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

CASE NO: 9987/2001

In the matter between:

ECAAR SOUTH AFRICA	**First Applicant**
TERRY CRAWFORD-BROWNE	**Second Applicant**

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**First Respondent**
THE MINISTER OF FINANCE	**Second Respondent**
THE NATIONAL GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**Third Respondent**
THE SPEAKER OF PARLIAMENT	**Fourth Respondent**

APPLICANTS' PRINCIPAL SUBMISSIONS

The following submissions are made with reference to the proposed Grounds of Appeal, each of which is dealt with in turn:

1. *The learned Judges erred and/or misdirected themselves in holding that Applicants' primary attack was misconstrued and/or should have been directed against the Cabinet's decision; and that the merits of such decision, the reasons*

for it and the documentation that was before the Cabinet ought to have been "properly analysed" in the review application – notwithstanding the fact that Applicants were denied access to proof of the merits of and reasons for the Cabinet decision, and the documents that were before the Cabinet, by the Honourable Court in an earlier application for discovery.

1.1 It is submitted that the Cabinet's decision has been, and remains, inscrutable, as the reasons for it and the reasoning process behind it were never accessible by the Applicants.

1.2 It is submitted to be unrealistic to expect litigants in the Applicants' position to proceed against a party whose deliberations are thus concealed behind a veil by virtue of law and constitutional custom (see **Schierhout v Union Government 1927 AD 94 101; Nyangeni v Minister of Bantu Administration and Development 1961 (1) SA 547 (E) 560).** In **Minister of Community Development v Saloojee 1963 (4) SA 65 (T) 71E-H** the following was said:

> **"The Cabinet and likewise the Governor-General-in-Council deliberates in secret and its proceedings are confidential. (See Jennings Cabinet Government 208-16 and May on Evidence 3ed 268). No minutes of Cabinet meetings are kept. In the case of 3ed 268). No minutes of Cabinet meetings are kept. In the case of Nyangeni ... O'Hagan J said:**

'The necessity for maintaining secrecy in respect of the deliberations of the executive organ of the State is, in my view, too obvious to require elaboration. In the public interest members of the Executive Council should enjoy a freedom of expression secure in the knowledge that they cannot, against their will, be required in any particular matter to disclose the knowledge of official communications made and received at meetings of the Council. It seems to me that where objection is taken in proper form to evidence of what has transpired during a meeting of the Union Executive the Court is obliged to uphold that objection.'"

1.3 Once it is established that the Cabinet's deliberations and the reasoning behind its decisions are closed to public scrutiny, and inadmissible as evidence, it is submitted to follow that any prospective litigant challenging a Cabinet decision would find it wholly impossible to "properly analyse" the merits of the Cabinet's decisions, the reasons for them and the documentation that was before it in the decision-making process. Thus, a litigant seeking to challenge a Cabinet decision would be non-suited. For the Courts meekly to permit the Cabinet thus to conceal its processes would be to deprive citizens of their last safeguard against government excesses, and could be argued to be an abdication by the Courts of their constitutional duty to protect citizens against possible government abuse.

Conversely, the Cabinet could take the most appalling decisions, based on the most irrational reasoning, with impunity. This, it is respectfully submitted, runs contrary to the spirit of the Constitution and must necessarily lead to the conclusion that an alternative course should be

available to those who seek to challenge Cabinet decisions. This aspect is addressed in the next paragraph.

2. *The learned Judges erred in failing to hold that the ultimate responsibility for government expenditure lies with Second Respondent in terms of common law, the State Liability Act 20 of 1957, and the Constitution; and that it was accordingly in any event encumbent on Applicants to direct their primary attack against him.*

2.1 Whenever the Cabinet has arrived at a decision which breaches or threatens a citizen's constitutional rights, it would appear that such decision would be beyond the reach of the Courts. What is a citizen's alternative course? It is respectfully submitted that, in order to give effect and substance in such cases to "the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court" (see **section 34 of the Constitution**), the Courts are obliged, if only for reasons of practical convenience, to recognise the citation of Ministerial Heads of Department.

2.2 *In casu*, this submission is reinforced by the provisions of the State Liability Act 20 of 1957, and the precepts of common law and the Constitution (**cf section 92(1) of the Constitution**): perhaps more than

any other member of the Cabinet, Second Respondent's responsibility for the funding of *inter alia* socio-economic upliftment of the poor and disempowered renders him ultimately responsible for financial policy decisions taken by the Cabinet.

