating that the Second Respondent filed an Affidavit in compliance with the aforementioned Order on 9 April 2003, he stated categorically that such Affidavit did indeed comply with the said Order. In any event, he certainly held the *bona fide* and reasonable belief that such Affidavit constituted compliance. Moreover,

explained Minister Manuel, on 28 October 2003, the Second Respondent filed a further Affidavit wherein she provided the Applicants with the Affordability Report, specifically sought by them as constituting compliance with the Order.

[30] He emphatically denied that the documents provided fell short of that which had been ordered in terms of the March 2003 Order or that such order had been frustrated by either himself or the Second Respondent. Responding to paragraph 18 of the Founding Affidavit, Minister Manuel averred that the true reason why the Applicant did not continue his efforts to obtain further discovery was that there had been full compliance with the March 2003 Order. In Minister Manuel's view, the main Review Application failed because it was simply devoid of any merit. In the last regard he referred the Court to the Judgment in the main Review Application by Blignault and Yekiso JJ. In Minister Manuel's view, regard being had to paragraph 24 of the Founding Affidavit, it is the Applicant who is in contempt of the order made by Le Grange J on 6 March 2008. Referring to the London Judgment relied on by the Applicant Minister Manuel stated that such Judgment has no bearing whatsoever on the relief sought in the present application. In any event, Minister Manuel stated that the fact that the Applicant may wish to arrange for a forensic audit and investigation provides no basis whatsoever for the relief claimed in the present application. In Minister Manuel's view the Applicant's preparedness to concede that these documents are required for

purposes of a forensic audit and investigation, suggests that, on the Applicant's own version, that the present application constitutes an abuse of process. Minister Manuel called upon the Court to have regard to the content of the Founding Affidavit, the vexatiousness on the part of the Applicant, the abuse of the process of Court and the ulterior motive for the launch of the application when the Court considers the question of costs. He argued for a punitive costs order i.e. on the scale as between attorney and own client including costs occasioned by the employment of two (2) counsel.

[31] **THE REPLYING AFFIDAVIT** was deposed to by the Applicant himself (Mr Crawford-Browne). Mr Crawford-Browne emphasized in reply that the full documentation is required and is material to him in that he intends to use same for purposes of plea and counterclaim in case number 5156/2008. They have also become even more material, submitted Mr Crawford-Browne, in the light of what he termed *"landmark Judgment on 10 April 2008 in the London Court regarding the British Serious Fraud investigation into bribes paid by BAE to Saudi Prince Bandar."*

Mr Crawford-Browne mentioned and emphasized in reply that the affordability study that went to Cabinet in August 1999 confirmed that the arms deal was a highly risky proposition that could lead the Government into mounting economic, fiscal and financial difficulties. He reiterated that the discovery of these documents, albeit five (5) years late, but in the aftermath of that landmark Judgment referred to

above, will lay a trail for forensic auditors and financial investigators to track those bribes. Mr Crawford-Browne contended that the First Respondent, being responsible for the affordability and financing of the arms deal, was repeatedly warned during 1999 of allegations regarding bribes paid by BAE to South African politicians. In Mr Crawford-Browne's view, despite the warning and in violation of the prevention of organized Crime Act (1998) the First Respondent deliberately and unlawfully "turned a blind eye" to those allegations.

[32] Responding on why the documents are sought five (5) years after discovery was ordered by the Court in March 2003 Mr Crawford-Browne gave a two-fold answer. The first leg of the answer he gave is that he was mentally and financially exhausted by what he called the "tricks" he had suffered during 2003 at the hands of the First and Second Respondents. The second leg of his answer is that the requirement for the documents is occasioned by the Judgment in London on 10 April 2008.

