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

**CASE NO: 5129/2002**
**Main application: 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 |
| **THE PUBLIC PROTECTOR** | Fifth Respondent |
| **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** | Sixth Respondent |
| **THE AUDITOR-GENERAL** | Seventh Respondent |

---

**JUDGMENT DELIVERED ON 26 MARCH 2003**

---

**BLIGNAULT J:**

[1] First and second applicants brought an application ("the main application") on notice of motion against the above seven respondents in which they seek to attack the validity of some of the

financial transactions forming part of the Government's armaments acquisition programme that has popularly become known as the Arms Deal. At issue at this stage of the proceedings is an interlocutory application in which applicants seek discovery of certain documents that were referred to by first, second and third respondents in their answering affidavits in the main application.

[2] First applicant is described in the founding affidavit as Economists Allied for Arms Reduction, South Africa ("ECAAR SOUTH AFRICA"), the South African affiliate of Economists Allied for Arms Reduction ("ECAAR"), an international non-governmental organization with consultative status to the United Nations Economic and Social Council. ECAAR, it is alleged, has, since 1989, campaigned against high military spending and military approaches to conflict resolution, and for peaceful and sustainable development and investment in human welfare world-wide. Second applicant, Terry Crawford-Browne, is a retired international banker, formerly employed *inter alia* as regional treasury manager for the Western Cape until 1986. His international banking experience includes foreign exchange dealing in the United States and Britain. He resides

at 3B Alpine Mews, High Cape, Cape Town. That is also the principal place of business of first applicant.

Second applicant made the founding affidavit on behalf of both applicants. First applicant, he said, brought the application acting in its own interest, in the interest of ECAAR as contemplated in section 38(c) of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"), in the public interest as contemplated in section 38(d) of the Constitution and as an association acting in the interests of its members as contemplated in section 38(e) of the Constitution. Second applicant, he said, brought the application in his personal capacity and as a member of ECAAR South Africa and the class of all poor persons in South Africa as contemplated in section 38(c) of the Constitution and in the public interest as contemplated in section 38(d) of the Constitution.

First respondent is the President of the Republic of South Africa. He is cited as a member of the Cabinet, and as the Head of State, and as the Head of the National Executive in terms of section 83(a) of the Constitution. Second respondent is the Minister of

Finance. He is alleged to be the Cabinet member responsible for entering into the financial transactions in question on behalf of the Republic of South Africa. Third respondent is the National Government of the Republic of South Africa, constituted in terms of section 40(1) of the Constitution. Fourth respondent is the Speaker of Parliament, who is cited in her capacity as such. Fifth respondent is the Public Protector appointed in accordance with section read with section 181(1)(a), of the Constitution. Sixth respondent is the National Director of Public Prosecutions appointed in terms of section 179 of the Constitution and seventh respondent is Auditor-General appointed in terms of section 188, read with section 181(1)(e), of the Constitution. No relief is sought against fifth, sixth and seventh respondents. They have been cited as it might be said that they have an interest in the subject matter of the application.

[5] In the notice of motion in the main application applicants seek the following relief.

> *"1. Reviewing, correcting and setting aside the decision of the Second Respondent made in and during* ***January***

*2000 to enter into foreign loan agreements and export guarantees in respect of frigates and submarines from Germany; Gripen fighter aircraft from Sweden; Hawk fighter trainer aircraft from the United Kingdom; and utility helicopters from Italy;*

2. *Declaring the decision to be null and void and of no force and effect in consequence of the invalidity of such decision;*

3. *Declaring the armaments acquisition programme ("the Arms Deal") to be null and void and of no force and effect in consequence of the invalidity of the foreign loan agreements and export guarantees;*

4. *Ordering only Second Respondent together with those further Respondents who oppose this application to pay Applicants' costs of suit, jointly and severally, one paying the other to be absolved, such costs to include the costs of two Counsel."*

According to second applicant the main application concerns the irrationality and accordingly the unconstitutionality of the South African Government's actions in entering into the various constituent parts of the Arms Deal and specifically the rationality of second respondent's conduct in entering into loan agreements and credit guarantees on 24 January 2000. It also constitutes a challenge to the lawfulness of second respondent's actions in entering into the underlying loan agreements.

Second applicant described the background to the main application in his founding affidavit. In September 1998 the Government released a document called "Defence in a Democracy". document contained a number of options and/or recommendations but it did not contain any decisions which simply required implementation. The Government did not at that stage approve any options or recommendations nor did it approve any loans or borrowings to finance any arms deal. In November 1998 the Department of Defence announced publicly a list of preferred suppliers of armaments and equipment and made clear its intention to proceed to purchase armaments at a cost of approximately R29,8

billion ("the arms acquisition"). Various organizations and persons including second applicant raised the objection at public meetings that the envisaged expenditure could not be justified in light of the fact that South Africa had no discernable enemies and furthermore a clear priority of poverty alleviation. According to second applicant the Government's response to these challenges was to inform the public that their envisaged expenditure of R29,8 billion on armaments would be offset by foreign investments and exports of R110 billion (later reduced to R104 billion); that these offsets would create 64 165 jobs; that the Department of Trade and Industry had from 1997 established offsets as the basis of the Government's industrialization programme, and that the intention was that any Government foreign procurement transaction worth more that US$10 million would be leveraged to fast-track South Africa's industrial development. The public was informed thereafter that affordability studies had been carried out and that these studies supported the notion that the Arms Deal was affordable because it would generate these offsets. A team from the Department of Finance ("the affordability team") carried out a study ("the affordability study") which was provided to Cabinet in August 1999. The fact of this study and the content thereof were not made

public until the Mail and Guardian newspaper disclosed its existence and content in March 2001. In fact the affordability study contained certain warnings in regard to the proposed transactions. Second applicant summarized the warnings of the affordability team follows:

"40.1 *Arms procurements are likely to impact (negatively) on expenditure by other Government Departments. Additional expenditure on armaments would cause expenditure to be shifted from other Government departments to Defence.*

