

Arms deal inquiry crushed

The government has deployed a rapid response force of loyal troops to halt an embarrassing probe of the arms procurement package.

Patrick Laurence reports

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IN THE PAST few months the African National Congress government machine has ensured with singleminded efficiency that no rigorous investigation of the alleged corruption surrounding the R43.8bn arms deal will take place. Its offensive has been the more determined because it began late: Parliament already had the bit firmly between its teeth when the government finally woke up in November to the potential embarrassment awaiting it if the proposed multiagency inquiry got off the ground.

Way back in September 1999 Patricia de Lille, the PanAfricanist Congress MP, first raised the fears of a group of anonymous ANC parliamentary colleagues that the deal might be contaminated by corruption. To backbench jeers, ANC leaders scornfully dismissed her concerns. When she asked for a judicial review, defence minister Mosiuoa Lekota countered by demanding that she disclose the identity of her informants. It is a sign of the executive's overweening confidence that it took no steps then to head off any future challenge.

The arms deal, or strategic defence procurement package as the government calls it, came under the spotlight again when the auditor general, Shauket Fakie, presented his report to Parliament last year. Fakie detected "material deviations from generally accepted procurement practice", many allegations pertaining to contracts awarded to subcontractors; potential conflicts of interest that had not been adequately addressed; and doubts about "offset" arrangements. He recommended a forensic audit.

That set the scene for the hearings of the standing committee on public accounts (Scopa) - arguably Parliament's most important watchdog, for it monitors how taxpayers' money is spent - and publication, on October 30, of its initial report. Echoing many of the concerns of the auditor general, Scopa concurred that an independent forensic audit was necessary. There was, it said, a need "to prove or disprove for once and for all the allegations which cause damage to perceptions of the government."

Scopa suggested a crosscutting investigation involving a combination of agencies with differing investigative skills and areas of legal competence and authority. It proposed an exploratory meeting with four investigative agencies: the Heath special investigative unit (SIU), the directorate of public prosecutions (which controls the investigative directorate for serious economic offences), the public protector and, of course, the auditor general. Parliament adopted Scopa's report unanimously on November 2. The exploratory meeting was duly held in Pretoria on November 13. Scopa chairman Gavin Woods was mandated to make a statement to journalists waiting outside. He told them, he recalled later, that the four agencies had agreed to co-operate and had even had preliminary discussions on how they could best work together.

Woods believes that it was only then that the executive began to panic. Its damage limitation campaign began with (strongly denied) reports that Essop Pahad, minister in the president's office, had tried to persuade ANC members of Scopa to withdraw or modify their support for the multiagency investigation. Pahad's alleged initiative was followed a week later by an ANC parliamentary caucus meeting, at which chief whip Tony Yengeni reportedly adopted a similar line. By the new year the ANC campaign had been endorsed at a meeting of its national working committee and its national executive's legkotla or general meeting.

The government's first target was to exclude the Special Investigating Unit (SIU) headed by Judge Willem Heath from the proposed multiagency investigation. Colm Allan, director of the public service accountability monitor at Rhodes University, offers an incisive assessment of the unit's powers and the experience it has acquired over the past four years. "No other public protection agency", he says, "can match the Heath unit's capacity speedily and efficiently to investigate and initiate civil recovery proceedings." He notes, too, that the unit has a bigger legal and investigative staff than any of the three public agencies proposed as participants in the investigation. (For the full text of Allan's commentary, visit www.psam.ru.ac.za and click Bulletin Board).

The SIU has powers of search and seizure and unlike the public protector and auditor general is not limited to making recommendations once it has completed its investigation. It can initiate civil proceedings against implicated individuals in its special tribunals. The burden of proof in civil proceedings is less onerous than it is in criminal cases - a balance of probabilities is sufficient as against beyond reasonable doubt.

The unacceptable independence of the unit hit home when Heath refused to supply the executive with information he had garnered on the arms deal. President Thabo Mbeki referred angrily to Heath's perceived defiance in his January 19 speech, in which he set out his reasons for following the advice of the justice minister to exclude the unit, and in his letter to Heath of the same date.

"We cannot allow the situation to continue where an organ appointed by and accountable to the executive refuses to accept the authority of the executive," he said, describing the situation as one of "ungovernability". Heath's explanation - which Mbeki emphatically rejects - is that the information is extremely sensitive and that its disclosure to the executive "could jeopardise the

investigation, lead to victimisation of whistleblowers and place potential witnesses in protection".