IN LIMINE

[33] A point *in limine* was taken by Mr Pincus SC on behalf of the First and Second Respondents. Mr Pincus correctly submitted that a party bringing an application as one of urgency is enjoined by Rule 6 (12) (b) of the Uniform Rules of Court to clearly and explicitly set out the grounds and circumstances which render the matter urgent and why the party would be unable to be afforded substantial redress at a

hearing in due course. It appears from the Answering Affidavits that the Respondents' contention is that there has been full compliance with the March 2003 Order. It is contended on behalf of the Respondents that even if there had been no compliance yet of the March 2003 Order, such order was made more than five (5) years ago. The relevant Respondents' Affidavit in compliance with the March 2003 Order was filed on 9 April 2003, also more than five (5) years ago, and the Affordability Report sough by Applicant was provided to him on 28 October 2003, almost five (5) years ago.

[34] Mr Pincus SC submitted that if Applicant genuinely laboured under the impression that discovery in compliance with the aforesaid Order had not yet been made, he has provided no explanation for his inactivity for five (5) years. There exists no valid reason for why this would now be ordered as a matter of urgency and most importantly, why he allowed the main Review Application to be argued while he allegedly remained dissatisfied with the discovery of documents. Similarly, he further submitted that, if First to Third Respondents (in the main Review Application) were in contempt of Court by virtue of their failure to comply with the March 2003 Order, First to Third Respondents would then have in fact been in contempt for the same for a five (5) year period with no attempt made by the Applicant to action this alleged contempt. The Applicant sought to explain his inactivity in reply by alleging that the reason for seeking the present relief after five (5) years is that:

i) He was mentally and financially exhausted; and

ii) The requirement for the documents is occasioned by the Judgment in London on 10 April 2008 regarding the investigations into bribes paid by BAE.

[35] Mr Pincus SC submitted that the first reason is no reason at all in that it fails to explain inactivity for five (5) years. The second reason provided related to nothing material, relevant or having any bearing on any issue between the Applicant and the Respondents. This led Mr Pincus SC to submit that the inescapable inference to be drawn is that the London Court Judgment has simply provided the Applicant with a renewed vigour to continue what counsel termed, his crusade in respect of the arms deal. In his view, there is no connection between the London Judgment and the relief sought in the present application.

[36] In what appears to be the Applicant's justification for launching this matter as one of urgency, the Applicant seems to suggest that he seeks the relief in the present application to assist himself in the presentation of his plea and counterclaim in the action, which he has to file shortly. Mr Pincus SC submitted that the action referred to has no bearing on and is not relevant to the relief sought in the present application. Indeed the action is completely different and it involves many different parties and different issues. I agree with Mr Pincus SC's submission that the Applicant has created his own urgency and has been dilatory in enforcing any rights he may have had in

connection with the March 2003 Order. Litigants must note that in instances where urgency is "self-created" as a consequence of a party's dilatory conduct, a Court will ordinarily be slow and loathe to coming to that party's assistance in having a matter heard as one of urgency. Under such circumstances the delaying party will forfeit the right to approach the Court as a matter of urgency.

See: ***Twentieth Century Fox Corporation and Another v Anthony Black Films (Pty) Ltd*** 1982 (3) SA 586 (W).

[37] I am of the view that a very strong case for lack of urgency in this matter has been made out. But the question of urgency at the present moment has become academic. The merits have been exhaustively dealt with. It is only best that the matter be decided on merits. Cameron JA in ***Commissioner, SARS v Hawker Air Services (Pty) Ltd*** 2006 (4) SA 292 (SCA), faced with submission regarding urgency at that stage gave the following guiding formulation:

"In this Court, the respondents persisted in submitting that the application was not urgent when it was brought in December 2003, but even if that were so, there is nothing now to be made of that. I have already pointed out that lack of urgency will entitle a High Court in the exercise of its discretion to refuse to enrol a matter where the ordinary forms and procedures have not been followed. But that is not what occurred. Patel J traversed the full ambit of the merits of the relief that was sought, and far from striking the matter from the roll for want of such compliance, dismissed it. Whether or not it was urgent in December 2003 is immaterial to the question now before us, <u>which is whether the application ought to have been dismissed</u>." (emphasis added)

MISJOINDER

[38] The inclusion of a party who is not a necessary party will be bad for misjoinder unless it can be justified on the ground of convenience or in terms of the rules of Court. See: **Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa** at page 199.

In these proceedings, the Second Respondent is not a necessary party in relation to the relief sought by the Applicant. Further, no basis is provided for the joinder of the Second Respondent on the basis of convenience.