40.2 *The intention of the industrial participation programmes is to offset or mitigate the negative effects of the arms procurements. To the extent that these projects fail to deliver their expected results, the negative economic effect of the procurements will be exacerbated;*

40.3 *The South African Government is fully exposed to depreciation of the rand against foreign currencies, which*

*account for about 75 percent of the total purchase amount. There is no effective means of hedging the currency risk inherent in the procurements;*

*40.4 There is clearly a risk that currency depreciation could be more rapid than anticipated. Any deviations from these assumptions are for the account of the Government, with the obvious implication that the costs of the packages and their financing could be considerably higher than expected;*

*40.5 The sums involved are extremely large; they involved fixed contractual commitments extending over long periods with high breakage costs; they are heavily import-biased; and their costs are offset by a set of associated activities (the NIPS) which cannot be guaranteed;*

*40.6 Analysis of these risks suggests the Government could be confronted by mounting economic, fiscal and financial difficulties."*

[8] Second applicant alleged further that despite these warnings second respondent in January 2000 entered into foreign agreements and guarantees in respect of the arms procurement. either ignored the warnings or he did not know about them. Second applicant claimed that had second respondent taken cognisance of the affordability study, then he could not rationally have entered into the loan guarantees and credit agreements as he did in January 2000. In any event, he did so on the basis of cabinet approval, which approval was based on wrong information. The warnings of the affordability team were withheld from the public until March 2001 when the Mail and Guardian disclosed them. They were disclosed in Parliament nor made public in any other way. Meanwhile numerous allegations of corruption had publicly been made various persons, including second applicant himself. On 24 January 2000 second respondent signed the foreign loan agreements and export credit guarantees necessary to conclude the Arms Deal. Second applicant alleged that second respondent did this without compliance with the provisions of the Exchequer Audit Act 23 of 1956 or the Public Finance Management Act 1 of 1999. The decision furthermore was not rationally related to the purpose for which the

power was given and was accordingly arbitrary. The foreign loan agreements, he said, are loans as contemplated by section 218 of the Constitution. The export credit guarantees are guarantees concluded with foreign governments. They are also governed by section 218 of the Constitution. The export credit guarantees are international agreements as contemplated by section 231 of the Constitution.

During September 2000 the Auditor-General reported to the Parliamentary Standing Committee on Public Accounts ("SCOPA") he had found very serious shortcomings in the acquisition processes in at least five respects:

(i) Conflicts of interest among decision makers;

(ii) The award of a fighter/trainer contract to BAE systems;

(iii) The inadequacy of the offset guarantees;

(iv) The disregard for personnel requirements to operate the equipment;

> The allocation of a naval sub-contract to Thompson CSF with a very substantial increase in costs over a local company tender.

In consequence of this report, SCOPA held public hearings in October 2000 and called *inter alia* for a multi-agency investigation. In February 2001 the Ministers of Defence, Finance and Trade and Industry appeared before SCOPA. At this hearing a letter from Deputy President Zuma was circulated to the public. It pointed out that a Ministerial Cabinet Committee ("the Cabinet committee") led the acquisition process. The members of the Cabinet committee were then Deputy President Thabo Mbeki, Minister Joe Modise, Minister Trevor Manuel, Minister Stella Sigcau and Minister Alec Erwin. The Cabinet committee reported to the Cabinet which gave final approval for this acquisition.

[10] At the SCOPA meeting second respondent was *inter alia* questioned concerning the affordability of the Arms Deal and the foreign exchange risks to South Africa. He responded that *"it is*

*absurd to have to consider foreign exchange risks in cash accounting when local borrowing does not consider such risks* Reinette Taljaard MP subsequently asked the following question in Parliament: *"Whether any specific steps were taken to hedge the cost incurred in the course of the arms acquisition programme, if not, why not if so what steps?"* Second respondent replied on 16 May 2001 in writing that the cost of the arms procurement programme is not hedged and that there are five very clear reasons why hedging is inappropriate.

11 In and during February 200 the Auditor-General, the Public Protector and the National Director of Public Prosecutions advised SCOPA that they were competen to investigate the Arms Dea and would be doing so. These three agencies released the Arms Deal report on 5 November 2001 The report suggests that senior member of the Government committed no irregularities in the Arms Deal. In its key findings and recommendations the report declares *inter alia*

> ***"14 1 1*** *No evidence was found of any improper or unlawful conduct by the Government. The irregularities and*

improprieties referred to in the findings as contained in this report, point to the conduct of certain officials of the Government departments involved cannot, in our view, be ascribed to the President or the Ministers involved in their capacity as members of the Ministers' Committee or Cabinet. There are therefore no grounds to suggest that the Government's contracting position is flawed.

14.1.12 Certain aspects of the financial and economic model used by the Affordability Team in their presentation to the Ministers Committee in August 1999 on the cost of the procurement, can criticized to an extent. However, even though there might be different views and models explaining future projected costs and effects, it appears from the investigation that the Affordability Team and IONT took adequate measures under circumstances to present to the Government a scientifically based and realistic view on these

*matters. The Ministers' Committee was put in a position by the Affordability Team to apply their minds properly to the financial impact of procurement. Ultimately, the decision about what the country can and can not afford is one of political choice.*

*14.2.4 Detailed and accurate information, including possible costs, should be submitted to Cabinet. currency risk implications regarding international armament acquisitions should be disclosed to Cabinet. Such information is necessary to ensure that essential functionalities are not removed from equipment during negotiations due to budget constraints."*

[12] On 16 July 2001 Mr Roland White, an official of the Department of Finance, and a member of the team who prepared the affordability study, testified that foreign exchange risks had been disregarded prior to the decision being taken. It is clear, suggested second

applicant, that Cabinet ministers were warned of the foreign exchange and other risks of the acquisition programme, but recklessly and irrationally choose to ignore those warnings.