Was Heath being unreasonably recalcitrant, as Mbeki implies, or was he defending judicial independence and fulfilling pledges of confidentiality to his informants? Democratic Party spokesperson on public accounts Raenette Taljaard, who describes Mbeki's epistle to Heath as a "poison pen letter", notes that the ruling party has been "directly linked to companies that will be deriving benefit from the arms procurement process." She believes that guarded scepticism on Heath's part is justifiable.

In the government's campaign against Heath a judgment of the Constitutional Court on November 28 last year was to prove a godsend. Under current law a judge must head the SIU, but in a case against the unit, brought by the Association of Personal Injury Lawyers, the court ruled that the SIU is part of the executive and cannot be headed by a judge without contravening the doctrine of the separation of powers. In his January 19 speech, Mbeki cited the court's injunction to act "without undue delay" to replace Judge Heath with somebody else who is not a judge.

The president neglected to mention, however, that the court had given the government a year to regularise the position. This implied that the unit as presently constituted could serve on the arms deal investigation, provided that the judge completed his contribution by the November 28, 2001 deadline. Taljaard seized on that point. Noting that Parliament had unanimously adopted the Scopa report calling for the inclusion of the Heath unit more than three weeks before the court ruling, she reasoned that the court had sought to create "legal space" to allow for its participation.

Mbeki's penchant for quoting selectively from documents to prove his case was again in evidence in his January 19 speech. He quotes a letter from lawyers Jan Lubbe, SC, and Frank Kahn, SC, director of prosecutions in the Western Cape, to justice minister Penuell

Maduna, which says "at this stage there is no prima facie evidence in law that any person or persons committed an offence." Lubbe is Heath's legal counsel. This quote was widely portrayed as the president's masterstroke, in which he had persuaded Lubbe to stab his boss in the back. Quite apart from the fact that, as many commentators have noted, prima facie evidence is what an investigation hopes to have at the end, not the beginning, of its inquiries, Mbeki fails to point out the same lawyers' equally significant conclusion.

"There are sufficient grounds . . . for a special investigating unit to conduct an investigation, and, in our opinion, such an investigation is warranted," they state. Taking account of the Constitutional Court ruling, they suggest that, "Consideration could be given to appointing another special investigating unit under an acting judge, who could then be placed in a position to continue with this investigation by reverting to his personal status after the Act is amended." Mbeki has not raised that possibility, though in fairness it should be recorded that ANC members on Scopa have done so.

Excluding the Heath unit from the arms probe was the first target, and the assault on the SIU has proved comprehensive: the judge himself has taken "long leave" and the unit will close when it has completed its current workload. More chilling is the statement by ANC spokesman Smuts Ngonyama that the party has "irrefutable evidence" that Heath colluded with opposition parties, most notably De Lille, and his call for a judicial review of the matter. His remarks suggest that nothing less than the total destruction of Heath's reputation and the complete vindication of the government's position will now satisfy the party.

However the government also had to solve the problem of Parliament. After all Parliament, the embodiment of the will of the people, voted for the multiagency investigation, including the SIU, as Scopa had recommended. Indeed Woods wrote to Mbeki on

December 8, formally requesting that he issue the necessary proclamation authorising the Heath unit's participation.

Frene Ginwala, the Speaker of the National Assembly and a member of the ANC's national executive, stepped into the breach at that point. In a statement issued on December 27 Ginwala said she was "not aware of any resolution by Parliament or the National Assembly instructing the president to issue any proclamation regarding the work of the Heath commission." She added there is "no reference whatsoever to the president" in the Scopa report adopted by Parliament on November 2; and Scopa has no authority to "subcontract its work" to the four agencies named in its report.

Her statement cast doubt on the legality of Scopa's quest for a multiagency investigation generally and, more particularly, on Woods' December 8 letter. In the view of the DP's Douglas Gibson, Ginwala provided the executive with an excuse to ignore Parliament's wish that the Heath unit should participate in the investigation. The Speaker had "contradicted" Parliament instead of supporting it.

At a special meeting of Scopa on January 30, Ginwala denied "interfering" with the arms probe. However her statement was used in evidence by justice minister Maduna when he advised Mbeki on January 15 not to issue the proclamation. A few days later deputy president Jacob Zuma also quoted it in an uncharacteristically aggressive letter to Woods. Any action Woods might have taken "to cause any investigative unit to carry out any investigation" is ultra vires and steps would have to be taken to ensure that the committee and Woods respected the rule of law, it said. Zuma went on to accuse Scopa of "having seriously misdirected itself", making unwarranted assumptions of corruption against government ministers and officials involved in the arms deal and of launching a fishing expedition in search of proof of those assumptions. Zuma's letter indicated a significant change of attitude on his part: early in December he was reported to have

strongly opposed attempts by chief whip Tony Yengeni to stop the inquiry going ahead.