[39] As appears from the Notice of Motion, the Applicant seeks compliance by both Respondents with the March 2003 Order and further seeks an Order that both Respondents be declared to be in contempt of Court for want of compliance with the aforesaid Order. A consideration of the March 2003 Order reveals that it was First to Third Respondents in the main Review Application who were required to make discovery of the IONT documents. No order was made against the Second Respondent. She was not a party to that application. The Second Respondent was simply the deponent to the Answering Affidavit, on behalf of First to Third Respondents in the main Review Application and the Affidavits filed by her were filed in her capacity as Director-General of the National Treasury, which position I am told she no longer holds. As there was no Order made against Second Respondent, there appears to be no basis upon which the Applicant can seek compliance by Second Respondent with the

March 2003 Order, nor is there a basis upon which she can be in contempt of a Court Order which was not made against her. It therefore comes as no surprise that it is submitted that Second Respondent is misjoined in these proceedings. I hold that in this regard there was misjoinder. The Second Respondent should never have been party to these proceedings.

CONSIDERATION OF THE MERITS

[40] The First Respondent appears to have complied with the March 2003 Order on 9 April 2003 when the Second Respondent deposed to the Affidavit of compliance. The Second Respondent also deposed to an Answering Affidavit in the Rule 35 (7) application wherein the document entitled "Affordability Report" was also provided to the Applicant. Even if the Affidavit of compliance was not accepted as providing sufficient compliance of the March 2003 Order, but the second Affidavit that resulted in the production of "Affordability Report', certainly must have been accepted as providing full compliance with the Order.

[41] The March 2003 Order, being an Order for the making of discovery in terms of Rule 35 (12), was an interlocutory order to the main Review Application. The Order was made in order to assist the Applicants in preparing their Replying Papers in the main Review Application. In this regard, in the Judgment handed down in the discovery application, Judge Blignault referred to the Applicants'

reasons for seeking discovery of the documents sought and quoted from the Applicant's Affidavit. What is readily apparent from that quotation is that the Applicant himself stated that the documents requested, were required by him in relation to the conduct of the main Review Application. The March 2003 Order was therefore made for that purpose and clearly interlocutory to the main Review Application. The main Review Application was dismissed and all other avenues open to the Applicants in that regard exhausted. As a matter of course therefore, once the main Review Application was finalized, any interlocutory order made in respect of that application would similarly have come to an end. There would, in my view, simply be neither basis nor reason for any enforcement of such an interlocutory order in fact or law.

[42] It comes as no surprise that the Applicant does not state in his Founding Affidavit that he requires compliance with the March 2003 Order in order to properly deal with the main Review Application because that application was finalized almost four (4) years ago. In Mr Pincus SC's submission the Applicant belatedly seeks compliance with the Order for what Mr Pincus SC described as "an ulterior purpose". It is clear that the Applicant has asked this Court to compel compliance with a discovery order, not for the hearing in that matter, but for other irrelevant purposes. Mr Pincus SC submitted that such request constitutes an abuse of the process. Neither of the reasons provided by the Applicant are a sound basis for the enforcement of

the Order. The enforcement of interlocutory orders is not available to assist the Applicant in a completely separate action to which he is a party. What constitutes an abuse of the process of the Court is a matter, which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.

See: ***Beinash v Wixley*** 1997 (3) SA 721 (SCA) at 734 and cases cited therein.

RULE 35 (14)

[43] If the documents were indeed required by the Applicant to enable him to properly plead to the First Respondent's action for a final interdict, then the Applicant has employed the incorrect procedure and should have employed the mechanism provided by Rule 35 (14) of the Uniform Rules of Court. Rule 35 (14) provides that:

"After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof"

Having regard, however, to the provisions of Rule 35 (14), even a reliance on that rule would be misconceived. The First Respondent's

cause of action against the Applicant in the action is one for a final interdict, restraining the Applicant from defaming him by publishing any matter in which it is alleged that he is corrupt or has committed the crime of corruption or any other criminal conduct in connection with the arms deal. The Applicant states that the discovery of the documents will *"lay a trail for forensic auditors and financial investigators to track bribes paid by BAE to South African politicians"*. He alleges that First Respondent was aware of allegations relating to these bribes and turned a "blind eye".