[13] In a section of the founding affidavit headed "Arms Deal" second applicant set forth his understanding of the deal gleaned from the media and public meetings. The initial budgeted cost for the Arms Deal was R29 billion. Testimony at Scopa in October 2000 revealed that the cost had escalated by that time to R43 billion and subsequent estimates have revealed that the figure is now R66 billion. The reason for the escalation is the depreciation of the South African Rand against foreign currencies. It is envisaged that the various items of military hardware will be delivered within the next four years and payments will be made over a twelve year period. The only economic rationale or justification advanced for the Arms Deal is that relating to the offsets. The nature of the offsets is that in exchange for the military contracts the foreign corporations undertake to invest in South Africa or purchase South African exports. The exact extent of these offsets, guarantees in respect of them and how they will affect the South African economy have not been disclosed.

They are stated to be "commercially confidential". The Arms Deal, he said, has been structured as follows:

> South Africa will borrow money by way of loan agreements from large international banks;
>
> The money so borrowed will be paid to the arms supplier;
>
> The loans are supported by the guarantees given by South Africa to the applicable state departments who in turn provide guarantees to the international banks. The decision by Cabinet to authorise the loan agreements is a constituent part of the Arms Deal. It constitutes an exercise of public power.

**[14]** Under the heading of 'financial irrationality' second applicant referred to the question of the depreciation of the rand, since 1994 at an average of 17% per annum. The prospect, he said, is that it will continue to depreciate in the future at a rate of 17% per annum. South Africa has thus been committed to a financial liability that will

escalate considerably bove the present estimate. It could realistically rise within 9 nine) years to R287 billion

Under the heading of economic irrationality' second applicant stated that the decisions are economically irrational for a number of reasons. In his view there is no discernable military threat to South Africa. The vrgument that the offsets wi provide industrial benefits assumes that thev can be guaranteed and wi not be cancelled o sharply reduced Second applicant submitted that this ar umen is rationa The offsets are exposed to economic and political realities in the countries concerned. Details of the offsets have been refused to the p blic The international experience is that those who get the benefit of offset arrangements are already amongst the best off economically and politicaly well connected Alternative expenditure of the resources would provide more benefits

In regard to strategic rationality' second applicant referred to the testimon of Professor Peter Vale that South Africa faces no military threat at present. South Africa' delicate socio-economic environment represents the most important threat to its constitutional

democracy. This has been aggravated by the HIV/AIDS pandemic.

procurement of sophisticated weaponry is unlikely to resolve these threats. The debate, according to him, should be turned towards human security.

Second applicant stated that the spending of the department of defence between 1999 and 2003 averaged 15% annually which is vastly greater than that of other departments. Yet the Government reported in 1998 that 19 million South Africans lived on or below the poverty line of R353,00 per month. The Arms Deal infringes the socio-economic rights of poor persons in South Africa such as the rights to adequate housing, health care, food, water, social security and education. It is for the Government to justify such limitations.

Second applicant submitted next that the entering into of the Arms Deal and the underlying agreements was not open and transparent. For that reason also it was 'unconstitutional'. Finally, he submitted that the foreign loan agreements and credit guarantees are international agreements. Yet, in breach of section 231 of the

Constitution, they were not approved by the National Assembly or the National Council of Provinces.

Ms Maria da Conceicao das Neves Calha Ramos is the director-general of the National Treasury. She made the principal answering affidavit on behalf of first, second and third respondents. Second respondent, she said, never gave export guarantees. There are four foreign loan agreements, all dated 24 January 2000; one in respect of the frigates, one in respect of the sub-marines, one in respect of the Gripen and Hawk aircraft and one in respect of the utility helicopters. They are all subject to strictures regarding confidentiality. The decision of second respondent was one of a number of Cabinet decisions. He did not decide whether the equipment should be procured. His decision related to the financing of the procurement.

On behalf of first to third respondents Ms Ramos raised the defence to the main application that this court does not have jurisdiction in the matter. She also challenged the *locus standi* of first and second applicants and opposed the application on its merits.

Ms Ramos set out to describe the history of the Arms Deal. From February 1996 to April 1998 a comprehensive process was carried out by Cabinet to determine the kind of defence force this country needed after 1994. A draft White Paper on defence was published on 21 June 1995. Widespread comment was received. was evaluated and incorporated in the final White Paper presented by the Minister in May 1996. It was approved by Parliament. It contained the new defence policy. It also provided for a Defence Review the aim of which was to elaborate on the policy through comprehensive long range planning on various matters. The drafting of the Defence Review was the responsibility of a working group appointed by the Minister of Defence. It established various sub-committees. It was decided at the outset that the Review would be subject to a process of consultation with defence stakeholders and interest groups. National and regional consultative conferences were held which were open to the public. The process culminated in a Defence Review document that was presented to, and approved by, Parliament on 26 May 1998.

[22] The Working Group had prepared and developed various force design options Four options were presented to the Parliamentary defence committees and Cabinet and were discussed in detail Minister of Defence and is department recommended option 1 included the acquisition of four corvettes, four submarines and 32 medium and 16 light fighter aircraft. The recommended design was approved by Parliament on 22 May 1998 Cabinet then acted by way executive action The first and fundamental decision taken in accordance with the authority vested in it by section 85 of the Constitution was to purchase the equipment needed to retain the effective defence capability of the SANDF The process to determine whether and how to purchase such equipment and the make-up thereof was extensive It involved various persons and bodies. The decision of second respondent to enter into the foreign agreements was ancillary to the preceding decisions and evaluations Only when became necessary to consider the question of how best such acquisitions should be funded was the decision made to enter into the loan agreements.