2.3 It is thus submitted that, for purposes of citation, Second Respondent was in the circumstances the logical alternative to the Cabinet. The corollary of the aforegoing is that Second Respondent was the appropriate person against whom the Applicants' primary attack had to be directed.

3. *The learned Judges erred in holding, expressly or by implication, that Second Respondent was confronted with a fait accompli and reduced to a mere functionary tasked with "finding the necessary funding" – notwithstanding the evidence of Ramos to the effect that Second Respondent was responsible for taking the decision relating to inter alia the affordability of servicing the loan agreements.*

3.1 In para 6.5 of her answering affidavit (**Record: 160**) Ramos stated the following:

> **"It was not the Second Respondent who decided whether, as a matter of policy, strategic defence equipment should be procured at all, and if so, the make-up of the package in question.** ***The decision of the Second Respondent related to the most practical, efficient and affordable method of servicing the financial obligations to be incurred by such procurement."*** (Italics supplied.)

3.2 Considering the italicised passage from Ramos' affidavit, it is submitted that two facts emerge which are common cause between the parties:

(a) Second Respondent indeed made a *decision*; and

(b) That decision related *inter alia* to aspects of *affordability*.

3.3 It is accordingly submitted to be an undeniable fact that, whether or not it was interwoven with a prior Cabinet decision, Second Respondent himself took the decision as to the terms of the loan agreements and the affordability of repayments. It was therefore clearly open to the Applicants to challenge Second Respondent's decision in its own right.

4. *The learned Judges erred and/or misdirected themselves in holding that the warnings contained in the Affordability Report were not intended to advise Second Respondent to desist from concluding the transactions in question (notwithstanding that they were contained in the Affordability Report which purported to provide advice to Government in regard to the affordability of the*

transactions in question), but to be merely informative as to the risks that had to be taken into account should Second Respondent proceed to enter into the loan agreements.

4.1 It is decidedly correct to state that one of the aims of the Affordability Report was to inform the Government as to the risks that had to be taken into account should Second Respondent proceed to enter into the loan agreements. However, it is respectfully submitted that, for that reason, Second Respondent could not merely blindly enter into the loan agreements regardless of the nature or magnitude of the risks set out and discussed in the Affordability Report. To have done so would have reduced him to a mere functionary, and would render the Affordability Report superfluous.

4.2 It is accordingly submitted that, where the Affordability Report drew attention to onerous risks, some of which had devastating implications for socio-economic rights of citizens, Second Respondent was duty bound to apply his mind thereto and to desist from entering into the loan agreements if desisting was to be the rational and reasonable one (which, it is submitted, it was).

5. *The learned Judges in any event erred in failing to hold that, had Second Respondent properly applied his mind to the advice contained in the Affordability Report, he would have been constrained to desist from concluding the relevant transactions; a fortiori, if Second Respondent had properly weighed up the costs of servicing the loan agreements against the negative impact they will have on socio-economic rights.*

5.1 The submissions made in the previous paragraph may equally apply to this proposed Ground of Appeal.

5.2 In addition, it is submitted that, had Second Respondent properly applied his mind to the likely consequences of servicing the loan agreements upon the onerous terms ultimately agreed, the reasonable course to take would have been to desist from concluding those transactions.

6. It is submitted that the conclusions stated in proposed Ground of Appeal 6 flow logically from the aforegoing.

7. *The learned Judges erred and/or misdirected themselves in failing to find that any infringement of or threat to rights took place within the area of jurisdiction of the Honourable Court.*

7.1 It is submitted that, should another court come to the conclusion that Second Respondent had in fact acted irrationally, unreasonably or unlawfully, it would irresistibly come to the conclusion that socio-economic rights were infringed or threatened, also within the jurisdiction of this Court.

7.2 It is respectfully submitted that a reasonable prospect of this happening indeed exists.

8. *The learned Judges erred and/or misdirected themselves in failing to find that Applicants (or either of them) had locus standi.*

8.1 As was submitted with regard to the question of jurisdiction, it is submitted that, should another court hold that an infringement of or threat to socio-economic rights had been established, it is likely to find also that the Applicants had *locus standi*.

8.2 It is again respectfully submitted that a reasonable prospect exists of another court finding accordingly.

9. It is submitted that, in respect of grounds 9 and 10 of the proposed Grounds of Appeal, another court may reasonably hold in favour of the Applicants, particularly when it is considered that the matter is one of immense public interest; and Respondents' obstructive conducting during the period leading up to the main hearing.

JOHN VAN DER BERG

Chambers
CAPE TOWN
3 May 2004