[44] From the aforegoing, it is apparent that the defence that the Applicant will seek to rely on in the action is that the defamatory comments made by him, which form the subject matter of the action, are true and in the public interest and that his continuing to make these statements would be justified on the same basis. The Applicant is able to raise this defence without a need to receive documents at this stage. I agree with Mr Pincus SC that what the Applicant seeks to do, through the present application, is not to have documents made available to him in order that he is able to plead properly (because he is able to do so without the documents), but rather to be provided with the documents at this stage in order to buttress the defence to be raised.

[45] This is demonstrated by the Applicant himself where he states:

"The full documentation is now required and is material to defending Case No. 5156/08." Sight must not be lost of the principle that the test is whether

the documents in question are essential, not merely useful, in order to enable the party to plead.

See: ***Cullinan Holdings Ltd v Mamelodi Stadsraad*** 1992 (1) SA 645 (T) at 647F; ***MV Urgup v Wester Bank Carriers (Australia) (Pty) Ltd*** 1999 (3) SA 500 (C) at 515C-I.

Van Dijhorst J in ***Cullinan Holdings Ltd v Mamelodi Stadsraad*** *supra* explained this principle eloquently when he stated the following:

"Die eerste vereiste is dat die aangevraagde dokument 'vir doeleindes van pleit' benodig word. Uit die eedsverklaring van Nel is dit duidelik dat die verweerder sy verwere duidelik kon formuleer sonder die vermelde dokumente. Die dokumente is nie noodsaaklik ten einde te kan pleit nie. Die feit dat dit nuttig kan wees indien die opsteller van die pleitstuk dit beskikbaar het, is nie die toets nie. Om hierdie rede alleen al moet die aansoek onder Reël 30 faal." See: 647F of the report.

Thring J of this Division drove almost a similar point home in ***MV Urgup owners*** of the ***MV Urgup v Wester Bulk Carriers (Australia)*** *supra* at page 515C when he gave an exposition in this regard as follows:

"As to the alternative relief claimed by the respondents which, as I have said, would in effect be an order in terms of Uniform Rules 35 (3) or (14) compelling the applicant to make available for inspection and copying the documents listed in Annexure A to the notice of motion, this may be dealt with fairly shortly. These subrules are both intended to cater for the situation where a party knows or, at the very least, believes that there are documents (or tape recordings) in his opponent's possession or under his control which may be relevant to the issues and which he is able to specify with some degree of precision. In the case of Rule 35 (3) the intention is to supplement discovery which has already taken place but which is alleged to be inadequate. Rules 35 (3) or (14) do not afford a litigant a licence to fish in the hope of catching something useful."

Judge Thring proceeded to quote from ***Cullinan Holdings Ltd v Mamelodi Stadsraad*** *supra* at page 647H-G and 648F-G, where Van Dijhorst J expressed himself thus:

"Dit was nie die bedoeling met die invoeging van Reël 35 (14) in 1987 om 'n onbeperkte of wye reg tot blootlegging voor sluiting van pleitstukke in te voer nie. Soos Reël 35 (12) die geleentheid skep om voor sluiting van pleitstukke insae te verkry in 'n dokument of bandopname waarna in die teenparty se pleitstukke of eedsverklarings verwys word, so skep Reël 35 (14) 'n geleentheid ten aansien van dokumente of bandopnames waarvan die applikant kennis dra, maar wat nie vermeld word in stukke dan geliasseer nie.

Myns insiens skep Reël 35 (14) nie 'n metode waardeur 'n gedingsparty deur gebruikmaking van generiese omskrywings 'n net kan knoop waarmee vir halfbekende dokumente gevis kan word nie. Dit is 'n

remedie wat vir besondere omstandighede geskep is. Dit vereis die oproep van 'n spesifieke dokument waarvan die applikant kennis dra en wat hy presies kan omskryf. Slegs dan kan hy deur gebruikmaking van Reël 35 (14) die normale blootlegging van Reël 35 (1) vooruitloop."