[23] Once Cabinet had taken this decision it became necessary for second respondent to give effect to the consequential financial arrangements. He acted in terms of his powers under the Exchequer and Audit Act. Second respondent considered the decision of the Cabinet and the advice of the International Offers Negotiating Team and the Financial Working Group before signing the loan agreements. The substance of the advice was summarized as follows in paragraph 2.4 of the Executive Summary of the Affordability Report:

"*2.4 LOAN PACKAGES*

*2.4.1 Following extensive negotiations in London Johannesburg with the ECA's, banks and exporters, Finance Negotiating Team was able to achieve almost all of its negotiation objectives. Concretely:*

- *ECA finance now accounts for all the imported content and, most importantly, allows down payments in respect of those goods to be made from those ECA*

Loans. The need for forex commercial loans has thus been eliminated;

- The non-UK Agencies have, to different degrees, matched the attractive options that were offered by the UK CA. CGD;

As a result the ECA Loans now include options to select different currencies during the delivery period, and with the exception of the German offer, there is an option to choose floating interest rates during the delivery period, with the option to fix at market rates during draw-down, and at the first repayment date the option to fix at the CIR Rate agreed on Loan signature. The ability to fix the CIRR ahead of Loan Signature for the French and the Italian packages is now much more libera so that a certain amount of hedging against an adverse rate movement is possible at no cost.

- The CA premia can now be paid in instalments and financed from the ECA Loans for a packages. In one case (Italy) the CA premium has been reduced.

  In the case of Germany an element of the finance ( 3% of contract value) is now available a CIR Rates rather than at market rate

  The French have allowed 10 years repayments for the corvettes Excocet missiles rather than the maximum years,

  Bank margins and fees have been reduced.

2.4.2 These concessions by the CAs are largely unprecedented. The finance package finally achieved has greatly pushed out the boundanes of ECA defence financing and is probably unique The terms now achieved with the ECAs and banks have substantially improved the financing in terms of cash flow, exchange

> *risks as well as producing substantial savings for the borrower amounting to approximately US$ 101.09 million (over R600m*

[24] Ms Ramos also stated the following with regard to the loan agreements

> *"In each case in which a loan agreement was concluded the Second Respondent was persuaded that such loan agreement constituted the most effective and economic way of financing the acquisition package. His decision was taken upon the advice of the experts and of the National Treasury and the overall conclusion was that no other form of finance was as beneficial to the republic as the taking of ECA finance. I point out that the Applicants nowhere suggest that a more efficient form of financing existed nor do they offer any alternative suggestions as to how the Second Respondent could have arranged such finance. I respectfully suggest that the method of financing chosen was the only realistic and practicable one available.*

[25] Applicants brought the discovery application after receipt of respondents' answering affidavits and before filing their replying affidavits in the main application. The documents of which they seek discovery are all referred to in respondents' answering affidavits. There are nine categories of documents. They are listed in paragraph 30 of applicants' founding affidavit in the discovery application as follows:

> The loan agreement dated 24 January 2000 between the Government of the Republic of South Africa and AKA Ausfuhrkredit-Gesellschaft mbH, and Kreditanstalt für Wiederaufbau, referred to in paragraph 6.3.1 of the answering affidavit in the main application;
>
> The further agreement with Societé Generale and Paribas dated 25 January 2000, referred to in the same paragraph;
>
> The loan agreement dated 24 January 2000 between the Government of the Republic of South Africa and AKA

Ausfuhrkredit-Gesellschaft mbH, and Kreditanstalt für Wiederaufbau in respect of the submarines, dealt with in paragraph 6.3.2 of the answering affidavit in the main case;

(iv) The loan agreement dated 24 January 2000 between the Republic of South Africa and Barclays Bank plc and Her Britannic Majesty's Secretary of State acting for the Export Credits Guarantee Department in respect of the Gripen and Hawk aircraft, dealt with in paragraph 6.3.3 of the answering affidavit in the main application;

(v) The loan agreement dated 24 January 2000 between the Government of the Republic of South Africa and Mediocredito Centrale SPA in respect of the utility helicopters, dealt with in paragraph 6.3.4 of the answering affidavit in the main application;

(vi) The documentation evidencing the recommended design allegedly approved by Parliament on 22 May 1998,

referred to in paragraph 30 of the answering affidavit in the main application;

(vii) The duly minuted decision taken by Cabinet to purchase the equipment needed to retain the effective defence capability of the SANDF, referred to in paragraph 33 of the answering affidavit in the main application;

(viii) The documents containing the advice of the International Offers Negotiating Team and the financial working group, referred to in paragraph 36 of the answering affidavit in the main application. If contained in the Affordability Report, a copy of that Report.

(ix) The purchase contracts entered into by the Government as buyer and the arms manufacturer as seller, referred to in paragraph 37 of the answering affidavit in the main application.

[26] The founding affidavit in the discovery application was made by second applicant on behalf of both applicants. Second applicant explained applicants' reasons for seeking discovery at this stage as follows:

"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 January 2001. The question whether 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 the 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 assist in arranging for an expeditious hearing."*

Applicants aver that they did not, and could not, foresee the disputes which have necessitated the present application. Second applicant stated that applicants are prepared to accept that the discovery be made subject to such confidentiality provisions as respondent may propose.

Second applicant pointed out that the question of jurisdiction in the main application might have to be decided in the discovery application because the court might decide that it could not order the discovery of documents if it did not have jurisdiction in the main application. The same applies to the questions relating to applicants' standing.

Second applicant also referred to additional evidence that emerged since the institution of this case. A report entitled

Transforming the Present Protecting the Future, Report of the Committee of Enquiry into a Comprehensive System of Social Security for South Africa ("the Taylor Report") dated March 2002 has been made public. It refers, *inter alia,* to an earlier report commissioned by the Government, The Poverty and Inequality Report, which documented the extent of the deprivation experienced by most South Africans in 1995. These reports deal with the nature and extent of poverty in South Africa and are to form part of applicants' case in the main application. A third report is entitled "Sustainable development at Coega" It was produced under the editorship of Professor Patrick Bond It is said to contain a damning indictment of the role of offsets in respect of the Coega deal.