To complete the mobilisation of its forces against the proposed investigation, four cabinet ministers - Alec Erwin, Jeff Radebe, Mosiuoa Lekota and Trevor Manuel - gave a press conference on January 12 in which they threw doubt on the competence of Scopa and attacked it for not having called themselves to give evidence.

Although the ANC has an overwhelming majority on Scopa, the committee's tradition of bipartisan scrutiny of government in the interests of taxpayers continued under strain but intact until mid January. Then the party pressures - "executive blackmailing" to quote Louis Green, of the African Christian Democratic Party - brought to bear on its ANC members began to tell. They, who had adopted the Scopa report without a murmur of dissent on November 2 last year, now stated: "The Scopa report to the National Assembly did not in any way single out any of the investigative bodies as institutions that must be appointed to look into (the arms deal)." The meeting with the four agencies specifically named in the Scopa report is suddenly downgraded to an "exploratory meeting", though Woods told journalists after the meeting, without contradiction from the nine ANC Scopa members present, that the four agencies had expressed the "desire and intention" of working together. Instead of dissent, there was consensus that all four agencies should join forces. In a bid to dignify their backtracking, they declared: "We reiterate our commitment to exposing and fighting corruption wherever it occurs . . . If any person associated directly or indirectly with the arms procurement process is found to have been involved in corrupt practices we will unequivocally support appropriate legal action taken against them."

The sacking of Andrew Feinstein from his position as the senior ANC spokesman on Scopa and chairman of the ANC study group

on public accounts at the end of January was the executive coup de grace. Feinstein, who together with Woods led the committee's probe into the arms deal, was vital in maintaining the committee's nonpartisan united front. His displacement by the more senior Geoff Doidge, ANC deputy chief whip, and the inclusion of Andries Nel mean that the executive can now rely on the party loyalty of Scopa's ANC members.

Nel, it should be remembered, is the man who was appointed chairman of a committee to decide whether disciplinary action should be taken against justice minister Maduna following his false accusation that the previous auditor general, Henri Kluever, had covered up the theft of R170 million. That committee has repeatedly asked for a postponement and has failed to report back to Parliament. Interviewed on SABC radio news Ken Andrew, the previous DP chairman of Scopa, described Nel's appointment as "a disgrace" and "a slap in the face of Parliament". He also expressed concern that ANC whip, Neo Mashihela was to attend all committee and ANC study group meetings, and that Yengeni was to oversee the work of the public accounts committee study group. These were unprecedented moves, he said. Yengeni's involvement is significant, for he is one of the individuals who could well come under the spotlight as one of the alleged beneficiaries of the arms deal.

Scopa now finds itself bogged down in quasi-legal and procedural challenges arising from Ginwala and Zuma's statements and split again on partisan lines. Despite the presence of a beefed up DP contingent, and of De Lille and Woods, it will be difficult for the committee can regain the momentum it had two months ago.

That leaves the three other agencies that Scopa originally wanted involved in the investigation. As a former ANC senator, the director of public prosecutions, Bulelani Ngcuka, is a political appointee. Whether he would press ahead with investigations if

they threatened seriously to embarrass the government has yet to be put to the test. Suspicions linger that his 1999 decision to release the Eikenhof Three, who were convicted for the murder of three civilians in 1993, after the emergence of new evidence, was influenced by the ANC's insistence that the trio were innocent and should be released. The new evidence raised doubts about their conviction but did not establish their innocence; legal observers have argued that the men should have been retried.

Auditor general Shauket Fakie and public protector Selby Baqwa are widely respected for their integrity. Fakie's report into the arms deal detected "material deviations from generally accepted procurement practice" and led to Scopa's recommendation for a multiagency investigation. Baqwa proved his mettle when he ruled that Maduna's false accusation against Kluever was unconstitutional. But on the arms deal both Fakie and Baqwa have shifted from support for the participation of the Heath unit to acceptance of its exclusion. Their change of stance, which preceded Mbeki's January 19 statement, raises the possibility that they succumbed to government and ANC pressure.

As many commentators have observed, the government's reaction has been out of all proportion if, as the executive insists, there are no irregularities to be found. Yet it has employed multiple tactics to head off what it must believe to be the public relations disaster of a genuine arms probe. Executive bullying, personal invective and sackings have gone hand in hand with selective argument and a legal sophistry designed to delay the process, muddy the issues and confuse the populace. Ironically, as head of the executive, Mbeki has presided over an assault on the independence of Parliament, while justifying his action against Heath in terms of the Constitutional Court ruling upholding the doctrine of the separation of powers.

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