[46] It needs to be emphasizes that the document must be essentially required for a "reasonably anticipated issue" in the trial. In this regard, the Applicant has failed to set out why it is essential that he has the documents, before pleading, as opposed to obtaining them for the support of any defence at the trial, and he has further failed to identify the issue for which he requires the documents. In due course, the Applicant will be in a position to request pre-trial discovery in relation to any issue relevant to the trial in the action. Should the discovery be lacking, the Applicant will be in a position to utilize the procedures provided for in Rule 35. However, no provision is made for discovery before pleadings have closed. That is what in essence is sought by the Applicant in the present application. In the case of ***Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another*** 2003 (4) SA 584 (CC), the Constitutional Court had reason to consider the provisions of Rule 35 (14) in circumstances where a party had contended that such documentation was required by him for purposes of pleading. The Court *a quo* had held that he was able to plead without such information and that his claim, insofar as it was based on Rule 35 (14), had to be dismissed. In the Constitutional Court, it was stated (at 595):

"In the first place, we are concerned with an order made at a very early stage of

> pleading, a stage prior to the delivery of a plea. It is patently clear from the record that the applicant is able to formulate and articulate his defences, in particular, if regard is had to the nature of the allegations against him. The matter must therefore be approached on the footing that even if the applicant were to be refused the information sought, he would be able to plead. The order made by the High Court does not prejudice the applicant in any way in the future conduct of the case."

The present matter is no different. The documents sought by the Applicant are not essential and not necessary for him to formulate his plea. On this basis even reliance on rule 35 (14) would be untenable.

CONTEMPT OF COURT

[47] The leading case on contempt of court is the recent case of ***Fakie NO v CCII Systems (Pty) Ltd*** 2006 (4) SA 326 (SCA) at 344 para 42 (Cameron JA). In terms of this judgment, in order to prove contempt of court, the party alleging contempt of court must now prove all the elements of contempt beyond a reasonable doubt. These elements are:

a) The Order made;

b) Service of the Order;

c) Breach of the Order;

d) That the Order was breached deliberately; and

e) That the Order was breached *mala fide*.

The ***Fakie NO*** case *supra* held further at page 344 para 42 that the party accused of contempt of court bears only an evidentiary burden in respect of the last two (2) elements referred to above. The party alleging the contempt bears the overall onus to prove all the elements

according to the criminal standard of "beyond reasonable doubt". The difficulty associated with establishing contempt of court is demonstrated in the following dictum from the ***Fakie NO*** case, wherein Cameron JA stated at page 333 paras 9 and 10:

"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

These requirements – that the refusal to obey should be both willful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

[48] It must further be considered that in seeking the Respondents' committal for contempt of court, the Applicant seeks final relief in motion proceedings. Therefore the well-known rule enunciated in the ***Plascon-Evans*** case applies. The rule is formulated as follows:

"Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

Where the allegations or denials of the respondent are so far-fetched or clearly untenable the Court is justified in rejecting them merely on the papers."

See: ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A) at 634-635.

The First Respondent's primary defence to the contempt application is that there has been full compliance with the March 2003 Order and as such there has been no breach thereof. The Affidavit of compliance contained the documents sought by the Applicant. The First Respondent stated that he "was satisfied and bona fide believed that the documents provided therein were in full compliance with the March 2003 Order."

[49] Being dissatisfied with the documents provided by the Respondents in the main Review Application, referred to *supra* the Applicant launched an application in terms of Rule 35 (7). In his Founding Affidavit in that application, he stated:

"It is respectfully submitted that First to Third Respondents have deliberately frustrated the Court Order of 26 March 2003 by failing to discover the 'voluminous Affordability Assessment document',

which is the IONT and Financial Working Group's report."

In answer to this application, the Second Respondent deposed to an Affidavit in which she stated repeatedly that the documents provided under cover of the compliance Affidavit constituted compliance with the March 2003 Order. Despite this belief, the Second Respondent provided to the Applicant the very Affordability Report that the Applicant had identified and referred to as being the document required in order for there to be compliance with the March 2003 Order. In regard to the supply of this document, the First Respondent stated that "to the extent that there had not yet been compliance with the March 2003 Order, the provision of this document rendered the Respondents fully compliant with the Order."