[29] Ms Ramos again deposed to the answering affidavit on behalf of first, second and third respondents. She pointed out that applicants stated that they require some of the documents in order to reply to respondent's allegation that the agreements signed by second respondent on 24 January 2001 were not international agreements. Applicants contended that the export credit agreements are guarantees concluded with foreign Governments and are

governed by the provisions of section 218 of the Constitution and that they are international agreements as contemplated by section 231 of the Constitution. Respondents have denied that they constitute guarantee arrangements as alleged but in any event no legally sustainable issue is sustained. If section 218 of the Constitution applied then the Government could guarantee a loan only if that guarantee complied with any conditions set in national legislation. As it was not clear what legislation applicants were referring to, clarity was sought by means of correspondence. In this correspondence applicants made it clear that they are not relying on any national legislation. Applicants, she submitted, thus abandoned any attempt to rely on a breach of section 218 of the Constitution.

[30] Ms Ramos dealt next with applicants' contention that section 231 of the Constitution applies to the alleged export credit guarantees which are alleged to be "guarantees concluded with foreign governments". It appears however from the description of the relevant agreements, contained in categories 1, 2, 3 and 5, that they were not concluded with foreign Governments. They were concluded with foreign banks and commercial entities. The phrase "international

agreements", as used in section 23 of the Constitution, she contended, refers to agreements between independent nations or other entities recognized as having international personality under international law. The agreement, document no 4, she said, was concluded between the Republic of South Africa and Barclays Bank plc and Her Brittannic Majesty's Secretary of State acting for the Export Credit Guarantee Department. The Secretary of State acted in terms of the Export and Investment Guarantee Act 1991 (UK). That act empowers the Secretary of State to make arrangements with a view to facilitating supplies from persons carrying on business in the United Kingdom to persons carrying business outside the United Kingdom.

[3] Ms Ramos contended further that applicants are not entitled to seek discovery of documents for the purpose of considering an amendment of their causes of action. The proposed new cause of action may involve totally different persons and totally different reasons. Applicants have moreover not even given any intimation of the nature of their proposed amendment.

The documents mentioned in category no 6, she contended, is already in applicants' possession. Document no 7 is a minute of the decision taken by Cabinet. It is privileged from disclosure. The decision in question is in any event not in issue in the main application. Category no 8, she submitted, is not relevant. The documents in category no 9 are irrelevant and subject to privilege.

In regard to the loan agreements, categories nos 1 to 5, she contended that disclosure thereof would not be in the public interest. They form part of the financial business carried on by the Government and ought not to fall within the public domain. Respondents accordingly object to their disclosure. In regard to the minutes of Cabinet decisions she contended that as a matter of principle the business of Government cannot be carried on if such documents are not protected from disclosure. The disclosure of these minutes is also subject to the provisions of section 11A of the Armaments Development and Production Act 57 of 1968 and section (2) of the Defence Act 44 of 1952. Section 11A prohibits the disclosure of information relating, *inter alia*, to the acquisition of armaments, unless authorized by the Minister of Defence. Section

118(2) prohibits the disclosure of information relating to the defence of the Republic of South Africa unless similarly authorized. Category no 9 comprises the purchase agreements between the Government and the manufacturers of the strategic defence equipment. In terms of the statutory provisions mentioned above the authority of the Minister of Defence is required for the disclosure of these documents. No such authority has been sought by applicants.

[34] Ms Ramos drew attention further to certain conduct on the part of applicants which makes the disclosure of documents to them particularly undesirable. Prior to the service of the application on respondents applicants had apparently facilitated or permitted publication thereof in the media. She drew attention to intemperate language in a letter which second applicant wrote to second respondent on 30 August 2002 and a letter which he wrote to Minister Essop Pahad on 9 September 2002. In the latter he made, *inter alia*, the unfounded allegation that applicants have copies of the agreements between the British and South African Governments which disprove third respondent's answering affidavit.

Ms Ramos submitted that if there any doubt in regard to the issues of relevance privilege or confidentiality the Court should call for the documents and form its opinion without making the documents available to applicants hould the Court order the disclosure of any documents then, he asked special procedures sho ld be followed in order to limit the resultant prejudice to the Government.

Second applicant led a replying affidavit on behalf of both applicants in the discovery application. n this affidavit he contended, *inter alia* that the statutory provisions relied upon by first to third respondents, namely section 118(2) of the Defence Act and section 1A of the Armaments Development and Production Act are overbroad and inconsistent with section 2(1 of the Constitution relating to the right of access to information and section 6 of the Constitution relating to the right to freedom of expression These constitutional issues would also nvolve the Minister of ustice and the Minister of Defence and for that reason the discovery application would also be served on these two Ministers

[37] In response to this constitutional challenge, Ms Ramos deposed to a further affidavit on behalf of first, second and third respondents. She pointed out that this constitutional challenge was raised at a late stage and she submitted that the question of the joinder of the Ministers in question should be left over for consideration only if the court cannot resolve the interlocutory proceedings in a way that would avoid a determination of these issues. Ms Ramos also pointed out that applicants made available to respondents a file containing the documents which are already in applicants' possession but of which they are still seeking disclosure. This file, she said, would be made available to the court at the hearing.

[38] Mr Kuper, who appeared with Mr Mtshaulana on behalf of first, second and third respondents at the hearing of the discovery application, submitted that first to third respondents' objections to jurisdiction and *locus standi* are well founded. He submitted further that these objections should be decided at the outset as they might dispose of the entire application. Since they would have final effect he suggested that they should be determined on the basis of the facts

averred in the applicants' affidavits which have been admitted by the respondents, together with the facts alleged by the respondent, as explained in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) at 634 HI.

[39] On the question of jurisdiction Mr Kuper submitted that the provisions of section 1 of the State Liability Act 20 of 1957 do not assist applicants. It reads as follows:

> *"1 Claims against the State cognizable in any competent court*
>
> *Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant."*

This provision, he submitted, does not alter the jurisdiction of the High Court with respect to subject matter, territory or parties. Applicants do not allege that the decisions under attack were taken in the area of jurisdiction of this Court. In the circumstances of this case, he submitted, this consideration is fatal. The joinder of fourth respondent does not assist applicants as no relief was sought in this matter against her or Parliament.

