

Your ref:
Our ref: Halton Cheadle/
Shamima Gaibie/NAI90001



01 July 2005

Ms Baleka Mbete
Madam Speaker
Parliament
Cape Town

Delivery by hand

Dear Madam Speaker,

We act on behalf of Mr Jayendra Naidoo.

Our client takes issue with the conduct of a member of Parliament, Ms Patricia De Lille, during the parliamentary sitting held on 21 June 2005. Her conduct on 21 June 2005, as will be demonstrated below, amounts to a clear abuse of her role as a member of parliament and of the principle of parliamentary privilege in circumstances that have amounted to a deliberate attempt to impugn the reputation of our client both personally and professionally.

We accordingly write to you on behalf of our client in the hope that you will, Madam Speaker;

- a) Firstly, use your role and good offices to secure some form of redress for our client within Parliament; and

- b) Secondly, consider our client's proposals for the amendment of the Rules of Parliament in the spirit of good governance and to protect the rights of ordinary citizens, who might find themselves in our client's predicament, in the future.

Background

- 1 In November 1998 our client was appointed by the Government in the role of Chief Negotiator of the Strategic Defence Procurement Programme, a position of high trust, as the representative of (then) Deputy President Mbeki. In that role, our client's function was to: report to Deputy President Mbeki and the Sub-Committee of Ministers appointed by the President; to chair the negotiations with the preferred bidders; and to lead and direct the negotiating team to achieve an "affordable package" which was acceptable to all stakeholders including the various Government departments, the preferred bidders, as well as the international finance institutions.
- 2 As our client was at that stage the outgoing Executive Director of the National Economic Development and Labour Council (NEDLAC), and not a Government official, he was appointed as a contractor, initially on a six month basis, with provisions for the extension of that contract on a monthly basis. In September 1999, our client presented a report to Cabinet which took a final decision to approve the proposed package. Thereafter by December 1999, contracts were concluded by the Negotiating Team, in conjunction with the various Government departments, with the prime defence contractors whereupon our client's contract with Government came to an end.
- 3 As is well documented in the press, the defence procurement process has generated much public debate and has also given rise to several allegations of corruption.
- 4 One source of such allegations was a document produced in Parliament in September 1999 by Ms De Lille commonly known as the "dossier". According to Ms De Lille, the *dossier* contained evidence of corruption on the part of a number of

individuals, one of whom was our client. Those allegations were extensively reported in the media at the time causing a great deal of damage to his reputation.

5 As a result of the allegations concerning the defence procurement process, including allegations of corruption surrounding the “arms deal”, the President established a ***Joint Investigation into the Strategic Defence Procurement Packages***. The investigation was conducted by the Public Protector, the National Director of Prosecutions and the Auditor General. During that investigation, our client provided a detailed documentary submission and was extensively questioned. The joint investigation gave rise to a detailed report in November 2001. It was carefully scrutinised by Parliament and accepted by the South African government in its press statement dated 15 November 2001.

6 The central thrust of the report is found in its key finding which is recorded in the following terms:

“No evidence was found of any improper or unlawful conduct by the Government. The irregularities and improprieties point to the conduct of certain officials of the government departments involved and cannot 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.”

7 Whilst the report alluded to irregular and improper conduct on the part of certain officials of the Government departments that were involved in this process, the report did not cite a single instance of irregular or improper conduct by our client.

8 In the context of what was considered to be an extensive and an exhaustive investigation by the joint investigation team, Ms De Lille, without hesitation, on 21 June 2005, effectively repeated the allegations made by her in 1999 and, in particular, she :

- Called upon the National Prosecuting Authority to “pursue the enemies of the State”;

- Implied that our client was an “enemy of the State” by announcing that he was one of those identified as being on the most wanted list of individuals involved in corrupt activities in connection with the “arms deal”.
- Stated that there was a need for the National Prosecuting Authority to investigate and charge those alleged to be involved in the arms deal and by associating our client’s name in this context she implied that he was part of a “plague” which her political party “*will be relentless in the battle to rid South Africa of this plague*”.

9 Ms De Lille’s false and unsubstantiated statements in Parliament reflect a deliberate attempt to undermine our client’s reputation and his business relationships. This was done by Ms De Lille, despite the fact that: the joint investigation team had access to the *dossier* when it conducted its investigations and submitted its report to Parliament; she has no new evidence to substantiate her allegations against our client; and she has made no effort to verify the contents of her *dossier* in so far as they relate to our client.

10 As you are no doubt aware, Ms De Lille’s inflammatory statements in Parliament have given rise to extensive media coverage and she has given interviews and gone on radio to give even greater coverage to her allegations. In those interviews she continues to refer to what she said in Parliament and thus continues to cause our client and others serious harm. She appears to be of the view that the principle of parliamentary privilege absolves her from acting honestly, responsibly and fairly to our client and to others, within the walls of Parliament.

11 Our client’s reputation has been unjustly smeared as a result of Ms De Lille’s conduct, with consequential damage to his business interests as well as those of his business partners and employees.