[50] That there was in fact compliance is supported by a number of compelling factors. The following testifies to this truth:

a) The Rule 35 (7) application was resolved by agreement on the basis that the documents provided would be used only for the main Review Application. No further discovery applications were launched by the Applicant, no further arguments were advanced that there had not been compliance with the March 2003 Order and the main Review Application was thereafter argued.

b) Blignault and Yekiso JJ, hearing the main Review Application, were clearly of the view that there had been compliance with

the March 2003 Order. In this regard Mr Pincus SC submitted that the findings by the aforementioned Judges is strongly indicative of the fact that the Applicants' counsel did not contend at the hearing of the main Review Application that there had not been compliance with the March 2003 Order and if such contention was made, it must have been rejected by the Judges.

c) In papers filed by and on the Applicant's behalf in sequestration proceedings against him, the Applicant referred to the documents provided to him. Rather than alleging that the First Respondent was in contempt of Court for failing to comply with the March 2003 Order, the Applicant indicated that the documents provided demonstrated that for which the documents were ultimately sought.

d) The passage of five (5) years, without any indication from the Applicant that there had not been compliance with the March 2003 Order, is in itself indicative of the fact that there had been compliance with the Order.

[51] In any event, if it was the case that there was no compliance with the March 2003 Order, the papers revealed that the First Respondent genuinely and *bona fide* believed that there had been such compliance. On this basis any possible non-compliance by the First

Respondent with the March 2003 Order could not have been deliberate and/or *mala fide* rendering the Applicant unable to prove these elements of contempt of court beyond a reasonable doubt. That the aforesaid belief held by the First Respondent was a reasonable one is supported by *inter alia* the fact that Blignault and Yekiso JJ shared his view, when hearing the main Review Application. The submission by Mr Pincus SC, is that the fact that it has taken the Applicant approximately five (5) years to seek the First Respondent's committal for contempt of court in relation to the March 2003 Order should not be underscored. This delay is very significant because it strongly indicates the fact that there was full compliance with the Order. In Mr Pincus SC's submission it demonstrates emphatically that the Applicant is actuated by malice in the present application, that the Applicant has an ulterior motive in seeking a committal for contempt at this stage and that the Applicant is abusing the process of Court. An important consideration in respect of an application for contempt of Court is that it is well established law that Courts are reluctant to go behind a discovery Affidavit, which is *prima facie* taken to be conclusive. See: ***Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*** 1999 (2) SA 279 (T) at 317.

In ***Marais v Lombard*** 1958 (4) SA 224 (E) at 227G it was held that:

"When a party making discovery has sworn an affidavit as to the irrelevancy of certain documents, the Court will not reject that affidavit unless a probability is shown to exist that the deponent is

either mistaken or false in his assertion."

Similarly, this approach was endorsed and adopted in ***Richardson's Woolwasheries Ltd v Minister of Agriculture*** 1971 (4) SA 62 (E) as applicable to possession as opposed to relevance of a document in issue.

[52] In ***Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd*** 1974 (4) SA 589(W) at 579E-H, the following significant formulation appears:

"It has further been held in a series of cases before the enactment of the present Rules that when a party to an action refuses to make discovery to produce for inspection any documents on the ground that they are not relevant to the dispute, the Court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of relevance is incorrect."

Whilst it is true that this Court has a broad "public interest" in obedience to its orders, very little interest can remain when the order to which the alleged contempt relates has its origin in an order made five (5) years ago and made interlocutory to a main Review Application which has been disposed of. In my view, regard being had to the above, the Applicant is unable to discharge the onerous burden of establishing the First Respondent's contempt of Court.