[40] Mr Arendse appeared, with Mr Katz and Mr Borgström, on behalf of first and second applicants. On the question of the court's jurisdiction in the main application, Mr Arendse referred to, and sought to distinguish, the decision of the Appellate Division in **MINISTER OF LAW AND ORDER v PATTERSON** 1984 (2) SA 739 (A). The court held in that case that the Cape Magistrate's Court did not have jurisdiction in an action against the minister where the cause of action arose in Hermanus. That case, he submitted, was based upon the provision in section 23 of the Constitution of the Republic of South Africa Act 32 of 1961 that Pretoria was the seat of the Government of the Republic. The present Constitution has no such

provision. Second and third respondents, he submitted, both have offices in Pretoria and Cape Town and can therefore be said to reside also in Cape Town.

My difficulty with the latter submission is that there is very little evidence in this case on which to base such a finding. Whether or it can be said that the Cabinet or second respondent also "resides" or "carries on business" in Cape Town is to some extent a factual question. It has not been canvassed on the papers and it is impossible to make any findings in this regard at this stage of the proceedings. Whether or not applicants would be allowed to attempt to cure this deficiency in their replying affidavits, should they elect to do so, can not be decided at this stage.

At the hearing Mr Arendse also sought to rely on an alternative ground of jurisdiction. He submitted that it can fairly be inferred from the allegations made by applicants in the main application that the socio-economic rights of some of the persons on behalf of whom the application is brought, are resident in the area of jurisdiction of this court. The infringement of those rights would accordingly take place

in this area of jurisdiction and that would give this court jurisdiction to hear this matter. Some support for this submission is to be found in the judgment of the Appellate Division in **ESTATE AGENTS BOARD v LEK** 1979 (3) SA 1048 (A). The respondent in that matter carried on business as an estate agent in Cape Town. The appellant took a decision to refuse to issue a fidelity fund certificate to the respondent without which he could not continue practising. The respondent thereupon instituted proceedings against appellant in the Cape Good Hope Provincial Division of the Supreme Court. The case came before the Appellate Division on appeal. One of the issues was whether the court *a quo* had jurisdiction to entertain the matter in view of the fact that the appellant's place of "residence" was in Johannesburg and the relevant decision was taken there. The Appellate Division held that the Cape court did have jurisdiction. following *dictum* of Trollip JA, at 1067 B-F is instructive:

> *"The true position was that, although the Board's decision was taken in Johannesburg, its inhibitory effect (wherever it pronounced or communicated) hit respondent in Cape Town where he is resident and has his business. It disqualified him*

from continuing to carry on his business as an estate agent thereby diminishing pro tanto his legal capacity or personality and effecting, as it were, a kind of capitis diminutio Now have already pointed out tha the relief against such adverse effect of the Board's decision which respondent was entitled to and did seek by way of an appeal under the Act was not mandatory but rather declaratory or empowering in respect of the Board Having due regard to that fact I think that the Court a quo had jurisdiction to entertain his appeal simply on the ground that he was resident within its area of iurisdiction After all, that was the Court immediately at hand and easily accessible to him and to which he would naturally turn for aid in seeking to have the diminution in his legal capacity or personality remedied. In the present context of our unitary judicial system of having one Supreme Court with different Divisions, as set out earlier in this judgment, convenience and common sense, are, inter alia, valid considerations in determining whether particular Division has jurisdiction to hea and determine the particular cause.

[43] M Kuper sought to counter this contentio by submitting that applicants have not established any real threat of injury to any of the persons on whose behalf the application is allegedly brought He submitted that applicants case appears to be founded upon the contention that the budgetary implications of the Arms Deal will effectively preclude the Government from meeting the socio-economic obligations imposed upon it by the Constitution Thi contention he s ibmitted is speculative. It is founded upon three controversial and unprovable assumptions, namely that the Rand currency will depreciate that the depreciation will continue over the next decade to the extent predicted and that such depreciation will preclude the Government from meeting its socio-economic obligations

[44] It would appear from these submissions, however that the question of jurisdiction may be inextricably linked to the merits of the main application Applicants have not yet filed a replying affidavit in the main application It would therefore be premature to consider the merits of the issues arising in the main application at this stage of the proceedings I will accordingly assume for purposes of deciding the

issues arising in the discovery application, that this court has jurisdiction in the main application

[45] In regard to applicants' *locus standi Mr* Arendse referred to section 38 of the Constitution. It reads as follows:

"38 *Enforcement of rights*

*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-*

*anyone acting in their own interest;*

*anyone acting on behalf of another person who cannot act in their own name;*

*anyone acting as a member of, or in the interest of, a group or class of persons,*

*anyone acting in the public interest; and*

*an association acting in the interest of its members.*

Applicants, he said, rely upon sub-sections 38 (a) c (d) and e of the Constitution The application he submitted is brought on behalf of all the poor people of South Africa. The leading decision on section 38(c' he submitted, is **PERMANENT SECRETARY, DEPARTMENT OF WELFARE, EASTERN CAPE, AND ANOTHER v NGXUZA AND OTHERS** 2001 (4 SA 84 CA) The respondents in that matter were among tens of thousands of recipients of social disability grants whose grants had unilaterally and without notice been terminated by the Eastern Cape provincial authorities. They had sought in the Eastern Cape Provincial Division not only the reinstatement of their grants, but also leave to institute representative class action and public interest proceedings against

the provincial authorities, in terms of s 38(b), (c) and (d) of the Constitution, on behalf of others in the province who had also had grants unfairly and unlawfully terminated. Some of these grantees did not reside in the area of jurisdiction of the Eastern Cape Division and the great of the provincial government was at Bisho, outside that area. The Supreme Court of Appeal held that the ECD had jurisdiction in respect of the action of the entire class. Mr Arendse also referred to the decision of a full court of this division of the High Court in **RAIL COMMUTER ACTION GROUP AND OTHERS v TRANSNET LIMITED T/A METRO RAIL AND OTHERS,** delivered on 6 February 2003 under case no 10968/2001. In that matter, a voluntary association formed to give public expression to grave concern about the safety of passengers on commuter trains, was permitted to take legal proceedings against the entities responsible for the safety on rail commuter services.