12 It is in this context, that we examine the nature of *Parliamentary Privilege* and seek your assistance to obtain immediate redress for our client within Parliament, and to

define the nature of that privilege and the responsibility of members of parliament to ordinary citizens of this country when they sit in Parliament.

Parliamentary privilege

- 13 Section 58 of the Constitution properly guarantees freedom of speech and protects members of Parliament from civil or criminal proceedings for anything said in Parliament. These guarantees and protections are fundamental to the proper functioning of democratic government. But parliamentary privileges can be abused and in some instances to the unfair detriment of members of the public.

- 14 In so far as the courts are concerned they will not allow any challenge to be made of what is said and done within the walls of Parliament in performance of its legislative functions and in protection of its established privileges. In other words, the courts are precluded from entertaining in any proceedings evidence designed to show that a member of Parliament, in parliamentary proceedings, deliberately misled Parliament. However, to mislead Parliament must itself be considered as a breach of the code of parliamentary behaviour and must be subject to sanction or discipline by Parliament. In this context, it is our view that Ms De Lille's statements about our client in Parliament, at the very least, constitute a breach of the code of parliamentary ethics and that she must immediately be subject to some form of sanction or discipline by Parliament lest she continues to injure the reputation of our client in Parliament in circumstances where our client has no opportunity of rebuttal.

- 15 As we know Parliament has exclusive power over its own internal procedures, a principle that is acknowledged by most democratic countries. However, as the 1996 Constitution is premised on constitutional supremacy, the internal rules of Parliament, including its standing rules, must be in accordance with and not at variance with the principles of the constitution.

- 16 Indeed the Constitution specifically provides in section 58(1) that the right to freedom of speech in Parliament is subject to the rules and order of Parliament. It is our client's submission that section 58(1) confers on Parliament the responsibility

of ensuring that the guarantee of freedom of expression is not abused. It is also our submission that Parliament, as part of the state, is required in terms of chapter 2 of the Constitution to respect and protect the rights in the Bill of Rights, including those rights that guarantee the right to human dignity.

17 In our opinion, the Rules of the National Assembly and the National Council of Provinces, do not adequately protect the rights of citizens and to that extent these Rules fall short of the requirements of a constitutional democracy in that they do not provide some measure of protection for citizens.

18 Several countries have sought to address this problem. For instance:

18.1 In *New Zealand*, provision is made in sections 160 to 163 of the Standing Orders of the House of Representatives for any person who believes that he or she has been defamed to request the Speaker to include that person's response to the defamatory statements in the parliamentary record. This provides partial respite.

18.2 In ***A v United Kingdom (2002) EHRR***, the European Court of Justice examines, in broad detail, the rights of citizens in various countries against parliamentarians who abuse the special privilege afforded to them during parliamentary sittings. For example, the European Court of Justice cites with approval the practice in numerous European Countries, including the Netherlands, and Finland. We repeat the European Court of Justice's findings:

18.2.1 *The Netherlands*

18.2.1.1. In terms of Article 71 of the Netherlands Constitution, members of the Senate and the House of Representatives enjoy a general immunity from legal proceedings during their participation in parliament. This right to immunity is however not absolute.

18.2.1.2. The Rules of Procedure of both the Senate and the House of Representatives cover cases in which an MP abuses the protection afforded by Article 71.

18.2.1.3. The President in each chamber may admonish any member who violates the Rules of Procedure and then offer the member concerned a chance to retract the offending remark. If the member refuses to make a retraction, or persists in violating the Rules of Procedure, the President may forbid him or her from speaking further or from attending the rest of the sitting or further sittings the same day.

18.2.2 Finland

18.2.2.1. In terms of Section 31(2) of the Constitution a member is required to conduct himself or herself with decorum and not act offensively towards another person. If a member breaches this condition, the Speaker may issue a warning or prohibit the representative from continuing to talk. In addition, Parliament may caution a member who has repeatedly breached the order or suspend him or her for a maximum of two weeks.

Proposals

- 19 Our client is genuinely concerned that Ms De Lille will continue to repeat defamatory allegations in Parliament against him because of the public profile it generates for herself and for her political party.
- 20 Our client accordingly requests Madam Speaker to give serious consideration to the issues raised herein and provide whatever redress may be available within the Rules as presently composed.

- 21 In addition, our client proposes that the parliamentary rules should be amended to provide at least for the following:
- 21.1 The right of the citizen to request the Speaker to allow the person defamed to have a response incorporated in the parliamentary record;
 - 21.2 The right of the citizen to request the Speaker in cases of egregious violation of a citizen's rights to request the Chief Justice to appoint judges to conduct a hearing into the truth of the allegations and to report to Parliament. The judges' findings would not be binding on Parliament but it would inform Parliament about disciplinary sanctions, if any, which should be taken against the relevant member if necessary;
 - 21.3 The Speaker's right to request the member to retract the member's unjustified allegations, and failing that to suspend the member from participating in Parliamentary sittings for a stipulated period of time.
- 22 Our client makes these proposals not only in order to ensure that Ms De Lille desists from continuing to defame our client but also in the public interest to deepen our democracy and to provide some recourse for citizens while at the same time preserving parliamentary privilege.

Yours faithfully

HALTON CHEADLE / SHAMIMA GAIBIE