APPLICATION TO STRIKE OUT

[53] Mr Pincus SC brought an application to strike out certain paragraphs,

sentences and/or words contained in the Applicant's Founding Affidavit and Replying Affidavit on the basis that such paragraphs, sentences and/or words were either irrelevant and constituted hearsay or they were scandalous and vexatious etc. Mr Crawford-Browne's response was merely that if his Affidavit is flawed all he could do was to beg the Court's indulgence and that all he was doing or attempting to do was to hold the Minister to account. I intend to quote some of the portions of the Founding papers with which Mr Pincus SC is concerned.

a) "…he is corrupt or has committed the crime of corruption or any other criminal conduct in connection with the arms deal. (Last sentence of paragraph 8 of founding Affidavit.

b) "…fraudulently concocted …" (Line 2 of paragraph 12 of Founding Affidavit).

c) "Notwithstanding her instruction…my senior counsel pleaded to me that he could not understand it without my expertise." (Last sentence of paragraph 14).

d) "His summons against me is but another instance of his vindictive behaviour. …it is illustrative of the extreme lengths to which the executive branch of government and the African National Congress (ANC) will go in their efforts to squelch investigation into the arms deal scandal." (Last two sentences of paragraph 19 of Founding Affidavit).

e) "The logical conclusion is that the First Respondent and other members of the ANC's NEC know that Modise and the ANC itself were receiving bribes, and were engaged in massive cover-up operations. That makes the First Respondent and his colleagues not only complicit in corruption, but

active accessories to it…" (Paragraph 24 of the Founding Affidavit)

f) "…the First Respondent was either negligently incompetent or corrupt or both." (Portion of paragraph 26 of Founding Affidavit).

g) "It thereby confirms that the Second Respondent willfully and deliberately misled the Court and myself..." (Paragraph 15 of Replying Affidavit).

h) "…I was mentally and financially exhausted by "dirty tricks" I had suffered during 2003 by the First and Second Respondents." (Third sentence of paragraph 20 of Replying Affidavit).

[54] Above quoted extracts are truly irrelevant and constitute hearsay. Some of the quoted extracts are most certainly seriously scandalous of not only the First Respondent, but also of persons who are not party to this litigation and therefore not before this Court to defend themselves. During the arguments I indeed warned Mr Crawford-Browne against serious scandalous and vexatious utterances against persons who are not before Court and who, in the nature of things, cannot therefore defend themselves. The warning came forth even before the application to strike out was heard. Importantly, Mr Crawford-Browne's application to this Court is for an Order that the two (2) Respondents comply with the March 2003 Order and that they be declared in contempt of court. It is clear that the extracts I have isolated above could in no way contribute to the success of this application. They are irrelevant and there is no rationale in including them in the Founding papers. Removal of these quoted questionable

sentences, words and/or paragraphs, does not in the slightest degree, affect Mr Crawford-Browne's application as it stands. I thus have no difficulty in striking out as I hereby do, the above offending parts of the Founding papers. I will, however, be slow in ordering a litigant who clearly prepared these papers himself and who appeared before me in person to pay costs. It suffices that Mr Crawford-Browne will be well advised that in future he needs to strive to avoid irrelevant hearsay and scandalous/vexatious statements in his papers. Such statements do more harm than good to a litigant's case. I make no order as to costs in relation to the application to strike out.

COSTS

[55] Mr Pincus SC in his submissions in this regard asked this Court to give a punitive costs order against the Applicant. He enumerated reasons that justified such an order. Amongst such reasons Mr Pincus SC stated that in seeking an interlocutory order in circumstances where the main Review Application was finalized in 2004, the Applicant has abused the process of Court. According to Mr Pincus SC, in waiting approximately four (4) years to bring an application for contempt of court, the Applicant has again abused the process of court. The general rule is that a successful party is entitled to recover his costs from the unsuccessful party. However, the Court remains vested with a discretion when it comes to the question of costs. I do not differ from the view expressed by Mr Pincus SC regarding the conduct of the Applicant. But, I also hold a view that the Applicant is also probably ill-advised and ill-informed about what obtains in our

Courts. I hold the view that it would meet the dictates of justice if costs awarded are not on the punitive scale prayed for on behalf of the Respondents.

ORDER

[56] In the circumstances I make the following order:

a) The application is dismissed with costs which costs are to include those costs occasioned by the employment of two (2) counsel.

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DLODLO, J