[46] On the question of standing, Mr Kuper submitted that applicants are required to show a direct and specific interest in the outcome of the litigation. He referred to the following *dictum* of O'Regan J in **FERREIRA v LEVIN NO AND OTHERS; VRYENHOEK AND**

**OTHERS v POWELL NO AND OTHERS** 1996 (1) SA 984 (CC) at paragraph 234:

> *"[234] This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case."*

Mr Kuper raised arguments that are similar to those set forth in paragraph 43 above, in order to justify the contention that applicants

have not shown that anyone is about to be affected by the decisions which are being attacked. It seems to me, therefore, that the issue of standing is also linked to the issues on the merits in the main application. Applicants have not yet filed a replying affidavit in the main application and it would accordingly be premature to determine issue of standing at this stage of the proceedings. I will accordingly proceed to consider the questions relating to discovery on the assumption that applicants do have *locus standi* in the main application.

Before dealing with the individual documents of which discovery is sought to be obtained, it may be useful to refer to two questions of a general nature. The first concerns the effect of rule 35(12). It reads as follows:

> *"(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape*

*recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."*

Mr Arendse submitted that a *prima facie* right to access of documents under rule 35(12) arises as soon as any explicit or implicit reference is made thereto in any affidavit by the opposing side. Counsel on both sides accepted the authority of the judgment of Friedman J in **GORFINKEL v GROSS, HENDLER & FRANK** 1987 (3) SA 766 (C) at 774 where it was pertinently stated that questions of privilege or relevance do play a role in the application of rule 35(12). The onus however rests on the recipient of the notice to prove facts that would relieve him of this obligation.

**[48]** The second point of a general nature concerns the question of State privilege. Mr Arendse submitted that earlier South African case law on the question of privilege must be applied with caution. The provisions of the Constitution, in particular sections 32 and 34,

must now also be taken into account. Section 32 guarantees the right to access of information. In **EX PARTE CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: IN RE CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996** 1996 (4) SA 744 (CC) the Constitutional Court said in regard to the underlying principle, in paragraph 83:

> *"What is envisaged by the (Constitutional Principle) is not access to information merely for the exercise or protection of a right, but for a wider purpose, namely to ensure that there is open and accountable administration at all levels of Government."*

Section 34 of the Constitution protects the right of a civil litigant to a fair trial.

**[49]** As a general proposition Mr Arendse's submission appears to be correct. A similar argument was, for example, approved in **SWISSBOROUGH DIAMOND MINES (PTY) LTD AND OTHERS v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND**

**OTHERS** 1999 SA 79 (T) at 344 The application of these principles of course will depend on the facts and circumstances of each individual case.

[50] I now turn to the individual documents of which discovery is sought to be obtained According to second applicant discovery of the first to fifth and seventh to ninth categories of documents is required to determine whether respondents' allegation is correct that second respondent did not sign international guarantees" As pointed out by Ms Ramos in her answering affidavit, second applicant appears to be referring here to possible contraventions of two separate provisions of the Constitution. The first is section 218 It reads as follows:

> *"218 Government guarantees*
>
> *'1. The national government, a provincial government or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation*

*(2)National legislation referred to in subsection may be enacted only after any recommendations of the Financial and Fisca Commission have been considered.*

*(3)Each year, every government must publish a report on the guarantees it has granted.*

M Kuper submitted that any guarantee would only be relevant under this section if it failed to comply with *any conditions set out in national legislation"* Applicants, he said were invited to identify the *"national legislation* that applied to the present situation but they have been unable to do so At the hearing Mr Arendse was invited by us to point to such legislation but he too was unable to do so.

[5 The second provision which applicants rely upon is section 231 of the Constitution It reads as follows

*"231 International agreements*

*The negotiating and signing of all international agreements is the responsibility of the national executive.*

*An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).*

*An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time."*

First to third respondents' answer to the request for these documents, as set forth in Ms Ramos' answering affidavit in the discovery application, is that it is manifest from the description of the nature of and the parties to the loan agreements that they were not concluded with foreign governments and would therefore not fall within the ambit of the phrase "international agreements" within the meaning of section 231 of the Constitution. Mr Kuper pointed out in addition that document no 4, being the loan agreement in respect of the Gripen and Hawk aircraft, is already in applicants' possession. It formed part of the file of such documentation that was handed in at the hearing of this application. Applicants, he submitted, were accordingly in a position to indicate how or why it and the other loan agreements would be relevant.

[52] Mr Arendse did not in his argument seek to dispute respondent's interpretation of section 231 of the Constitution. He did not seek to show that applicants could not form a clear view as to whether the loan agreement already in applicants' possession contravened the provisions of section 231 of the Constitution or that any of the other loan agreements might contain different features that

would be relevant to the uestion whether they contravened section 23 o the Constitution Mr Arendse was imilarly unable to provide any support for the inference that any of the documents in categories nos 7 8 and 9 might be relevant fo this purpose

3 accordingly agree with respondents' submission applicants are not entitled to discovery of the documentation mentioned in categories 1 to and 7 to 9 on the grou ds that they may evea a possible contravention of either section 18 or section 231 of the Constitution.

54 The sixth category of documents of which d scovery is sought, is described as follows: The documentation evidencing recommended design allegedly approved by Parliament on 22 May 998 referred to in paragraph 0 of the answering affidavit in the main application In M Ramos answering affidavit in the present application she pointed out that the recommended desig in questio appeared in the document entitled 'Defence in a Democracy" to which applicants referred in thei found ng affidavit and which they offered to have ava lable at the hearing

document was handed to the court at the hearing and M Kuper pointed out that the item in question appears at page 36 thereof

55] M Arendse however argued that applicants also require the documentation surrounding the approval of this design by Parliament. It seems to me however that there are two reasons why this furthe request for discovery must fail. It was never asked for in the application and the proceedings of Parliament are, in any event, public documents There is no reason why expensive discovery proceedings should be instituted in order to obtain disclosure thereof

'56' The next (seventh document of which discovery is sought is described as the duly minuted decision taken by Cabinet to purchase the equipment needed to retain the effective defence capability of the SANDF. First to th rd respondents object to the disclosure of this item on the grounds of relevance and privilege They also pointed out that Ms Ramos did not refer to any minute in her answering affidavit in the main application he simply described the decision that was taken M Arendse however recognizing the problems posed by State privilege in regard to this document, indicated during

argument that applicants are not seeking discovery of a full minute of the entire discussion that preceded the taking of the resolution. All that is required is a summary of the gist of the resolution. This is required, he said, to enable applicants to verify Ms Ramos' version of the decision.

It seems to me that applicants' request for discovery of this "document" is without substance. Apart from questions of relevance and privilege, applicants are in fact asking this court to order respondents to create a document in order to discover it for purposes of the verification of Ms Ramos' statement in her affidavit. Not only would such an order be irregular but no factual basis has been suggested in the affidavits or in argument for a finding that Ms Ramos' statement in this regard may not be truthful.

The eighth category of documents of which discovery is sought is described as the documents containing the advice of the International Offers Negotiating Team and the Financial Working Group.

[59] The reference to these documents in the affidavits occurred as follows: Second applicant's founding affidavit in the main application contains an annexure marked "E3" which is a review by Idasa entitled "Democracy and the Arms Deal". That document contains an annexure marked "A" with the title "Executive Summary". It is described in the Idasa document as a report by the Affordibility Team appointed by the Department of Finance to consider and report upon the cost implications of the proposed transactions and in particular what negative consequences entering into the transactions might have for the South African economy. In paragraph 36 of her answering affidavit Ms Ramos said *inter alia* that second respondent considered the advice of the International Offers Negotiating Team and the Financial Working Group. The substance of the advice was summarized in paragraph 2.4 of the Executive Summary of the Affordability Report. Applicants now seek discovery of these two items of advice.

[60] First to third respondents objected to the disclosure of these items on the ground of relevance but not privilege. They contended furthermore that the advice of these two bodies need not be

discovered as the answering affidavits only referred to the substance of the advice of these bodies and not to any documents as such. Mr Arendse, however, relied upon **PROTEA ASSURANCE CO LTD AND ANOTHER v WAVERLEY AGENCIES CC AND OTHERS** 1994 SA 247 (C) as authority for the proposition that an implicit reference to a document is sufficient to bring rule 35(12) into operation. It is implicit in Ms Ramos statement, he submitted, that these advices would have been in writing.

It seems to me that this is the one category of documents in respect of which applicants are entitled to discovery. On the face of it, the advice appears to be relevant to the decision of second respondent which is under attack in the main application. It was referred to by Ms Ramos as follows:

> *"35. Once Cabinet had taken the executive decision, in accordance with section 85 of the Constitution, to acquire, it became necessary,* inter alia, *for the Second Respondent to give effect to the consequential financial arrangements which were needed, including the raiding of*

*loan capital. The Second Respondent acted in terms of the powers accorded him under the Exchequer Audit Act.*

36. *In so determining to act, the Second Respondent considered the advice of the International Offers Negotiating Team ("IONT") and, in particular, the Financial Working Group appointed to research, investigate and advise on relevant topics and which group had in turn been assisted by financial advisors. The substance of that advice is to be found in summary in paragraph 2.4 of the Executive Summary of the Affordability Report at p 99 of the founding affidavit ..."*

Mr Arendse correctly pointed out that it is a conclusion of the Executive Summary that the proposed armaments procurement create important and "unique risks" for the Government. In the light of applicants' attack on the rationality of second respondent's decision and the admission by Ms Ramos that these advices were considered, they appear to be relevant to applicants' case. It is in my view implied in Ms Ramos' statement that there are documents

containing the advices in question. If indeed these advices do not exist in a documentary form then a simple affidavit to explain that would be adequate compliance with the order that I am about to make.

The ninth category of documents of which discovery is sought is described as the purchase contracts entered into by the Government as buyer and the arms manufacturer as seller. First to third respondents objected to the disclosure thereof on the grounds of relevance and privilege. It seems to me that applicants' attempt to discovery of these documents founders on the ground of relevance. The salient facts regarding these purchases such as the parties thereto, the dates thereof, the merx in each case and the cost thereof have already been disclosed. Mr Arendse has been unable to indicate any other feature of the contracts that would be of any relevance to applicants' present cause of action. Applicants also stated that they need these documents in order to assess whether to amend their claims. If such a ground for discovery is at all tenable, on which no opinion is expressed, then it seems to me that the person seeking discovery should at least provide some particularity of

the nature of the proposed amendment so that the question of the relevance of the documents can be properly considered. This was not done in the present case. I am accordingly of the view that applicants are not entitled to discovery of the ninth category of documents.

[63] That leaves the question of costs as the only outstanding issue. Mr Arendse submitted that applicants should be entitled to their costs even if they only succeeded in respect of a single one of documents. In the event they did only succeed in respect of one out of the nine categories of documents. On the other eight categories they failed. The questions of jurisdiction and *locus standi* however standing over for determination in the main application. In the circumstances it seems to me that the appropriate order would be to reserve the question of the costs of the discovery application for determination at the hearing of the main application.

[64] In the result I make the following orders:

(a) First, second and third respondents are directed to make discovery in terms of the provisions of rule 35(12), within a period of 10 court days, of the following documents:

> *"The documents containing the advice of International Offers Negotiating Team and Financial Working Group, referred to in paragraph 36 of the answering affidavit in the main application.*

(b) All questions of costs relating to the discovery application are reserved for determination in the main application.

A P BLIGNAULT

**DAVIS J:** I agree.

D M DAVIS